

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**PLAINTIFF’S REPLY TO DEFENDANT’S OPPOSITON TO PLAINTIFF’S MOTION FOR
JUDGMENT ON HER RETALIATION CLAIMS, OR IN THE ALTERNATIVE, FOR A NEW TRIAL,**

I. Plaintiff Engaged in “Protected Activity”

The jury’s inquiry with respect to the retaliation claim for Prof. Martin’s rejection ended with its determination that Harrison’s conduct was not based on sex. There is no *general* statute protecting an employee who asks for protection from any type of stalking at work;¹ accordingly, the hostile work environment fostered by Howard University by allowing a homeless, delusional stalker to roam the hallways of its law school, and Howard’s retaliatory termination of the professor who asked that the stalker be barred from campus, are not actionable under any statute or the common law, unless the professor was targeted by the stalker due to her race, color, sex, national origin, religion, disability or age. In this case, Harrison targeted only women to pursue as his proclaimed “wife,” making it “clear” that Harrison’s harassment of Prof. Martin was based on sex, even if not sexual in nature. *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516 (D.D.C. 1999).

Despite the evidence and 1999 holding to the contrary, the jury determined that Harrison’s conduct was not sexual in nature or based on sex. The jury then concluded that Martin’s complaints about Harison therefore did not constitute “protected activity.” The jury’s misunderstanding of the law on sexual harassment was carried over into the retaliation claim. The jury *never* answered Questions 6 or 7, which asked; 1) whether Howard had produced evidence to support its “articulated” reasons for selecting Cunningham over Martin; and, if the jury answered “YES,” then 2) whether Howard’s asserted reasons for Martin’s rejection were false or pre-textual.

¹ This void in the law may well be an area for which Crime Victims’ Groups and Women’s groups may want to lobby, particularly with the increase in workplace violence and stalking in this country.

Because the jury never reached questions # 6 or 7, Plaintiff is, at minimum, entitled to a new trial to allow the jury to answer them; however, a new trial on Plaintiff's retaliation claims is not necessary, since Plaintiff is entitled to judgment, as a matter of law. Howard's own APT Committee members, through their testimony and their official May 11, 2001 APT Committee statement regarding Prof. Martin's non-renewal, constitute admissions that all of Howard's articulated reasons for Prof. Martin's non-renewal are unequivocally false.

In its *Opposition*, pages 2-5, Howard has improperly used five (5) of its twenty (20) pages, or one fourth of its *Opposition to Plaintiff's Motion for Judgment on her Retaliation Claims* to reargue its *Motion for Judgment on Plaintiff's Sexual Harassment Claim* and its *Opposition to Plaintiff's Motion for Judgment on her Sexual Harassment Claim*. Plaintiff incorporates, by reference, her *Motion for Judgment on Plaintiff's Sexual Harassment Claim* and *Reply*, as well as her *Opposition to Defendant's Motion for Judgment on her Sexual Harassment Claim* and will not repeat here all of the arguments made therein; however, a few points are worth repeating and/or highlighting because Howard persists in making major misrepresentations of the record and violating the the Rules of the Court.

A. In Violation of Rule 60(b)(3), Howard University Asks the Court to Issue a Judgment Based on a Verdict Obtained through Former Dean Bullock's Perjury and Howard's Fraud upon the Court

Shockingly, Howard continues to argue that it is entitled to prevail based on former Dean Bullock's perjured testimony.² Howard argues that it is entitled to benefit from Bullock's perjured testimony and Howard's attorneys' Rule 11 violations by prevailing in this case based on testimony that is a documented lie, made by the Defendant's corporate representative, on the stand. Howard essentially argues that it should be granted a "get out of jail free card," escaping any penalty for perpetrating a fraud upon the Court and the jury.

² Bullock's perjury is subject to criminal prosecution. This Court also has the authority to sanction Bullock, both as a witness and as an attorney, or "officer of the Court," as well as sanctioning Howard's attorneys, pursuant to Rule 11, both to punish them for perpetuating this fraud upon the Court and to compensate Plaintiff for the additional legal work she and/or other attorneys have had to perform to rebut this perjury. As a member of the Bar, Alice Gresham Bullock can be disciplined for this perjury, including up to disbarment. Despite tenure, she could even be dismissed from Howard's faculty, since perjury in open court would constitute misconduct more than sufficient to justify termination. The extents to which Howard and its representatives have resorted to avoid any payment to Plaintiff, or the restoration of her teaching career are extraordinary and should be sanctioned. 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.

Howard's former Law School Dean, Alice Gresham Bullock, perjured herself at trial when she testified that she did not perceive Harrison's stalking or Prof. Martin on campus as "harassment" or based on her gender or status as a woman. In a July 1, 1999 memorandum to Howard's General Counsel (Ex. A of *Pl.'s Opp. to Def.'s Mot. for Judgment re Retaliation*; Plaintiff's Trial Ex. 8b), at 1,³ Bullock **admitted** that she was specifically aware, by no later than December 1, 1997, that Harrison posed the threat that he might "stalk" or "**harass**" Prof. Martin and "**other women**" on campus. *See also Pl.'s May 8, 2006 Motion for Judgment on her Sexual Harassment Claim* (Docket # 461), at 20-22, and *Pl.'s May 23, 2006 Opposition to Defendant's Motion for Judgment on her Sexual Harassment Claim* (Docket # 472), at 8-12, and *Plaintiff's Reply to Defendant's Motion for Judgment on her Sexual Harassment Claim*, at 1-2,

Even after numerous opportunities to somehow defend its former Dean and corporate representative, whose testimony is binding on Howard, Howard has made absolutely no apology, defense or excuse for Bullock's blatant perjury. Instead, on page 16 of its *Opposition to Plaintiff's Motion for Judgment on her Sexual Harassment Claim*, and again, on page 4 fn. 1, of its *Reply to Opposition to Plaintiff's Motion for Judgment on her Retaliation Claims*, Howard *again* falsely insists that Plaintiff's Trial Ex. 8b was not admitted into the record and demands that this Court ignore its perjury and fraud.

As discussed in the above referenced previous filings, Ex. 8b was admitted into the record;⁴ however, even Howard's assertion were true, the Court may not ignore Bullock's perjury or a party's fraud upon the Court. As discussed in Plaintiff's *Motion for Judgment on her Sexual Harassment Claim*, at 2-3, 18, 30, and Plaintiff's *Opposition* (# 472), at 2, 12, a party may obtain relief from a judgment pursuant to Fed. R. Civ. P. 60(b)(3), based upon the adverse party's commission of fraud, misrepresentation or other misconduct. There is nothing in Rule 60(b)(3) limiting the evidence that can be considered by the Court in determining whether a party committed fraud at trial. The Court may rely on the entire record in the case – including summary judgment evidence -- and

³ Also in the record as Ex. KKK-1 of Pl.'s October 9, 2002 *Motion for Summary Judgment* (re-filed electronically, on November 1, 2005, as Docket # 330).

⁴ Prior to closing arguments, the Court Officer, Mr. Smith, confirmed that Ex. 8(b) was admitted in to the record, although he had no record of Ex. 8(a) being admitted. The court reporter, Catherine Jones, examined the electronic transcript and confirmed that Mr. Smith's notes were accurate. Plaintiff was therefore permitted to include references to Exhibits 8(b), but not Ex. 8(a) in her charts summarizing evidence produced at trial, to be used in her closing argument.

even new evidence to uncover fraud and/or to issue judgment, as a matter of law, on any claim. Rule 60(b)(3) does not permit a party to commit a fraud upon the Court and *benefit from it* simply because the fraud is not exposed during the trial itself. To the contrary, Rule 60(b)(3) applies only to post trial motions, and therefore anticipates that the fraud requiring a judgment to be set aside would be exposed *after* a verdict or judgment is issued. Parties are entitled to expect that witnesses, in court will tell the truth on the stand or be held accountable for it later, even if the truth is exposed after trial. That is the very purpose of laws prohibiting perjury.

B. Howard Repeatedly Misrepresents the Well Established Case Law -- including this Court's 1999 Holding in this Case -- and that there are "No Magic Words" to Invoke the Protections of Title VII

On page 2-6 of its *Opposition*, Howard again argues – as it has argued throughout this litigation, that because Prof. Martin entitled her written requests to Dean Bullock as a “Security Problem” rather than “sexual harassment,” her complaints were not “protected activity” and that Deans Bullock and Newsom could not be expected to perceive that she considered Harrison’s pursuit of her as his desired “wife” as sexual harassment. Howard refuses to acknowledge that it lost this argument, in 1999, and that this issue has long been settled, as a matter of *res judicata*. As discussed on pages 7-8 of *Plaintiff's Motion for Judgment on her Retaliation Claims*, Judge Hogan held there are no "magic words" which must be chanted in order to invoke Title VII protection. 1999 U.S. Dist. LEXIS 19516 at *18, citing *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).

Judge Hogan expressly held that the plaintiff does not need to use the words “sexual harassment” to be deemed to have complained about sexual harassment. The plaintiff only needs to report *conduct that constitutes sexual harassment*. Judge Hogan cited case law illustrating this point, including:

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.").

Prof. Martin certainly asked Howard Law School officials to “do something” to keep Harrison out of her workplace. By entitling her memoranda “Security Problem,” Martin highlighted for her supervisors what needed to be done and informed them of what she had already done, i.e., reported Harrison’s conduct to campus security and D.C. police.⁵ Prof. Martin wrote the first memo about Harrison’s conduct on November 25, 1997, five days after the stalking had begun. On November 20, 1997, Prof. Martin immediately reported Harrison’s conduct verbally, as “harassment” to Associate Dean Newsom, Campus Officer Sirleaf and the D.C. Metropolitan Police Department. She provided them with copies of Harrison’s letters and played his voicemail message for them.

As discussed on pages 14-15 of *Plaintiff’s Motion for Judgment on her Sexual Harassment Claim*, on November 21, 1997, the responding D.C. police officers deemed Harrison’s harassment of Prof. Martin to be so severe that they characterized it as criminal “stalking” and took a stalking complaint. The D.C. Criminal Code specifically defines criminal stalking as severe “harassment,” whether in the form of letters, phone calls or personal appearances. D.C. Code Ann. § 22-404 (b); see also *Plaintiff’s Motion for Judgment on her Sexual Harassment Claim*, pages 14-15. Martin used the term “stalking” and referred to Harrison as a “stalker” as he was characterized by D.C. police. Since criminal stalking is, by legal definition, a severe form of harassment, and since Harrison was harassing Martin in pursuit of her as his “wife,” the conduct that she described, both orally and in her memos, constituted harassment on the basis of sex, as everyone who heard about it characterized it.

In 1999, Judge Hogan did not hold that the jury would determine whether Harrison’s pursuit of Prof. Martin was based on her sex – he had already decided that, as a matter of law, based on the undisputed facts. Judge Hogan identified the question as whether the conditions that Martin reported to Bullock rose to the level of a “hostile work environment,” rather than a mere annoyance.

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. (Emphasis added)

⁵ Martin asked the administration to follow the police department’s instructions to ban Harrison from campus and to hold him for police if he showed up on campus. Martin also asked that Howard obtain a mug shot from the D.C. police department, of Harrison, since he had a criminal record, and that the school post a notice and Harrison’s photograph and otherwise inform the law school community that Harrison is banned from campus and potentially dangerous. Howard never took any of these actions, as Bullock and Newsom admitted at trial.

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

The jury found that Harrison's harassment of Martin did rise to the level of creating a hostile work environment for her and that Howard failed to take reasonable steps to eliminate the harassment. Plaintiff is therefore entitled to judgment, as a matter of law, on her sexual harassment claim.

C. Howard Improperly Persists in Arguing that Plaintiff was Required to File an Internal Campus EEO Complaint against Harrison

Howard persists in arguing that Prof. Martin was required to file an EEO complaint, on or about November 20, 1997, with Howard University's EEO Officer, at main campus, miles away from the law school, reporting Harrison's sexual harassment of her, and that her failure to do so deprives her of Title VII protection from retaliation by the University for her complaint. Judge Hogan has repeatedly and specifically rejected Howard's argument – most recently, during the trial, when Howard requested a jury instruction advising jurors to consider the fact that Prof. Martin never filed a formal EEO complaint with Howard University's EEO Officer.

First, Judge Hogan explained the obvious, as Plaintiff has repeatedly explained throughout this litigation: since Harrison was not a Howard employee, it would have been pointless and impossible to file an internal charge against him with Howard's EEO Officer.⁶ The appropriate means of keeping Harrison away from her was the use of security. Prof. Martin entitled her memos "Security Problem" in order to quickly alert the administration to the action that needed to be taken to eliminate the hostile work environment that she was experiencing.

Second, Howard's internal EEO Complaint procedures instruct the victim of sexual harassment to complain to *either* the EEO Officer or his or her *supervisor*. There is no question that Prof. Martin *immediately* reported Harrison's conduct to her *supervisors* – Deans Bullock and Newsom.⁷

⁶ On page 5 of its *Opposition*, Howard misrepresented the testimony of Teresa Guerrant, Esquire, as stating that she was concerned about the "criminal stalking" (Howard's original) of Prof. Martin, but that "she did not advise her to file a sexual harassment complaint with or against the University." First, Ms. Guerrant did not use, let alone stress, the word "criminal," but referred to Harrison's conduct toward Prof. Martin as both "sexual harassment" and "stalking." In addition, Howard's attorney, Brian Shwalb, did not ask Ms. Guerrant if she *ever* discussed filing a charge against the University or ever advised her to do so. Martin did file a charge against the University and a Grievance within the University on or about May 15, 1998. Ms. Guerrant has no special or personal knowledge of *Howard's internal* EEO complaint or Grievances processes.

⁷ In fact, the Howard Handbook specifically requires any supervisor becoming aware of sexual harassment to report it to the EEO office. The Handbook specifically acknowledges employer responsibility for third party, or

Third, the only persons that could be identified as employees subjecting Prof. Martin to a hostile work environment, based on sexual harassment, were Deans Bullock and Newsom. Certainly, Martin had some obligation to allow Dean Bullock sufficient time to take reasonable steps to keep Harrison out of the workplace – particularly since Dean Bullock wrote to Martin, memo dated December 1, 1997, but delivered on December 3, 1997, stating that she was discussing the matter with Director of Security, Lawrence Dawson. It was only *two weeks* later, on December 18, 1997, that Howard retaliated against Martin by refusing to renew her contract.

Fourth, between December 18, 1997 and May of 1998, Martin applied for additional vacant faculty positions with the law school and attempted to reason with Dean Bullock to remedy the wrong committed without litigation. Martin appealed to APT Committee members, other colleagues, and, in March and April of 1998, even to President Swygart for assistance in addressing this injustice. Martin explained that Howard’s breach of her contract was particularly inappropriate after she had performed all of her duties while being targeted by a serial stalker, targeting “African-American women,” as she wrote in a March 6, 1998 memorandum to Bullock and copied to all APT Committee members (Ex. B of *Pl.’s Opp. to Def.’s Mot. for Judgment re Retaliation*) On April 28, 1997, Martin distributed to her colleagues in preparation for the “Emergency Faculty Meeting addressing student protests, including the non-renewal of Prof. Martin.”⁸

Fifth, the EEOC allows a complainant 300 days from the date of prohibited activity to file an EEO charge. Even in federal government employment, the victim of discrimination has 45 days to file an internal EEO charge. Although she was not required to do so, Prof. Martin actually did file a timely internal grievance, including both her breach of contract and sex discrimination grievances, on May 15, 1997 (Howard’s Grievance Committee Report, Ex. C of *Pl.’s Opp. to Def.’s Mot. for Judgment re Retaliation*). There is no basis for arguing that Martin was obligated to file a pointless formal internal EEO Complaint against Harrison, a non-employee who could not

non-employee harassment of an employee; however, Bullock and Newsom would have had to report *themselves* to the EEO Officer, since the University had no means by which to discipline Harrison with firing, suspension, etc. It could only keep Harrison off the premises – and that was the job of Campus Security, not the EEO Officer.

⁸ Despite Bullock’s and Nolan’s claims of surprise at Martin’s claims, in fact, it could not have come as any surprise to anyone on the faculty or at the University President’s Office, in May of 1998, that Martin characterized her non-renewal as a retaliatory act for her complaints of Howard’s refusal to stop Harrison from sexually harassing her in her workplace.

be disciplined by Howard, but could only be kept off of the premises and held for police, by Campus Security. In fact, such a complaint would likely have been rejected by the EEO Officer, as lacking jurisdiction.

D. Howard has Misrepresented Plaintiff's Testimony regarding Prof. Derrick Bell

On page 5 of its *Opposition*, Howard claims that Plaintiff testified that :

she was in fear of Harrison because he had stalked and threatened Derrick Bell, a well known Black male law professor, after Professor Bell informed Harrison, to Harrison's disbelief, that one of the characters in Bell's book was a fictional character.

Prof. Martin's fear of Harrison, while she was at Howard, was based on his letters (both to her and to Valerie Edwards, a Toronto attorney), voicemail messages, visits, criminal record and reports of violent behavior from the police and counselors in a homeless shelter where Harrison had stayed. Martin never spoke to Prof. Bell while she was employed at Howard, but communicated with him for the first time after she left Howard. Since there was nothing in any of Martin's memos or verbal reports to Bullock about Harrison confronting Derrick Bell, there is no basis for Howard's arguments that Bullock might have understood Harrison "to stalk and threaten Black law professors," male and female. Moreover, as discussed above, Bullock's own memo to Howard's General Counsel, as well as Associate Dean Newsom's admissions, make it clear that they did not perceive Harrison as a stalker of African-American men.⁹

Harrison never identified Prof. Bell as his "wife," or potential sexual partner (which "wife" infers). Harrison did not describe Prof. Bell as "voluptuous" or claim to be infatuated with his "legs" – terms that Harrison used to describe his observations of Prof. Martin (whom he referred to as "this Valerie Edwards look-alike") and the original "Valerie Edwards" whom Harrison claimed to know in New York. These are terms that he reserved for *women* – in particular, those women whom he perceived as having the potential to be his "natural wife." The fact that Harrison had other, frightening, violent tendencies does not negate the fact that he targeted women for pursuit of his love interests any more than learning that a serial rapist or women robbed and killed a

⁹ Judge Hogan had ruled, pre-trial, that Plaintiff could testify about what Prof. Bell told her about Harrison, his own frightening encounter with Harrison and his pursuit of African American women as evidence of her continuing mental distress created by the stalking; however, at trial, Judge Hogan cut her off she could complete this testimony. It is not clear then, what the jury took from this incomplete testimony. To the extent that the jury could have concluded that Harrison stalked African American professors generally and did not target African American women as his "wife," then Plaintiff was unduly prejudiced by the Court's exclusion of the testimony that would have clarified this confusion.

man indicates that he does not target women for rape. Just as learning of Harrison's criminal record and history of violence added to Martin's fear that Harrison was an irrational, violent person, Prof. Bell's reports added to that fear, which continued long after her employment with Howard ended.

E. Howard Misrepresented Harrison's Letter to Valerie Edwards, Esquire, in Toronto

On page 6 of its *Opposition*, Howard claims that "Harrison stated that he did not pursue Plaintiff for sexual reasons." Harrison's letter to Valerie Edwards of Toronto (**Ex. A**) says no such thing. This is another Rule 11 violation, wherein Howard's attorneys simply fabricate purported "facts" that they think might support a defense in this case. Howard also claims that Harrison stated that he had "misidentified" Prof. Martin, apologized to her and vowed that he would never bother her again. First, the letter was written to Valerie Edwards in Toronto – not to Prof. Martin. The "apology" and statements about misidentification were to convince his next stalking victim that he was not harmful. Second, Harrison is clearly a delusional, mentally unstable person, reportedly with outbursts of violence. In his letter, he also states that he is involved in "warfare" with mythological characters, including "Neptune," and "Poseidon," whom he believes was reincarnated in the form of the first Valerie Edwards' husband, Vladimir Edwards. He states that he is the "savior" of the world and that he is a better writer than Langston Hughes and other famous writers. Finally, the entire letter is based on his explanation that he believes that, somewhere, there is a physical incarnation of the fictional character in Prof. Bell's book, Geneva Crenshaw, who is his "natural wife" and will help him save the world.

On January 12, 1998, when Prof. Martin presented a copy of the Toronto letter to Dean Newsom, he responded, "Oh, sh-t!" and then proceeded to state that Harrison could be back and posed a threat to other female professors, such as Profs. Crooms and Cunningham,¹⁰ in addition to Martin. Even though Howard's own binding

¹⁰ Actually, Cunningham was not a likely target for Harrison's pursuit of a "wife." Since Harrison conducted research on Martin, he likely conducted research on each of his other targets as well. Research on Cunningham would have quickly revealed that Cunningham is a lesbian, since she writes in what she refers to as her "lesbian voice:" See *Unmaddening: A Response to Angela Harris*, 4 Yale J.L. & Feminism 155, 156-157 (1991):

Multi-voicedness within the individual means that a person speaks partially with her Black voice, partially with her female voice, and partially with her lesbian voice. She does so because none of these

witness recognized that the Toronto letter indicated that Harrison was still a threat to Martin and other women on campus, Howard argues that this letter explained Harrison's actions as normal, reasonable and indicating that he never targeted her or other women for stalking, but simply mistook her for someone else – **who does not exist!**

Despite the complete lunacy expressed in Harrison's letter to Valerie Edwards, Howard attempts to portray it as the communication of a rational man who can be counted on to leave Martin alone. Who was to say that Harrison would not return and surprise Prof. Martin after Valerie Edwards, or any other target, rejected him, as surely they would? Any rational woman in Martin's position would continue to ask Howard to ban Harrison from campus and take reasonable precautions to ensure that he did not return unobstructed.

II. New Supreme Court Law, Burlington v. White, Redefines Retaliation under Title VII, Excluding Concept of Actionable Conduct under the Retaliation Clause of Title VII

If the jury had proceeded to answer the verdict questions regarding whether Howard's articulated reasons for Howard's selection of Prof. Cunningham, rather than Prof. Martin, to teach EEO law – which Prof. Martin had been teaching for four years and which Prof. Cunningham had never taught -- it would have been compelled to find that Howard presented no evidence to support its purported "reasons;" however, the comparison of Martin and Cunningham's credentials and the APT Committee's basis for assessing them, though relevant, are not determinative, under the facts of this case and the controlling Supreme Court and D.C. Circuit law.

Even if a jury could somehow determine that Howard's selection of Cunningham was the Committee's good faith belief about the candidates' qualifications, though misinformed, Howard could not possibly justify leaving at least three tenure-track positions vacant, while students clamored and protested for additional classes

voices defines her completely. . . . A whole voice . . . would not be Asian-American and female and lesbian. A whole voice does not borrow or attempt to adapt voices. While the whole voice has the capacity and perhaps even the need to harmonize with other voices, it is first self-defining. Speaking in a whole voice, being Asian-American means being female and lesbian; being lesbian means being Native American and economically disadvantaged. What it means to be a woman is what it means to be Black. What it means to be a woman is what it means to be lesbian.

Cunningham uses this passage again in her first article in academia, "*The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 Conn. L. Rev. 441, n. 279 (Winter, 1998). See also discussion in Plaintiff's September 7, 1999 *Opp. to Def.'s Motion to Dismiss* (Docket # 8) Bullock therefore had available a convenient replacement for Martin who was not likely to attract Harrison to Howard's campus.

and professors. Bullock's Answer to the Complaint admits that, while Prof. Martin was repeatedly applying for vacant positions and being told that there were none, Bullock was actually withholding from the APT Committee at least three tenure-track positions for which Prof. Martin was well qualified. *Pl.'s Motion for Judgment*, at 20; Bullock's Answer to the Complaint ¶ 326; Pl.'s MSJ at 21, 42. Under the controlling law on retaliation under Title VII, particularly as recently defined by the U.S. Supreme Court, Bullock's admission compels judgment for Plaintiff on claim of retaliatory rejection for a tenure track position and/or a renewed visitorship.

On June 22, 2006, the United States Supreme Court decided *Burlington v. White*, 548 U.S. _ (2006).

Burlington held that, in order to make out a case of retaliation under Title VII:

... a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context, means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

The Supreme Court expressly adopted the D.C. Circuit's standard for proving actionable retaliation set forth in *Rochon v. Gonzales*, 438 F.3d 1211(D.C. Cir. 2006). *Id.* As discussed in Plaintiff's Motion, at 16, *Rochon* expressly adopted, for Title VII, its own standard for proving actionable retaliation set forth in *Passer v. American Chemical Society*, 935 F. 2d 322 (D.C. Cir. 1991), an *Age Discrimination in Employment Act* (ADEA) case. *Passer* held that an employer 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. *Burlington*, Slip. Op. at 14.

The Supreme Court offered guidance with respect to actionable retaliation and mere "petty slights, minor annoyances, "snubbing by supervisors and co-workers" that take place at work and that "all employees experience." *Burlington*, Slip. Op. at 13.

The real social impact of workplace behavior often depends upon the constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used of the physical acts performed. *Oncala*, supra, at 81-82.

Burlington, Slip. Op. at 14.

This court limited Plaintiff's retaliation claims to her December 18, 1997 rejection for the advertised EEO/Labor position and Howard's order that she prematurely vacate her office (Jury Verdict Form, #s 5-8. As

discussed on pages 9-11 of her motion, Prof. Martin alleged retaliatory non-renewal of her teaching contract, as a law professor, at Howard University, for the 1998-1999 academic year and beyond. She never limited it to the December 18, 1997 decision, nor to the EEO/Labor law position, since three positions were advertised. All applications produced as exhibits demonstrated that Prof. Martin applied for “any” tenure-track position and never restricted her application to the EEO/Labor position.

The Court refused to allow the jury to consider Dean Bullock’s acts, beyond the December 18, 1997 decision,¹¹ to prevent Prof. Martin from even being considered by the APT Committee for vacant faculty positions. First, Bullock withheld and concealed vacant positions from the APT Committee to prevent Committee members from considering Prof. Martin to fill any of them. Bullock even directly lied to at least APT Committee member, Prof. Nolan, who specifically asked her whether there were any additional vacancies on the faculty for which they could select Prof. Martin.

In March of 1998, Bullock “converted” (or pretended to convert) the advertised Constitutional Law/Civil Rights position to a tax position in immediate and direct response to the plaintiff’s application for the advertised Constitutional Law/Civil Rights. Certainly, if, as in *Passer*, the cancellation of an honorary symposium constitutes actionable retaliation under Title VII, the cancellation, withholding and/or a conversation of a faculty position to prevent the APT Committee from selecting Prof. Martin to fill any of the vacancies.

As discussed in Plaintiff’s November 30, 2002 Objection to MJ Facciola’s *Report and Recommendation*, Bullock’s actions are analogous to a store owner who places a “Help Wanted” sign in the store window. When an African-American applicant enters the store in response to the sign and applies for the job for it, the store owner yanks down the sign and says that there are no openings. This conduct would constitute even a classic “adverse employment action,” no longer required under the less stringent retaliation provision of Title VII. Bullock’s

¹¹ Plaintiff repeatedly and vehemently objected to the wording of this entire section of the verdict form, particularly 5(c), which specifically asks whether “the APT Committee intentionally retaliated against Plaintiff...” whereas Plaintiff alleged that Dean Bullock “poisoned” the Committee by secretly meeting with Vice Chair Taslitz, who made the presentations and misled the other four Committee members into believing that Prof. Cunningham’s progress in scholarship had surpassed Prof. Martin’s progress – a claim that is blatantly false and is easily proven false by an examination of the resumes and applications of Martin (Exs. P and R of *Pl.’s Opp. to Def.’s Mot. for Judgment re Retaliation*) and Cunningham (Exs. Q and S of *Pl.’s Opp. to Def.’s Mot. for Judgment re Retaliation*). Plaintiff offered alternate language reflecting her actual allegations (**Ex. B**, Pl.’s Proposed Jury Verdict Form, page 3, # 6), but the Court rejected all of Plaintiff’s proposed verdict questions.

retaliatory conversion/withholding of the Constitutional Law/Civil Rights position from the APT Committee constitutes actionable retaliation.

Now that the Supreme Court has clarified any confusion with respect to this issue, it is clear that the jury was not properly instructed on this issue. Under *Burlington*, Plaintiff's proposed instruction should have been adopted. As discussed on pages 15 -18 of Plaintiff's motion, *Chappelle-Johnson v. Powell*, 440 F.3d 484 (D.C. Cir. 2006), holding that **an adverse action includes the denial of an opportunity to compete for a vacant position**. 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,¹² 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.¹³

III. Howard Falsely States that the Jury Made Determinations Regarding the Falsity of Howard's Articulated Legitimate Non-Retaliatory Reasons for Prof. Martin's Non-Renewal

On pages 13-14 of its *Opposition*, Howard falsely states:

the jury reasonably concluded that Plaintiff failed to prove by a preponderance of the evidence that the APT Committee intentionally retaliated against Plaintiff because of her complaints about Harrison and that her complaints about Harrison was a substantial factor in the Committee's failure to recommend Plaintiff for the EEO/Labor tenure track position. In fact, there were legitimate, non-discriminatory reasons why the APT Committee did not vote for Plaintiff and the Committee was not influenced by the complaints that Plaintiff lodged with the University about Harrison. *See* Verdict Form 5c.

¹² The evidence actually demonstrates that Bullock feigned conversation of the Constitutional Law position and that it actually remained available for years after Martin left Howard. In fact, when Martin applied for it in subsequent years, Howard's APT Committee consulted its General Counsel about what to do with her application. Howard never interviewed Prof. Martin or otherwise contacted her about the position. Howard changed the AALS advertisement for the position to *exclude* experienced professors from consideration. Howard University's own Grievance Committee determined that this changed advertisement was evidence that the law school re-wrote the job description specifically to deter Prof. Martin from applying and to exclude her from consideration. (Ex. C of *Pl.'s Opp. to Def.'s Mot. for Judgment re Retaliation*, Howard University Grievance Report) Despite this advertisement excluding experienced professors, Howard did interview Prof. Jon Duncan, then a tenured professor at Texas Wesleyan University, for the position.

¹³ As discussed in Section VI, below, Howard's order for Prof. Martin to vacate her office, while she was 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 actionable retaliation claim, based on the analysis set forth in *Rochon* and *Passer*.

In fact, the jury never made any determinations about whether the Committee rejected her because of her complaints about Harrison or whether Howard's articulated legitimate non-retaliatory reasons for Prof. Martin's non-renewal were false or pre-textual. Questions 5(a)-(c) simply incorporate and repeat the jury's answer to 1(c), which determined the jury's verdict on Plaintiff's sexual harassment claim.

The verdict form (**Ex. C**), included the following questions and jury answers regarding retaliation:

5. Did the Plaintiff prove by a preponderance of the evidence that:

a) She was engaged in legally protected activity when she notified the Dean's office of Mr. Harrison's conduct?

YES NO

b) Howard University knew of her behavior that constituted legally protected activity?

YES NO

c) After learning of the Plaintiff's protected activity, the Appointments, Promotions and Tenure Committee of Howard University Law School, (hereinafter, "APT Committee") intentionally retaliated against Plaintiff because of her protected activity and that the protected activity was a substantial factor in the APT Committee's failure to recommend Plaintiff for the EEO/Labor Law tenure track position?

YES NO

If you answered "NO" to any of these questions, you have found for Defendant Howard University on the first retaliation claim and should go Question 8.

If you answered "YES" to all of the above questions, go to Question 6.

The jury specifically left questions 6 and 7 unanswered once it determined that Martin's complaints about Harrison did not constitute "protected activity" within the meaning of Title VII, pursuant to its Answer to Question # 1(c).¹⁴ See *Plaintiff's Motion for Judgment on her Sexual Harassment Claim*.¹⁵

¹⁴ Plaintiff had proposed a verdict form (**Ex. B**) and jury instructions on the sexual harassment claims (**Ex. D**) that incorporated Judge Hogan's legal conclusion that Harrison's pursuit of Prof. Martin was sexual in nature and/or based on sex, based on the undisputed facts set forth by both parties. Plaintiff's proposed verdict form was based on Judge Hogan's 1999 precedent-setting published decision, identifying the two issues proceeding to the jury as: 1) whether Harrison's pursuit of Prof. Martin was so severe and pervasive that it created a hostile work environment for her, as opposed to a mere annoyance; and 2) whether Howard University took reasonable measures to end the hostile work environment. Plaintiff's proposed verdict form and jury instructions were rejected. Instead, the jury was asked to determine a question that Judge Hogan's 1999 decision had already answered, as a matter of law. Similarly, it was undisputed that Prof. Martin found Harrison's pursuit of her unwelcome, but the verdict form asked the jury to determine whether Plaintiff welcomed the harassment. The jury verdict form therefore added questions about undisputed facts and conclusions of law based on undisputed facts, adding to the jurors' burden and confusion. In addition, Plaintiff based on trial strategy on litigating the questions identified in Judge Hogan's 1999 decision as proceeding to the jury. The additional questions on the verdict form complicated -- and may have confused -- the presentation at trial.

¹⁵ As Plaintiff stated in her *Opposition to Defendant's Motion for Judgment on Plaintiff's Sexual Harassment Claim*, pages 5-6, and *Plaintiff's Motion for Judgment on her Sexual Harassment Claim*, page 8, and discussed in

IV. Had the Jury Proceeded to the Questions regarding the Falsity of Howard's Articulated Legitimate Non-Retaliatory Reasons for Prof. Martin's Non-Renewal, it Would Have been Compelled to Conclude that Howard's Articulated Reasons were False, Pre-Textual and that Howard Failed to Produce Any Evidence of its Articulated "Reasons"

A. The Undisputed Evidence of Record, and Howard's Admissions, Irrefutably Prove that Howard's Articulated Reasons for Prof. Martin's Non-Renewal are False

As stated above, Plaintiff is, at minimum, entitled to a new trial on her retaliation claims; however no new trial on these claims is necessary. Plaintiff is entitled to judgment, as a matter of law, based on the undisputed evidence of record, Howard's own admissions and the controlling case law, including *Burlington Holcomb*, *Rochon*, *Chappelle-Johnson*, and *Passer*.

I. Did Howard University produce evidence of legitimate, non-retaliatory reasons for the APT Committee's decision not to recommend Plaintiff for the EEO/Labor Law position but to instead recommend Professor Cunningham?

If you answered "YES" to this question, you should go to Question 7.

If you answered "NO" to this question, you have found for Plaintiff Dawn Martin on the first retaliation claim and should go to Question 8.

The evidence of record would have compelled the jury to answer # 6 with a "NO," ruling in favor of Plaintiff, Dawn Martin, as the jury verdict form states. As discussed in Plaintiff's Motion, pages 22-31, Howard did not *produce evidence* of legitimate, non-retaliatory reasons for the APT Committee's decision not to recommend Plaintiff for the EEO/Labor Law position but to instead recommend Professor Cunningham. Howard *articulated* purported reasons, but Howard did not produce an iota of evidence to support any one of its ever changing "laundry list" list of articulated "reasons." To the contrary, Howard's own APT Committee members and Howard's own admissions in its Answers to Interrogatories and other filings specifically contradict Howard's articulated "reasons" for Prof. Martin's non-renewal.

Had the jury proceeded to answer Question # 6, it would have been compelled to find that Howard *did not* produce evidence of legitimate, non-retaliatory reasons for the APT Committee's decision not to recommend

detail in pages 3-25 and *Plaintiff's Motion for Judgment on her Sexual Harassment Claim*, pages 3-27, 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; 3) the dictionary definition of the term "wife;" and; 4) 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.

Plaintiff for the EEO/Labor Law position but to instead recommend Professor Cunningham. As the verdict form states, this conclusion would have resulted in a verdict for the Plaintiff, Dawn Martin, on her claim of retaliatory rejection for the EEO/Labor Law position.¹⁶

Once the jury answered # 6, it would have been obligated to skip # 7; however, even under number 7, the jury would have been compelled to find for Plaintiff, Dawn Martin.

II. Did the Plaintiff prove by a preponderance of the evidence that the legitimate, non-retaliatory reasons offered by Howard University were false and pre-textual or that the real reason for the APT Committee's recommendation of Professor Cunningham as opposed to Plaintiff was retaliation?

If you answered "YES" to this question, you have found for Plaintiff Dawn Martin on the first retaliation claim. Go to Question 8.

As discussed in Plaintiff's Motion, pages 22-29, Plaintiff did prove, through Howard's own APT Committee members, as well as the resumes and applications for the faculty positions, that Howard's articulated reasons for Prof. Martin's non-renewal were blatantly false and pre-textual.

B. In Violation of Rule 11, Howard has Fraudulently Misrepresented the Record

Again, Howard has simply fabricated facts, without citing evidence to support it or citing purported evidence that does not exist. Howard continues to employ the strategy of "so many lies, so little time," in order to exhaust Plaintiff and her limited resources. Plaintiff will briefly identify the major misrepresentations.

1. Howard Falsely Represents that "All Five APT Committee Members" Confirmed Howard's Articulated Reasons for her Rejection

On page 5 of its *Opposition*, Howard states that "all five APT committee members" supported "the multitude" of legitimate, non-discriminatory articulated reasons" why the Committee selected Prof. Cunningham

¹⁶ As discussed in Section I, and in Plaintiff's Motion, pages 10-14, the verdict form should not have limited the inquiry to the EEO/Labor law position, but should have read, "Did Howard University produced evidence of legitimate, non-retaliatory reasons its failure to offer her a tenure-track position or a renewed visitorship for the 1998-1999 academic school year? This question would have acknowledged that Howard had numerous opportunities to offer Prof. Martin a tenure track position and/or renewed visitorship, but that Dean Bullock withheld from the APT Committee at least three tenure-track positions for which Prof. Martin was qualified and lied to at least one Committee member, Prof. Nolan, about the vacancies to prevent the Committee from considering Prof. Martin to fill any of them. The jury would also have considered Dean Bullock's conversion of the Constitutional Law Law/Civil Rights position to a tax position, to avoid Prof. Martin's selection to fill the faculty vacancy that Prof. Martin specifically identified to the APT Committee, when she learned from a source outside the University, that the original selectee for the Constitutional Law Law/Civil Rights position had declined Howard's offer months earlier and accepted a position at another University.

over Prof. Martin. As discussed in *Plaintiff's Opposition to Defendant's Motion for Judgment on her Retaliation Claims*, at 6-23, incorporated herein by reference, Howard's ever-changing articulated "reasons" for Prof. Martin's non-renewal were specifically contradicted by all of Howard's APT Committee members, except Taslitz. See also *Plaintiff's Motion*, pages 22-30. The only "reason" that the APT members testified was the reason for the rejection, e.g., "failure to complete an article for publication," as compared to Prof. Cunningham's "published" article, as of December 18, 1997, is proven to be false and pre-textual by simply reading the resumes (Exs. P and Q of *Pl.'s Opp. to Def.'s Motion for Judgment re Retaliation*) and applications of Profs. Martin and Cunningham, as of the fall of 1997. (Exs. R and S of *Pl.'s Opp. to Def.'s Motion for Judgment re Retaliation*). Both the 141 page article (approximately 187 manuscript pages) of Prof. Martin, "911: How Will Police and Fire Departments Respond to Public Safety Needs and the Americans with Disabilities Act?" (911:...) and the 67 page article of Prof. Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*,¹⁷ had been accepted for publication as of December 18, 1997 and were expected to be published, in print, during the spring of 1998. *Pl.'s Opposition* at 10-11, 15-19. Both Prof. Martin's and Cunningham's articles were actually published in the Winter of 1998. *Pl.'s Opposition* at 13.

Howard also credited Cunningham with two more works in progress, claiming that she had presented evidence that she was about to publish again soon. In fact, Cunningham did not publish anything again until *two years later*, in 1999. (Ex. E, Howard's current website for Cunningham, listing her scholarship) In 1999, Cunningham published "The Racing Cause of Action and the Identify Formerly Known as Race: The Road to Tamazunchale," 30 Rutgers Law Rev. 707 (1999) (a 22 page article included in a Symposium on law and literature) and "Preserving Normal Heterosexual Male Fantasy: The 'Severe and Pervasive' Missed-Interpretation of Sexual Harassment in the Absence of a Tangible Job Consequence," 1999 Chi. Legal Forum 199 (a 75 page article discussing concepts of sexual harassment and male power in the workplace). Cunningham's three articles, written from 1996 through 1999 (totaling 164 published pages), served as fulfilling the scholarship

¹⁷ On page 9 of its *Opposition*, claims that Cunningham's article was accepted by "a top law journal." There is no evidence of record that the University of Connecticut Law Review is a top law journal. To the contrary, the University of Connecticut Law School is ranked # 68 of law schools in the country, by USA World and News Report (Ex. E of *Pl.'s Opp. to Def.'s Mot. for Judgment re Retaliation*).

requirement for Prof. Cunningham to obtain tenure. After her 1999 publications, Cunningham did not publish again for three years, in 2002. (Ex. E) This fact does not demean Prof. Cunningham; rather, it demonstrates that professors are not expected to publish every year and that it takes time to write an article of substance.

In the fall of 1997, when Howard rejected Prof. Martin for a tenure track position, she had published, she had already produced a 141 page article to be credited toward tenure, as well as a 23 manuscript page draft of a second article and had a title, thesis and preliminary research for a third article. Even a year prior to her eligibility for tenure, Martin met the requirements of completing two articles since entering academia, as stated by Howard's Handbook. The comparison of Martin and Cunningham's scholarship -- not even including Prof. Martin's publications before joining Howard's faculty -- demonstrates that Martin was well prepared to be awarded tenure at Howard the following year. Clearly, Martin was not "resting on her laurels," as Howard's counsel, Mr. Lattimore, stated in his opening statement.

III. **Howard Falsely Claims that APT Members Decided to Reject Martin "Pre-Harrison"**

On page 13 of its *Opposition*, Howard claims that:

several members of the APT Committee testified that they had already made up their minds before Mr. Harrison ever appeared that they would not support the Plaintiff's renewal because of her inexcusable failure to publish.

Howard does not name any of the "several" APT Committee members because there is only Taslitz. Leggett and Smith specifically testified that they did not make up their minds about the vote until December 18, 1997, during the Committee's deliberations. After the vote, Nolan hugged Martin and told her, "I wish I had a job for you," and "I'm praying for you." Beyond those words of comfort, Nolan even asked Dean Bullock if there was an additional vacancies for Prof. Martin to fill. Clearly, then, Prof. Nolan had not made up her mind not to select Prof. Martin *before* she heard of Harrison, nor did Nolan want Martin removed from the faculty because of the status of her article. To the contrary, Nolan lobbied for Martin to be named as a second choice for the EEO/Labor position on December 18, 1997, and was still lobbying for Martin to remain on the faculty well into the spring of 1998. LaRue said that he could not remember much about the deliberations, except that, from the APT Committee presentation, he believed that Cunningham's article was actually published, as of December 18, 1997 (although it was not actually published until a full year later) and that he did know that Prof. Martin's article

was accepted for publication, though not published, as of that date. In his deposition, LaRue adopted his statement to the EEOC, “There was nothing negative about Dawn (Prof. Martin).” LaRue depo, 103, adopting EEOC statement as an exhibit (**Ex. F**, LaRue’s Statement to the EEOC). LaRue further testified that he had only favorable views of Martin’s teaching, scholarship and collegiality. LaRue depo at 102-104, 10, 58-59, 85.

The only APT Committee member who indicated that he had decided not to support Prof. Martin’s candidacy prior to her stalking by Harrison (beginning on November 20, 1997) was Taslitz. Even Taslitz completely changed his story about when he made this determination – ranging from the beginning of Prof. Martin’s second year at Howard, to nearly the time of her arrival, claiming that he was “disappointed” that she did not have the article published when she arrived at Howard. Taslitz’ inconsistent time frames defy logic. Plaintiff testified that Taslitz advised her to send out the article *after* she joined Howard’s faculty so that Howard could join Cleveland-Marshall College of Law in obtaining credit for the article’s publication. Plaintiff’s testimony is logical and credible, in light of the testimony of all of Howard’s APT Committee members, stressing the need for Howard to be credited with scholarship in order to retain its accreditation.

Since Prof. Martin actually submitted a “completed” article to the APT Committee members when she visited Howard in January of 1996, and gave her presentation to the faculty on the article, there was no reason for her to hold back on sending it to journals other than to comply with Howard’s request, *via* Taslitz; thereafter, however, the relevant public safety cases began to be decided and appealed under the ADA, creating a body of law that Prof. Martin needed to include in her article so that it would not be obsolete, or moot, if the accepting law journal took a year or more to publish it – as is common in the field, and is in fact, what occurred, both for Prof. Martin and Prof. Cunningham. Although Taslitz claimed that adding these cases took away the opportunity to give advise on the analysis to be used, Taslitz admitted that he did not read the final version of the article after Prof. Martin added the cases; accordingly, he is either unaware, or pretends to be unaware, that this area is still extremely controversial, with split circuits and inconsistent decisions, with no uniform, cohesive analysis.

As is evidenced even from the table of contents of *911*(**Ex. G**), Prof. Martin’s article explored and offered cohesive and consistent legal analyses and policies to address all aspects of the issues, from the perspective of each group affected by these analyses and polices – including the police officers/firefighters, the public, persons

with disabilities, the courts, and the law enforcement and firefighting agencies. It was precisely because Prof. Martin offered these analyses, along with suggestions regarding possible legislation, that the New York University **Journal of Legislation and Policy** published the article! Tazlitz admitted that he has no special knowledge in Title VII or employment law, yet he purported to critique Prof. Martin's article and to demean it as less scholarly than was desirable; however, his purported opinion is contradicted by Profs. Smith (former General Counsel of the EEOC and well known civil rights scholar), LaRue and Rogers, all of whom do have experience in EEO law. In fact, Dean Bullock testified that Prof. Martin's article received a wonderful accreditation review." Bullock deposition at 132; Plaintiff's MSJ at 31-32. Again, Taslitz stands alone in his criticism of Prof. Martin – his purported "friend" and mentee.

IV. Howard Falsely States that Plaintiff Failed to "Timely Complete" or "Ultimately Publish" any Scholarly Article at the University.

On page 5 of its *Opposition*, Howard claims that Plaintiff failed to "timely complete" or "ultimately publish" any scholarly article at the University. First and foremost, it is irrefutable that Prof. Martin's did "**ultimately publish**" her article, *911* and that this publication was credited to Howard Law School in the accreditation process. In addition, the undisputed evidence of record is that: 1) there was never any date by which any article was to be completed or publish; therefore, her article could not possibly have been "untimely;" 2) Prof. Martin submitted to Mrs. Bruner her *completed 911..* article¹⁸ for distribution to law journals on August 4, 1997; 3) a computer error in Mrs. Bruner's office corrupted the document, requiring that Mrs. Bruner's staff completely retype the unusually lengthy article and there was nothing that Prof. Martin could do to speed up this administrative process;¹⁹ 4) that, in addition to her *911* article, Prof. Martin had written and submitted to Dean

¹⁸ Martin provided the APT Committee with a *completed* earlier version of the article, in January of 1996, when she visited Howard for her on campus interview. At that time, the article was approximately 102 manuscript pages long. Prof. Martin expanded it to 123 manuscript pages by the spring of 1997, when she submitted it to Dean Bullock as part of her 1997 summer grant application. Finally, it was approximately 187 manuscript pages long when Prof. Martin submitted it to Mrs. Bruner on August 4, 1997, for distribution to law journals. While it was in Mrs. Bruner's office, being retyped and waiting to be retyped, Prof. Martin checked recently decided cases to ensure that the article was kept up to date. When she found new cases on point, she borrowed the article back from Mrs. Bruner, for no more than a day at a time, to include the new cases she had found.

¹⁹ Mrs. Bruner testified that Prof. Martin had no control over when the article was retyped. Mrs. Bruner testified that Dean Bullock was aware of the computer error and the difficulties with scheduling in the retyping (Bruner depo at 37). The APT Committee knew that the delay in sending out Prof. Martin's long *completed* article was

Bullock a draft of a second article, “*Lights, Camera, Discrimination! ‘Playing’ the Victim under Title VII,*” during the spring semester of 1997, upon which Dean Bullock awarded Prof. Martin a 1997 summer grant, specifically acknowledging satisfactory progress with her scholarship; 5) no later than November 5, 1997, as Prof. Martin informed the Committee in her application memo, she had a title, thesis and preliminary research conducted for a third article, since joining Howard’s faculty, entitled “*Still Racist after all these Years – and Covered by the Americans with Disabilities Act?*” (*Pl.’s Opp. to Def.’s Motion for Judgment re Retaliation* at 16-19); 6) on or about November 27, 1997, Mrs. Bruner sent out Prof. Martin’s article to 30 journals -- based on Dean Newsom’s order reducing the number to 30, from the original 180 that Mrs. Bruner had prepared; 7) on December 17, 1997, Prof. Martin received a telephone call from the Law Review Editor of Pepperdine Law School accepting her article for publication; 8) on December 17, 1997, Prof. Martin immediately called Prof. Tazlitz and informed him of Pepperdine’s acceptance of her article and he congratulated her, particularly on the quick acceptance, only two weeks after it was submitted; 9) in January of 1998, the NYU Journal of Legislation and Policy also accepted the *911...* article for publication and Prof. Martin selected NYU, a top ten law school and her *alma mater*, to publish the article during the spring, 1998 semester.

Far from “resting on her laurels,” Martin was busily working on her class preparation, student counseling, exam preparation workshops for her students, her scholarship and innovative teaching methods, particularly in the new class she was assigned, Evidence. She invented “The Evidence Game” and conducted a mock trial. All of this information was contained in Martin’s November 5, 1997 application memorandum. (Ex. R of *Pl.’s Opp. to Def.’s Motion for Judgment re Retaliation*, discussed on page 6 of *Pl.’s Opp.*)

V. **Howard Falsely States that Prof. Leggett Characterized Prof. Martin as “Young in her Career,” when, in Fact, she had a Seventeen Year Career as a Civil Rights Attorney**

On page 7 of its *Opposition*, Howard claims that Prof. Leggett characterized Prof. Martin as “young in her career,” but cites no evidence for this claim. From the context of the statement, Howard appears to be referring to

due to the computer error and typing priorities in Mrs. Bruner’s office. Martin specifically informed them both in conversation and in her November 5, 1997 application memorandum. (Ex. R of *Pl.’s Opp. to Def.’s Motion for Judgment re Retaliation*) No one on the Committee or from Dean Bullock’s office ever suggested that Prof. Martin’s article be given priority or that she take it back and re-type it herself, or indicated that this computer error would be held against her with respect to her in any way.

the hiring memo that the APT Committee wrote to Dean Ramsey, in 1996, recommending Prof. Martin's hire. (Ex. H) Howard has completely misrepresented the facts. First, Prof. Taslitz, not Leggett, actually wrote the memo, as both testified that Taslitz normally wrote the APT Committee memos for Leggett's signature. Second, the memo describes Prof. Martin as a "young scholar," as demonstrated by her publication and work in progress. In 1996, Prof. Martin was 39 years old – which is considered "young" in *age* for a law professor. No witness described Prof. Martin as "young in her career;" it would have been ludicrous to do so. In 1996, Prof. Martin had been a civil rights lawyer for 15 years, having worked for this nation's top civil rights agencies. She was recognized as a national expert in EEO law. She had also been teaching for two years, was about to be promoted from Assistant to Associate Professor. She had published four published articles prior to teaching and a fifth one while a tenure track professor at Cleveland-Marshall College of Law.

Once again, Howard cannot make up its mind as to its defense. In its *Opposition*, Howard attempts to portray Prof. Martin as a *novice* in law and/or teaching; yet, in Howard's closing argument, Brian Shwalb used a football analogy, comparing Martin to an aging "veteran" football player whose time it was to "step aside" for the "rookie," Cunningham, to give her "a chance." First, Howard's desperate closing argument amounts to an admission of a *per se* violation of the *Age Discrimination in Employment Act* (ADEA), 29 U.S.C. Section 621-634.²⁰ Howard is apparently willing to admit to *age discrimination* in order avoid liability for maintaining an environment of sexual harassment and retaliation. Second, Prof. Martin, at age 40, was neither "ready for pasture" nor eligible for retirement.²¹ She was in her *prime*. Howard, through Alice Gresham Bullock, *stole* those

²⁰ Prof. Martin turned 40 in May of 1997 and was therefore newly covered by the ADEA. Based on Howard's admission, Plaintiff is considering filing a motion to amend her complaint to conform to the evidence produced at trial, to add a claim under the ADEA.

²¹ Although Prof. Martin graduated from law school (1981) eleven (11) years before Prof. Cunningham graduated (1982), according to her personnel records (Ex. I), she is only four (4) years younger than Prof. Martin. Prof. Martin was born in 1957 and Prof. Cunningham was born in 1961. Even if age discrimination were not illegal, then, the 4 age difference between Profs. Martin and Cunningham could not justify any sense that Howard might have Cunningham longer as a faculty member than it would have Prof. Martin. In fact, new professors often gain their experience, scholarship and rank at once school and "trade up" for a higher ranked school, particularly when they have no spouse, children or other ties to a community, as was the case with Prof. Cunningham. In contrast, Prof. Martin had a daughter, family and ties to the community in the D.C. area, which she clearly stated was her motivation for *returning* to D.C. from Cleveland and for staying in D.C. and "making Howard my permanent home." (Ex. J, April 27, 1996 letter from Martin to Ramsey, page 5) In fact, now that Prof. Cunningham is a full professor with tenure at Howard, she is "visiting" at Dickinson Law School, now part

prime years from her. Howard should finally be required to restore whatever can be restored of the “years that the locusts have eaten.” Prof. Martin asks this Court to restore her to her rightful place as a Full Professor, with tenure, and permit her to complete the next 20 to 30 years of her teaching career flourishing, providing for her family and passing educating new lawyers, as she was doing before Dean Bullock derailed her career in 1998.

On page 7 of its *Opposition*, Howard claims that Leggett testified that Martin:

had not listed serious reasons (i.e. I had a headache) why she could not complete her 911 article by Fall, 1997...

First, Martin did “*complete*” her article by the Fall, 1997. Second, Leggett *never* testified that the obstacles that Martin experienced while expanding the article were comparable to “a headache.”²² Although Howard persists in using this one paragraph out of a six page memo as a “canon” to shoot fireballs at Prof. Martin, ignoring everything else in the memo and all other evidence, this one paragraph is actually irrelevant to the overall facts. *It was not even part of Prof. Martin’s original application memo.*

Taslitz even corroborates Martin’s testimony that the original memo that he reviewed did not contain this paragraph and that he advised her to add a paragraph discussing hardships that she had had over the previous year to impress upon the Committee how difficult it was to complete the 911 article, along with her additional scholarship and teaching duties. Taslitz also confirmed that, after he read the revised version, revised at his suggestion, he told her that the memo was “fine.” Again, Howard has turned everything in this case on its head and back again, as convenient for it, with no regard for the truth and in blatant violation of it.

VI. Howard Falsely States that Martin’s Conversations with Taslitz were “Heated”

On pages 10-11 of its *Opposition* Howard falsely claimed Taslitz testified that “Plaintiff’s conversations with him were always heated....” To the contrary, Taslitz actually testified that he found Prof. Martin to be a “warm” person and that he considered himself her friend. Taslitz depo at 51, 54, 244, 245, 396, 305. Plaintiff

of the University of Pennsylvania, for the fall semester of 2006. (Ex. K; website from Dickinson Law School. (Ironically, Dickinson is the first law school that made Prof. Martin an offer, in 1992)

²² Howard may be callously “mocking” the permanent injury that Martin sustained in a car accident, when she was hit from behind, in October of 1996, requiring her to wear a neck brace, undergo therapy and continue with chiropractic care even to date. The neck and back injury included the severe headaches; yet, Prof. Martin never missed her class while suffering from this injury. She kept her office hours, made progress on her scholarship and fulfilled her responsibilities as a single mother to an active twelve year old girl in her first year of high school.

and Taslitz testified that they often went to lunch together and that Taslitz often stopped by her office to walk with her to faculty and other meetings. Even Mrs. Bruner observed that Prof. Martin appeared to be well liked by her colleagues, particularly Prof. Taslitz, and that they included her in social and other gatherings. Bruner depo at 87-89. In fact, Taslitz testified that, when they spoke about her non-renewal, in January or February of 1998, Martin ended the meeting by giving him “a hug.” Even in the face of her devastation at losing her job and ability to support and protect her daughter, Martin found compassion for her “friend,” Taslitz, who told her that he “agonized” over her non-renewal. Taslitz told Martin that he did not know, before December 18, 1997, that she would not be renewed, so he could not warn her. Taslitz told Martin that he did believe that she would be retained permanently when he recruited her, but there had been a “Dean change” that he did not anticipate. (Dean Ramsey was replaced by Dean Bullock.) In her March 31, 1998 letter to Taslitz, Martin repeated his words to him. **(Ex. L)**

Surely, if Martin had known that it was Taslitz who recommended to the rest of the Committee that she be rejected, and that he had misrepresented the status of her scholarship, she would not have *hugged* him; nor would she have alleged, in her Complaint, that Taslitz did not vote to reject her. See Complaint ¶ 208. Martin testified that Taslitz’ friend, Andrew Gavil, advised her to speak to their mutual “friend,” Taslitz, to try to mend their relationship. Gavil acknowledged that this “sounds like something I would have done....” Gavil depo at 124.

Taslitz testified that Prof. Martin complained about various matters that Howard has conveniently taken from Martin’s November 5, 1997 memo. (Little did she know how that life was about to get more complicated than it had been during the unusual year she described.) Howard contradicts itself by pointing out that Prof. Nolan testified that Prof. Martin never told her that any of these matters interfered with her ability to complete or publish her article. Prof. Nolan also testified that she and Prof. Martin discussed many things, including their classes, teaching methods, students and their scholarship projects and interests. Prof. Nolan saw Prof. Martin nearly daily during her second year at Howard, since their offices were almost directly across the corridor from each other. Prof. Martin was not described as a “complainer” by Prof. Nolan, or to any of the 13 members of Howard’s administration, faculty and/or clerical staff who testified, other than Taslitz. Plaintiff only began “complaining” once Harrison began to stalk her, beginning on November 20, 1997, and the school retaliated against her for

reporting the stalking, taking away her career and livelihood. On page 10 of its *Opposition*, Howard even admits that *after* the December 18, 1997 decision, Taslitz' "relationship with Plaintiff, a fellow New Yorker, changed." Howard's admission is consistent with everything that Martin has claimed.

On page 10 of its *Opposition*, Howard claims that Prof. Taslitz testified that Prof. Martin had "become angry with another faculty member (Gavil) who informed him that Plaintiff had referred to one of her students as a 'bitch.'" In fact, Taslitz did not testify that Plaintiff was "angry" at anyone faculty member or that anyone ever reported to him that Prof. Martin referred to a student as a "bitch." Taslitz testified that Gavil had told him that Martin had not followed his advice on an incident with a student and handled the situation badly, although Taslitz could not recall any details of the incident; however, Gavil contradicts Taslitz and does not even claim that he gave Martin advice or that she did not take it.

As discussed in Plaintiff's October, 2002 *Motion to Strike*,²³ incorporated by reference herein, and repeatedly in this litigation, Plaintiff vehemently denies Gavil's accusation. Gavil simply changed the story to include the word "bitch" to help his friend Taslitz justify his role in removing Martin from the faculty. Plaintiff renews her *Motion to Strike* Gavil's testimony regarding this conversation. By order dated September 24, 2002, MJ Facciola precluded Howard from using this evidence; however, Howard blatantly violated the Order and has based its case primarily on this precluded testimony. Howard did not make this allegation until three years into this litigation, during Gavil's deposition, in September of 2002, only days before discovery closed. Howard refused to produce Dean Purdy for a deposition, so the Court precluded Gavil's testimony. Plaintiff has consistently maintained that the Court should enforce its own Order and strike all references to this "bitch" story from the record, both because Plaintiff was denied discovery on the issue *and* because it is irrelevant to the Committee's decision since four of the five Committee members testified that they had only heard favorable faculty comments about Martin and that they found her to be quite collegial. In its official July 1, 2001 APT

²³ Howard falsely claimed that Gavil was a member of the APT Committee in 1997 and that his opinion of Prof. Martin was therefore a factor in her rejection. Gavil was not on the Committee and had no vote. Plaintiff offered proof, through Howard's own filings, that Gavil was not a member of the Committee; nevertheless, MJ Facciola erroneously determined that he was and ruled accordingly.

Committee Statement, Howard admitted that “non-collegiality” was not a factor in Martin’s rejection. Gavil’s testimony is completely irrelevant. Plaintiff should not have had to waste time refuting his story.

Plaintiff had a right to rely on the Court’s September 24, 2002 preclusion Order; however, MJ Facciola used the precluded evidence as a major reason for denying Plaintiff’s motion for summary judgment. Plaintiff had good reason to believe that she would be granted summary judgment on some or all of her claims, since Howard failed to file a Local Rule 56.1 *Statement of Disputed Facts*, despite being given a specific additional opportunity to file one. Where a party fails to file a Rule 56.1 *Statement*, the opposing party is entitled to have his/her *Statement of Material Undisputed Material Facts* deemed true. *Mintz v. District of Columbia*, 2006 U.S. Dist. LEXIS 34446 (D.D.C. 2006).²⁴

Taslitz admitted that he never asked Prof. Martin anything about this interaction with his best friend, Andrew Gavil and that Prof. Martin never mentioned it to him.²⁵ Moreover, if this incident is what caused Taslitz to decide to oppose Prof. Martin’s candidacy for a permanent position – more than a year later²⁶ -- why did he

²⁴ MJ Facciola avoided this result by erroneously claiming that Plaintiff did not file a Rule 56.1 Statement either, so he was entitled to “divine” the facts. Judge Hogan corrected MJ Facciola’s modified MJ Facciola’s Report and Recommendation to reflect that Plaintiff did file a Rule 56.1 *Statement of Facts*, but this new order was not applied to deem the facts true, as asserted by Plaintiff, in analyzing her *Motion for Summary Judgment*. Plaintiff at least believed that she would be permitted discovery on this issue, and be permitted to depose Dean Purdy once the motions for summary judgment were decided, if claims proceeded to trial; however, the motions for summary judgment were not decided until three years after they were filed, during which the discovery period had been long closed. Once the summary judgment motions were decided, in October of 2005, Plaintiff moved to depose Dean Purdy on this issue, but the Court denied her motion. Plaintiff has therefore been consistently and completely denied discovery on this issue, first raised three years into this litigation.

²⁵ Martin clearly recalls – and documented in an October 1996 memo (**Ex. M**) – the lunch between Prof. Gavil and herself, initiated at Gavil’s invitation. As they were leaving the restaurant, Gavil “ambushed” Martin by telling her that a student had complained about her (that Prof. Martin did not call on her fast enough in class). Gavil did not inform Prof. Martin that he had already reported this trivia to the Dean of Students, Denise Purdy – a fact that Prof. Martin learned when approached by Dean Purdy. Dean Purdy apologized to Prof. Martin for the inquiry when she learned of the trivial and meritless nature of the complaint. Martin’s memo to Dean Purdy and Gavil, in response to Gavil’s report of the student complaint to Purdy (**Ex. M**), makes absolutely no reference to any accusation that Martin referred to the student as a “bitch” or any other inappropriate word. If there had been a concern about language used at the time, presumably it would have been addressed in the ten page memo or a memo written in response to Martin.

²⁶ Newsom’s testimony regarding Prof. Martin’s grades for her first semester at Howard, in the fall of 1996, is similarly pretextual. First, Newsom had no vote and no role in the APT Committee. There was no testimony that anyone on the Committee was aware of Newsom’s purported concern about Martin’s first semester grades and there is no question that it was not a factor in the decision a year later. In addition, Howard falsely states that students received grades above 100%. Both Plaintiff and Newsom testified that once class participation points were added to the anonymous test grades, grades were capped at 100%. Newsom’s complaint was that 4 students

present himself as his friend and mentor for the following thirteen months, with no warning of her inevitable non-renewal, based on the word of non-APT Committee member Andrew Gavil,²⁷ reporting a purported word spoken by Prof. Martin only two months after she joined Howard's faculty?

Taslitz' testimony is not even consistent with his actions. If Taslitz had decided, by the beginning of the 1997 academic year, that he would not support Martin's candidacy, why would he stop by her office and remind her to timely apply? Why would he ask to see her application before she submitted it to the Committee and suggest additions? (Ironically, the now notorious paragraph containing the 11 obstacles overcome in completing the 911 article.) Why wouldn't he have given her some warning and opportunity to apply to other law schools in August of 1997 and participate in the AALS recruiting conference in November of 1997, as *he did warn Prof. Cunningham*? Why would Taslitz set Prof. Martin up to be left without a job and a means to support her daughter, in the spring of 1998? The answer is that he did not. Taslitz fully intended to recommend to the Committee that Prof. Martin's be selected for one of the tenure-track positions and continue teaching the EEO and Torts classes that she had been teaching at Howard for the previous two years.

Taslitz's plans changed only because Bullock informed him that she wanted Martin removed from the faculty due to her complaints about the stalking. His inconsistent, deceptive and frightened behavior, immediately asking Bullock to assure him of legal representation if he was sued, is evidence of his guilty conscience and his knowledge that Martin had a good basis for a lawsuit against the University and him as well.²⁸

received grades of 100% and, although he said it was completely up to Prof. Martin, he would have given only one 100% in any given class and, to achieve that purpose, he would have lowered the grades of the four students at the bottom of the class and failed them. Prof. Martin elected not to punish students who passed the course in order to reward students who received extra points for class participation. There was no question that Prof. Martin's grades were well within the school's guidelines and that she complied with the "C" curve. There were also several "Ds" in the class. Two former students who testified at trial on Prof. Martin's behalf testified that the received grades ranging from A to C in Prof. Martin's classes. Newsom's testimony is a complete "red herring" and the grade sheet should never have been admitted into evidence, as they were, over Plaintiff's objection.

²⁷ This entire incident is evidence of Gavil's "non-collegial" nature, as also attested to by Profs. Boyer and Jones, in their depositions. In fact, Gavil could not gain the support of his colleagues to continue as a member of the APT Committee in 1996. As explained by Prof. Smith, in 1996, the APT Committee was composed of professors appointed by Dean Ramsey – including Profs. Taslitz, Gavil, Leggett, LaRue and Bullock (who was not active in 1996, because she was on sabbatical at the AALS, as she testified.) As Prof. Smith also testified, when Dean Ramsey left Howard, the faculty returned to the system of voting for the APT Committee members. All members except Gavil received the votes to remain on the Committee.

²⁸ Plaintiff did not join Taslitz as a defendant because, at the time that she filed the lawsuit, she believed that

VII. “Confusion” of Prof. Leggett

On page 7 of its *Opposition*, Howard claims that Leggett was “confused” when he the list of professional and personal challenges that Martin faced during first year at Howard while she was expanding her 911 article. First, Prof. Leggett’s testimony was not that he was confused when he read the memo; he testified that he was “confused” at the December 18, 1997 APT deliberations meeting, when “someone” was saying that Prof. Martin had not completed or published an expected article. Had Leggett actually read the November 5, 1997 memorandum and referred to, or remembered its contents, he would not have been confused. The memo clearly explains that she expanded the long *completed* article by approximately 70 pages to include new, developing case law. This is not a “confusing” concept. LaRue understood it very well and praised the resulting article, as did J. Clay Smith. *Pl.’s MSJ* at 33; *LaRue* depo at 43-44; *Smith* depo at 81-82.

It is true, however, that Leggett’s testimony has reflected a great deal of “confusion” overall. First, Leggett’s own testimony directly conflicts with his May 11, 2001 Statement, written on behalf of the APT Committee. As discussed in Plaintiff’s motion, page 24, Leggett states that Martin did not “complete” an article for publication as of December 18, 1997; yet, Leggett actually testified that he knew, as of December 18, 1997, that Martin had not only completed her article, but it *had* been accepted for publication. On page 8 of its *Opposition*, Howard claims puts the titles of Martin’s articles into Leggett’s mouth to express explain more why he was “flabbergasted,” “shocked” and “stunned;” however, Leggett never testified about Martin’s articles by name and did not even appear to know, even by the time of trial, that she had a draft of “*Lights..*” and a title, thesis and preliminary research for a third article, “*Still Racist...*”

Second, Leggett testified, at trial, that candidates “sign up” on a “sign up sheet” for interviews at the AALS conference in Washington, D.C. This testimony was contradicted by every person who testified about the procedures, including Taslitz, Nolan, Smith and Martin. All other witnesses testified that candidates are selected in advance by the APT Committee members. Indeed, if candidates could just “sign up,” the Committees would

Taslitz had supported her candidacy. Plaintiff had no idea, until the APT Committee member depositions, in September of 2002, that Taslitz voted against her and convinced the other four members to vote for Cunningham to take over her EEO course. This information was disclosed only after three court orders to compel discovery and a contempt finding against Howard for failure to produce discovery. Taslitz’ vote was Howard’s well kept secret for three years into this litigation.

have to interview candidates that would not even qualify and would forfeit time for candidates they wanted to see.

Third, Leggett testified that he was “confused” about the status of Martin’s scholarship (MSJ at 30-31; *Plaintiff’s Motion for Judgment on Retaliation Claims*, at 26-27; yet, there was no reason for him to be confused because Martin’s resume and application clearly stated the status of her scholarship. Had Leggett read the materials for himself, instead of relying on Taslitz’ presentation, he would have known that Martin added 70 pages to her article *911*, had a draft of a second article, *Lights*, and had a thesis for a third article, since joining Howard’s faculty, entitled, *Still Racist after all these Years....* In fact, with all due respect to Prof. Leggett, with whom it is undisputed Martin enjoyed a collegial and friendly relationship, if Leggett had been *listening* during the November 7, 1997 interview, or remembered the interview, that the Committee had with Martin, he would have know about these articles because she discussed them at this interview, highlighting her scholarship along with other information in her application.

Fourth, as Martin has maintained, unchallenged, Leggett, during the November 7, 1997 interview specifically said that, in addition to the tenure-track positions, Howard would have one or more visitorships – but these would be “real visitorships.”²⁹ This statement demonstrates that Leggett was well aware of Howard’s practice of using “visitorship” slots for positions that were not conventional visitorships. Leggett may also be confusing the timing of conversation with Martin’s original application process in 1996, when his only contact with Martin before her hire was his brief, late appearance in the AALS interview in D.C., after most of the questions had been asked and answered by Taslitz and Gavil.

Fifth, Leggett claimed, for the first time, at trial, that he met with Martin in January of 1996 and that they specifically discussed her visitorship as a limited two year visitorship. Martin has consistently testified that she met with Taslitz, Gavil, Dean Ramsey, and a few other professors during her January 1996 visit to Howard, but she has never mentioned Leggett. In fact, in her April 27, 1996 memorandum to Dean Ramsey (**Ex. J**), Prof. Martin discussed at length her discussion with Prof. Taslitz regarding her “visitorship” and the apparent lack of precedence at both Howard and Cleveland State University for the type of “visitorship” that she was being offered by Howard, understanding that, despite the “visitorship” status, the parties intended for her to become a

²⁹ Martin also references Leggett’s remark in her March 31, 1998 letter to Taslitz (**Ex. L**), page 3-4.

permanent member of the faculty.

Prof. Martin mentioned a number of other professors with whom she spoke regarding terms and conditions of the position offered to her, including issues of moving expenses, summer grants and other benefits. She mentioned talking to Profs. Andrew Gavil, Reggie Robinson and Frank Wu, but not Ike Leggett.³⁰ Surely, if Martin had had any significant conversation with Leggett about the terms and conditions of the offer that Howard expected to make with her, she would have mentioned Prof. Leggett along with these other professors. In addition, during the negotiation period for her initial hire, there were numerous letters and telephone calls between Martin and Howard APT members and/of administrators. These correspondence included repeated conversations and at least one letter from Prof. Taslitz, at least one phone call and one letter from Prof. LaRue, at least one telephone conversation with Associate Dean Johnson, and at least one telephone call from Prof. Gavil.³¹

Sixth, as Bullock testified at trial, she conducted a fundraiser for Leggett, who is currently a candidate for Montgomery County Executive. To the extent that he can “remember” events in the best light for Howard, it is in his political interests to do so, rather than to alienate Howard University and its allies in this geographic area where Howard has so much power and influence.

Leggett’s confusion is simply a reflection of the fact that it was Taslitz who performed most of the duties of the Chair and Leggett who signed off on what Taslitz wrote. Leggett was a follower in the Committee – not the leader. He did not know what was happening at the time that Bullock and Taslitz were secretly meeting and discussing the fact that Bullock wanted Prof. Martin removed from the faculty because her reports of stalking constituted “bad judgment,” caused her to have a “bad day,” and required her to “do a lot with respect to that” – which, as it turned out, was to do a lot to remove Prof. Martin from the faculty.

³⁰ On cross examination, Howard’s lead counsel, Mr. Shwalb, asked Martin why she did not mention meeting with Dean Ramsey in her letter to Dean Ramsey. Because it is a 6 page letter, and Martin did not stop to read every word to see if she did mention her meeting with Ramsey, she assumed that Mr. Shwalb was correct in the underlying assumption that she did not mention the meeting, so she just responded with words to the effect of: “Why would I need to tell him about the meeting if he was there?” In fact, however, on page 1 of the letter, Prof. Martin did briefly refer to her meeting with Dean Ramsey.

³¹ Gavil called Martin on the Friday night of the November 1995 AALS conference, to invite her for a second interview. Gavil stressed that the members who had met her had really liked her and anted to make sure that everyone at the conference met her before they left. The team was divided into two groups to maximize the number of candidates, so candidates typically did not meet the entire team at the conference.

V. **Howard has Unconscionably Misrepresented Prof. Martin's March 31, 1998 Letter to Taslitz**

On page 11 of its *Opposition*, Howard has misrepresented Martin's letter to Taslitz, quoting the *Bible*, Matthew 18: 17-17, wherein Jesus Christ has directed God's children to speak directly to each other to attempt to resolve their differences and attempt to heal the discord before involving other people in the dispute and creating discord. As discussed at length in her June 19, 2006 *Reply to Defendant's Opposition to Plaintiff's Motion for Judgment on her Breach of Contract Claim*, pages 20-25, the letter stresses the need for God's children to express love, truth and fairness to each other. Martin quoted the words of Jesus Christ, as recorded in the Book of Matthew, verbatim. She described her efforts to follow Christ's example and instruction; yet Howard has turned even this scripture "on its head." Martin can only count herself in "good company" among the persons whose reputations that Howard has set out to defame. There is another appropriate Biblical passage.

Let the lying lips be put to silence, which would speak grievous things proudly and contemptuously against the righteous.

Psalms 31:18.

VI. **Premature Eviction from Office**

As discussed in Section I, above, and in her motion, at 16, in *Burlington*, the U.S. Supreme Court expressly adopted the ruling and analysis in *Rochon*. *Rochon* specifically adopted, for Title VII, the definition of adverse action that it had set forth in *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.* Certainly, if the cancellation of an honorary symposium constitutes actionable retaliation under Title VII, 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, is actionable retaliation.

The Verdict Form adopted by the Court (**Ex. C**), Question, 8(c) asks the jury to determine whether Dean Newsom's order for Prof. Martin to vacate her office constitutes "an adverse employment action." Under *Burlington*, the inquiry should have been whether the action taken might dissuade the plaintiff or others from making or supporting complaints of discrimination or retaliation.

As discussed in Plaintiff's motion, Plaintiff had just filed her University Grievance, as well as her EEOC charge, on May 14th and 15th, respectively. Howard had immediate notice of Prof. Martin's Grievance, since it was filed directly with the University. Both the internal Grievance and the EEOC charges alleged sex discrimination and retaliation for Martin's complaints about Harrison. Howard admits that its Office of General Counsel received Notice of the EEOC charge, from the EEOC, on May 26, 1998. On the *very same day*, Associate Dean Newsom called Plaintiff and ordered her to vacate her office, no later than May 29, 1998 – *three days' notice*. Dean Newsom also wrote a memo to Martin requiring that she vacate her office. Although the memo was dated May 21, 1998, it was in Martin's campus mailbox until May 26, 1998, ordering her out by May 29, 1998, along with Newsom's May 26, 1998 extending the date to vacate to June 1, 1998. Prof. Martin's grades for her EEO class were not due until June 16, 1998. Some students had not even turned in their research papers to be graded yet. Martin was meeting with students about their papers and other matters.

Based on the "norm" or treatment afforded Prof. Martin's similarly situated comparator, Prof. Betsy Levin, Prof. Martin should have been permitted the use of her office for at least two more months, unfettered, to grade papers not yet due or submitted, to meet with students about their exams or papers, to continue scholarship work, to organize her papers and books for easy access, packing and unpacking, to interact with colleagues, and for any other purpose that her colleagues were using their offices.

Even had the harm been compensated later, through the grievance process, under *Burlington*, the stress caused by having to move all of her teaching materials, books and other belongings from her office, store them elsewhere, set up her home with the materials necessary (computer, internet, other) unpack and reorganize those materials while trying to grade exam papers, seek employment elsewhere and tend to the emotional needs of her daughter who was experiencing debilitating headaches and depression as a result of fear that her mother might be killed at work and then because her mother no longer had the means to support her. Even if this hardship had lasted only for a month, as did the suspension in *Burlington*, Howard's actions would constitute actionable retaliation, under *Burlington*. In the present case, however, the hardship was never remedied because Howard's Law School Dean, Alice Gresham Bullock, defied the internal grievance process and the University Grievance

Committee and flatly refused to participate in the process, claiming that the University Grievance Committee did not have jurisdiction over Prof. Martin's claim.

Under the University Grievance procedures, the University is obligated to maintain the *status quo* at the time that the Grievant files the grievance; in this case, however, Bullock defied the rules and refused to maintain the *status quo*, i.e., maintain Prof. Martin on the faculty while the grievance was being resolved. Not only did the law school refuse to maintain the *status quo* or to participate in the University's own grievance process, but it placed Prof. Martin in a position even *below* the *status quo* – it required her to leave her office while she was still grading EEO papers, not due until June 16, 1998. There was no legitimate non-discriminatory reason to require Prof. Martin to leave her office by the end of May while allowing Prof. Levin to stay in her office through July, with no order, even then, to vacate. *Pl.'s Statement of Material Undisputed Facts*, ¶ 261; Ex. A of Pl.'s MSJ, Martin Declaration ¶¶ 197-200; Newsom depo at 215-217, 267) Plaintiff was still grading exams and they were not due until June 16, 1998. Howard claims that Dean Newsom's memo was not initiated by him, but was in response to a request for an extension of time on her Torts grades; however, all that Prof. Martin's request required was for Newsom to grant the extension – there was absolutely no legitimate reason for him to order her to vacate her office, on three days' notice.

By May of 1998, it was well known that Prof. Martin had complained about Harrison, stating clearly that Harrison was pursuing African-American female professors. (Ex. B of *Pl.'s Opp. to Def.'s Motion for Judgment re Retaliation*, March 6, 1998 memo to Bullock, fn. 1) Prof. Martin sent copies to all members of the APT Committee of her March 6, 1998 memorandum to Dean Bullock, on March 6, 1998, as indicated by her "cc" on the memo to all members of the APT Committee. In addition, on April 29, 1998, Dean Bullock called an Emergency Faculty Meeting, to address the "Concerned Students" complaints (Ex. N, memorandum sent by Dean Bullock to all faculty members on or about April 28, 1998, which included, among numerous other issues, the students' protest of Prof. Martin's non-renewal and the lack of courses and professors necessary to complete requirements for graduation and the Bar Exam).

On April 28, 1998, in response to Dean Bullock's memo and in preparation for the entire faculty to address the portion of the "Concerned Students" protests of Prof. Martin's non-renewal, Prof. Martin distributed

to the entire faculty the packet of correspondence between Dean Bullock and herself regarding the stalking by Harrison and her non-renewal. Prof. Martin's colleagues were therefore well aware that she had repeatedly requested protection from Harrison, that Howard failed to take reasonable steps to protect her and other women on campus from Harrison and Dean Bullock was refusing to renew her contract, despite vacancies on the faculty and the shortage of classes and professors to teach needed courses. In fact, as both Martin and Prof. Sherman Rogers testified, at the April 29, 1998 meeting, Prof. Kurland spoke in favor of Prof. Martin's renewal, citing the shortage of courses and the immediate need for professors to cover courses for the following year. MSJ at ___.

Less than one month later, Prof. Martin's colleagues saw her being forced to pack her boxes and vacate her office, humiliated, disregarded and "discarded" before her peers and her students. This public humiliation and rescission of tools and resources necessary to complete her work at the law school could well deter a reasonable person from ever making an EEO complaint. Certainly, it was far more substantial than a "petty slight," "minor annoyance," "simple lack of good manners," or "snubbing by supervisors and co-workers" or "petty slights" that "all employees experience," that the Supreme Court enumerated as examples of non-actionable conduct under Title VII. *Burlington*, Slip. Op. at 13-14. This was not a "petty slight" or something that "all employees experience[d]." Martin was singled out for early removal, while her colleagues were still there to watch it.

Howard was well aware that the EEOC and the Grievance Committee would conduct interviews with witnesses, primarily law school employees. Numerous law school employees were potential witnesses in any lawsuit that Martin might file, alleging sex discrimination and retaliation. Such witnesses included APT Committee members, professors (tenured and non-tenured as well as professors or all ranks, some seeking promotions, merit pay increases and summer grants), administrators, secretaries and campus security officers.³²

Under the "constellation of surrounding circumstances, expectations, and relationships" in this case, Prof. Martin's premature removal, against the backdrop of her complaints regarding Harrison and her unjustified non-

³² Dr. Sirleaf specifically testified that Dean Bullock told him that he had "compromised" his job by calling in to a radio show in support of Prof. Martin, corroborating her account of the stalking events at Howard, including Howard's failure to take reasonable steps to prevent it and its retaliation against her. Dr. Sirleaf also testified that he and his wife remain concerned about the job security of his wife, who was hired to work in the Office of the Law School Dean during the pendency of this litigation. The image of Prof. Martin being forced off the premises while her colleagues were grading papers and meeting with students in their offices, "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." See *Burlington*, at 13.

renewal, sent a clear, deterrent message to “others” employed at Howard that complaining of sexual harassment, or stalking, or discriminatory treatment, would result in being “kicked out” of the University and removed from the premises, as soon as they can be replaced.

CONCLUSION

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

Respectfully submitted,

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