

Record No. 06-7157

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**DAWN V. MARTIN, ESQUIRE
Plaintiff-Appellant**

v.

**HOWARD UNIVERSITY, HOWARD UNIVERSITY SCHOOL OF LAW, AND
ALICE GRESHAM-BULLOCK, ESQUIRE
Defendant-Appellee**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(The Hon. Thomas F. Hogan)**

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

Howard's Brief consists of blatantly false statements, which Ms. Martin will address in a separately filed *Motion for Sanctions, Pursuant to App. R. Civ. P. Rule 38*.

Although Howard University filed no cross appeal, it improperly asks this Court to reverse the court's 1999 decision, *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516, 1999 WL 1295339; 81 Fair Empl. Prac. Cas. (BNA) 964; 15 I.E.R. Cas. (BNA) 1587 (D.D.C. 1999), adopting EEOC regulation 29 CFR 1604.11(e). Howard frivolously urges this Court to become the *only* jurisdiction in the country to reject the regulation.

It was the duty of the court, and not the jury, to determine whether Prof. Martin's complaint of a stalker in her workplace, Leonard Harrison, pursuing her to be his "wife," constituted "protected activity" within the meaning of Title VII. In 1999, the district court properly held that the stalker's conduct constituted sexual harassment. Prof. Martin's complaints therefore constituted "protected activity." In 2006, however, *after the trial*, in violation of the law of the case, and all procedural due process, the district court improperly submitted this question to the jury after it was too late for Ms. Martin to put evidence regarding this issue.

Confused by Howard's arguments and the court's refusal to provide requested supplemental instruction on the definition of "sexual harassment," the jury returned a verdict based on a misunderstanding of the law, on an issue that should never have been before it.

Neither Howard nor Alice Gresham Bullock, in her individual capacity, has denied that she committed perjury when she testified that she did not perceive that Harrison was stalking Prof. Martin as a woman, or based on her sex. Because the verdict was based on this perjured testimony, it must be vacated. Since the jury found in favor of Ms. Martin on the other issues that constitute her sexual harassment claim, and based on the entire record, she is entitled to judgment on this claim.

The magistrate's October 3, 2003 *Report and Recommendation*, adopted by Judge Hogan, without discussion, in 2005, is replete with factual and legal errors. These errors included the *sua sponte* dismissal of retaliation claims that Judge Hogan upheld in 1999 and which Howard did not challenge. This decision should be vacated. Ms. Martin is entitled to judgment, as a matter of law, on her retaliation claims. The reason stated by its Appointments Committee, in its official *May 11, 2001 Statement*, prepared for litigation, is undeniably false, as proved by the actual publication dates of the articles of Profs. Martin and Cunningham.

Ms. Martin is entitled to the restoration of, and a trial on, her claim of intentional infliction of emotional distress. A reasonable jury could certainly find that former Dean Bullock's conduct was outrageous and/or violated public policy.

Ms. Martin is entitled to a new trial on her breach of contract claims for various improper evidentiary rulings, including Howard's denial, at trial, that Prof. Taslitz had the authority to bind the university when he negotiated Prof. Martin's contract in 1996. Howard had already admitted, in its Answers to Interrogatories, that Prof. Taslitz had this authority.

A court may not hold the issue of mandatory Rule 37 sanctions forever abeyance, closing the case without deciding the motion.

ARGUMENT

I. Scope of Reply Brief and Related Motion for Sanctions against Howard University for Making False Representations to the Court, in Violation of Rule 38

Howard's legal arguments are buried within the "muck and mire" of flagrantly false representations of the record.¹ As the D.C. Court of Appeals cautioned, in another sex discrimination case brought by a Howard University professor:

...[a]n unscrupulous employer who has engaged in discriminatory practices may sometimes falsely depict a person with a legitimate complaint as a meritless troublemaker; the effects of the employer's wrongful conduct may then be compounded by the undeserved *ad hominem* condemnation of and calumny against a plaintiff who deserves better.

Carter-Obayuwana v. Howard University, 764 A.2d 779, 793 (D.C. 2001).²

Howard's "eleventh-hour" defense of "non-collegiality" is contradicted by *Howard's own binding witnesses* and document production, including the Appointment (APT) Committee's May 11, 2001 official position statement:

D. Collegiality

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

Pl.'s Tr. Ex. 33 at 3.³

In *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1293 (D.C. Cir. 1998), this Court recognized that "a lie is evidence of consciousness of guilt." *Aka* also warned that vague

¹ Frederic D. Cooke, Esquire, representing Alice Gresham Bullock in her individual capacity, filed a separate Brief and did not join in Howard's misconduct.

² Howard has a pattern of long, "contentious" litigation with its employees. See, e.g., *Summers v. Howard University*, WL 751316 at *4, 5 (D.D.C. 2006) (finally settled).

³ This "smoking gun" evidence is *the very document* that Judge Hogan advised Ms. Martin's counsel to withhold from the jury. (Martin at 42) Howard's claim that this document "hurt" Ms. Martin and that Judge Hogan was "kind" enough to give her counsel good advice (Howard at 41-42) is absurd. This document is the cornerstone upon which the retaliation cases rises and falls. See also Section V, B.

allegations about attitudes and interpersonal relationships are suspect in employment discrimination cases:

... courts traditionally treat explanations that rely heavily on subjective considerations with caution. Particularly in cases where a jury could reasonably find that the plaintiff was otherwise significantly more qualified than the successful applicant, an employer's asserted strong reliance on subjective feelings about the candidates may mask discrimination... an employer's heavy use of "highly subjective" criteria, such as "interpersonal skills," could support an inference of discrimination.

156 F.3d at 1298.

Howard has also misrepresented the date upon which Howard rejected Prof. Martin.⁴ Howard claims that Dean Bullock made the decision on October 31, 1997 (Howard at 6), before the stalking began on November 20, 1997; however, Howard has repeatedly acknowledged that this form letter, sent to all visitors whose contracts were ending (including the selectee, "e. christi cunningham"⁵) was *not* a decision.⁶ No decision was made on her application until December 18, 2007 – nearly a month after Harrison began stalking her.⁷

Ms. Martin should not be forced to sacrifice legal arguments in order to correct all of the false statements or the "mudslinging" in which Howard continues to engage; nor should this Court become immersed in such mire while it is attempting to sort out the legal issues before it. Howard, should not, however, be permitted to make false representations before this Court, with impunity; nor should this Court be deceived into adopting Howard's false representations into its

⁴ A detailed *Statement of Undisputed Material Facts (Pl's Facts)* (#330-2, JA __), per the record as of October 9, 2002, appended to Ms. Martin's *Motion for Summary Judgment (MSJ)* (# 273, 289, 330-1). See also Ms. Martin's *Statement of Disputed Material Facts* (#283, 313-1, JA __), appended to her *Opp to Def's MSJ (OMSJ)* (#283, 313-2).

⁵ JEX 40, JA __.

⁶ JEX 55, JA __; Tr. 736:17-739:24, JA __ - __; 1522:11-1524:25, JA __ - __; Bullock's Answer to Complaint (#27) ¶¶ 221-224, JA __ - __; Pl's MSJ at 24, JA __, Ex. H, Bullock depo at 71-72m JA __; Pl's Facts ¶119, JA __.

⁷ *Def's Opposition to Plaintiff's MSJ*(#292) at 9, JA __; JEX 118, *Howard's Answers to Interrogatories* ¶ 30, JA __; Pl's MSJ at 14, JA __; Tr. 698:13-700:1, JA __, Tr. #490 at 63:11-65:13, JA __.

statement of facts, in its published decision.⁸ Howard’s “defense” had consisted of nothing more than a constant flow of Rule violations (Fed. R. Civ. P. 11), continuing as *App. R. Civ. P. Rule 38* violations on appeal. Ms. Martin will therefore separately file a *Motion for Sanctions for Howard’s Violations of Rule 38*, exposing Howard’s false representations.⁹ This *Reply* will address the legal issues before this Court.

II. The District Court Properly Adopted EEOC Regulation 29 CFR 1604.11(e)

A. Howard may not Challenge any Ruling of the District Court because it did not Cross-Appeal

Howard’s request that this court reverse the district court’s precedent-setting adoption of EEOC regulation 29 C.F.R. §1604.11(e) is procedurally improper. Howard *did not* cross appeal and therefore has no procedural basis for requesting reversal on *any* issue.

B. Every Court that has Considered this Issue has Adopted EEOC Regulation 29 CFR 1604.11(e)

The district court’s precedent-setting adoption of EEOC regulation 29 CFR 1604.11(e) appropriate. *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516. Public policy compels protecting women in their workplaces so that “working while female” does not force them to choose between their safety and their jobs.¹⁰ Nine years later, every court that has

⁸ Howard’s false representations Martin have already been improperly memorialized, for posterity, once in this case. The parties agree that MJ Facciola’s October 20, 2003 *Report and Recommendation* is replete with material factual errors. *See* Martin at 23. If this decision is vacated, Ms. Martin *Motion for Summary Judgment* will be left undecided – as opposed to denied. The Court may then consider her 2002 *Motion for Summary Judgment* or simply grant her 2006 *Motions for Judgment*, based on the entire record.

⁹ For example, Howard claims that Prof. Martin “was not even a full time professor at Howard” (Howard at 4); however, for two years, *Prof. Martin was a full-time Associate Professor at Howard*, with a full course load. She had a faculty office, office hour obligations, faculty voting rights, committee obligations and publishing obligations. Her 1997-1998 salary was \$83,000 per year, plus a \$3,000 summer grant, for a total salary of \$86,000, with health, life and retirement benefits. The junior visiting professor, christi cunningham, who was selected for the position over Prof. Martin is now a tenured, full law professor. JEX 4, at 9013, 9028, JA__, __

¹⁰ *See* Martin at 14-15; *Amicus* at 5-8, 11-13.

considered this issue has adopted EEOC regulation 29 CFR 1604.11(e). *Amicus at 5-8*. Howard urges the D.C. Circuit to become *the only jurisdiction in this country* to reject this EEOC regulation.

Howard's own *Sexual Harassment Policy* acknowledges that an employer is obligated to end sexual harassment in the workplace by a non-employee – the same position advocated by the EEOC. JEX 2 at 154, JA __; Tr. 1530:19-1532:10, JA __ - __. Howard's argument is therefore completely frivolous.

C. Howard Refuses to Acknowledge that Reporting Non-Employee Harassment Differs from Reporting Harassment by a Supervisor or Co-Worker

Complaints about harassment by non-employees are not reported or remedied in the same manner as harassment by employees. *See Amicus at 7-8; Martin at 17-18, 23-24*. The remedy for non-employee harassment is normally to take security measures to keep the non-employee out of the workplace. Judge Hogan's 1999 holding that there are no "magic words" necessary to invoke Title VII is completely meaningless if the Court adopts the position that Title VII excludes employees who phrase their complaints about harassment in the form of requests for security to protect them physically in their workplaces.¹¹

In *Maupin v. Howard County*, No. 13C05062062 (verdict July 2, 2007) (Howard County, Maryland Circuit Court), the call from a purported Ku Klux Klan (KKK) member to an African-American high school teacher was one factor creating a hostile work environment for her. *Id.* If employers are permitted to ignore these threats from third parties, the harassed employee may be

¹¹ Prof. Martin first used internal means to address Harrison's harassment. She reported it to Deans Bullock and Newsom and University President Swygart. She then filed a Grievance, but Dean Bullock defied the Grievance Committee's orders to respond. Tr. 2541:6-2542:8, JA __; Tr. 2544:6-2549:18, JA __ - __; Pl's Tr. Ex. 39 at 364-365, JA __. The Grievance Committee determined that there was reason to believe that the Law School had violated Prof. Martin's rights to academic freedom and procedural due process. *Id.*

compelled to leave the workplace. This would cost the employee his/her job and the employer racial diversity.

Such tactics are reminiscent of the school desegregation cases wherein African-American students were attacked by White supremacists and intimidated into leaving the schools they had integrated. It would be a sad irony if *Howard University* removed Title VII protection from plaintiffs like Ms. Maupin, threatened by non-employee racists in their workplaces. Similarly, an employer must not be permitted to rid itself of *women* by failing to protect them when they are threatened, in their workplaces, based on their gender.

III. Pursuant to Rule 60(b)(3), Alice Gresham Bullock's Perjury Requires that the Jury's Verdict be Vacated

Neither Howard nor Alice Gresham Bullock has ever denied that former **Dean Bullock committed perjury at trial.**¹² *Prof. Bullock actually argues that perjury does not constitute fraud upon the court!* (Bullock at 15)

Rule 60(b)(3) is “aimed at judgments which are unfairly obtained....” *Devon Distributing Corp. v. Minor*, 2007 WL 4348069 at *4 (S.D. Iowa 2007). Where a party has committed perjury, “there can be no doubt that the judgment was unfairly obtained....” *Id.*¹³

Rule 60(b) attempts to balance the interest in stability of judgments (i.e., the policy of *res judicata*) with the interests in seeing that judgments not become instruments of oppression and fraud.... [C]ourts must apply Rule 60(b) “equitably and liberally”... to achieve substantial justice.”

Evans v. Commercial Bank and Trust Co., 2003 WL 22871619 (Bankr. W.D. Tenn 2003), quoting *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 844-845 (6th Cir. 1983).

¹²See also *Pl's Reply MJSexH* (#483) at 1-3, JA__-__; *Pl's Reply MJRet* (#489) at 2-4, JA__-__.

¹³Even if Alice Gresham Bullock had not committed perjury, her own personal understanding – or lack thereof – of what constitutes conduct that violates Title VII, cannot invalidate a Title VII claim. *Amicus* at 9-11.

“A Rule 60(b)(3) motion is properly granted where ... the testimony given by a material witness is false; [and] without it, a jury *might* have reached a different conclusion. *Id.* See also *Abrahamsen v. Trans-State Exp., Inc.*, 92 F.3d 425, 428 (6th Cir. 1995), as modified by *Jordan v. Paccar, Inc.*, 1996 WL 528950 (6th Cir. 1996), holding that “prejudice should be presumed” once the moving party has demonstrated that the opposing party engaged in the misconduct.

Absent Dean Bullock’s perjury, the jury would only have had before it her July 1, 1999 memorandum (Pl’s Tr. Ex. 8b, JA__) – and her *truthful* testimony – admitting that she understood that Harrison was targeting *women* to “stalk” and “otherwise harass” to be his “wife.”¹⁴

Judge Hogan compounded his error by refusing to allow Ms. Martin’s counsel to cross-examine Dean Bullock on the question of whether she believed a sexual harassment complaint could only be made where the victim used the words “sexual harassment.” Tr. 1534:9-1535:4, JA__ - __¹⁵ This wrongly procured verdict must be vacated.

IV. The District Court’s Erred, in 2006, by Ignoring its own 1999 Decision Holding that Harrison’s Harassment of Prof. Martin was Based on Sex

A. The Court was Obligated to Decide whether Prof. Martin’s Complaints about Harrison’s Stalking on Campus Constituted “Protected Activity”

Howard claims that the question of whether Harrison’s harassment of Prof. Martin was based on sex was properly before the jury, but cites no authority for this proposition. (Howard at 15-17) Howard also argues that it was the jury’s province to decide whether Prof. Martin

¹⁴ Howard’s argument that Harrison simply mistook Prof. Martin for “someone he once knew” (Howard at 8, fn. 2; 19) is as delusional as Harrison. Harrison could not have mistaken Prof. Martin for a real person because *he was not looking for a real person*. JEX 126; Tr. #490 at 30:5-39:12, JA__ - __; Pl’s MSJ at 3-6, JA__ - __; Pl’s Reply MSJ at 6-8, JA__ - __ Harrison was chasing *his own vision* of a fictional female character. *Id.* Pl’s Opp to Def’s MSJ (#283) at 4-7, JA__ - __.

¹⁵ Judge Hogan similarly cut off Officer Sirleaf’s testimony about his own understanding that Harrison’s stalking was “sexual in nature. Tr. 310:16-311:6. Judge Hogan stated that it was “obvious” that the pursuit of a woman to be a man’s a “wife” is sexual in nature. *Id.* Ms. Martin was therefore deprived of an opportunity to prove the very point that became the crucial question in this case *and* was misled into believing that it was a point that she did not have to prove.

engaged in “protected activity” when she reported Harrison’s stalking (Howard at 21); however, it is the responsibility of the court – not the jury -- to determine whether conduct constitutes “protected activity.” *McFarland v. George Washington University*, 2007 WL 3284016 at 11 (D.C. 2007), *citing Carter-Obayuwana*, 764 A.2d at 790-791, *citing Howard University v. Green*, 652 A.2d 41, 45-47 (D.C. 1994). The jury should *not* have decided this issue.

Howard misleads this Court by claiming that the jury found that Howard selected Prof. Cunningham over Prof. Martin for legitimate, non-retaliatory reasons (Howard at 21), citing its answer to Question 5(C). The jury did not make any finding regarding whether Howard’s stated reasons for the decision were supported evidence or false and pretextual.

The jury’s determination that Harrison’s harassment of Prof. Martin was not based on sex determined the answers to Questions #8 (a), (b) and (d): whether Prof. Martin engaged in “protected activity” when she complained to the law school administration about Harrison. These answers determined the answer to # 5(C), which asked whether Howard retaliated against Prof. Martin based on her *protected activity*.

Once the jury had concluded that Prof. Martin’s complaints *did not* constitute *protected activity*, it could not have found that *any* act committed by Howard was in retaliation for *protected activity*. The jury’s verdict, based solely on its answer to a question that should never have been before it, must be vacated.

B. Howard Refuses to Address Judge Hogan’s 1999 Holding that “it is clear that Plaintiff was only the object of Mr. Harrison’s attention because she was a female”

Howard repeats Judge Hogan’s statement in his 2006 opinion claiming that, in 1999, he did not hold that Harrison’s harassment of Prof. Martin was based on sex; however, Judge Hogan’s 2006 *conclusory statement about what he said in 1999* is not evidence of *what he actually said in 1999*. Howard refuses to address the 1999 decision itself, or Magistrate Judge

Facciola's reiteration of this holding in his October 20, 2003 *Report and Recommendation*, adopted by Judge Hogan, holding that the issue of whether Harrison's harassment of Prof. Martin was based on sex *would not be a triable issue of fact for a jury*.

The proof of what Judge Hogan said in 1999 is the 1999 opinion itself. In 1999, Judge Hogan properly decided that Harrison's harassment of Prof. Martin was sexual in nature and/or based on her gender. 1999 U.S. Dist. LEXIS 19516 at 8-11. *See Martin at 11; Amicus at 9.*¹⁶

C. Howard Misrepresents "the Law of the Case" by Arguing that Judge Hogan had a Right to Change his 1999 and 2005 Ruling of Law after the Trial, Changing the Rules after the "Game was Over"

Howard renders the doctrine of "the law of the case" null and void by arguing that a judge can change a ruling at any time, without notice or justification. (Howard at 15, fn. 4) *Langevine v. District of Columbia*, 106 F.3d 1018, 1023 (D.C. Cir. 1997), cited by Howard, qualifies a judge's authority to modify interlocutory orders, adding "*when it is consonant with equity to do so*," quoting *Schoen v. Washington Post*, 246 F.2d 670, 673 (D.C. Cir. 1957).

There were orders in this case that were modified, such as Judge Hogan's October 21, 2005 Order (#325), correcting two of the many errors made by MJ Facciola in his 2003 *Recommendation*; however, it was not "*consonant with equity*" to reverse a long-standing, six year ruling and impose a new burden on Ms. Martin after trial, when the "game" was over and she had been denied the opportunity to meet that burden.

Howard incorrectly claims that Ms. Martin agreed to the verdict form. Ms. Martin submitted a proposed verdict form (#441, JA __), but the court rejected it. She argued that the 1999 decision concluded that Harrison harassed her on the basis of her sex and that this question was not properly a question at trial. Tr. 2561:1-2562:5, JA __ - __. She argued that Howard

¹⁶ See Pl's Reply MJSexH (#483) at 8-11, JA __ - __; 16-17, JA __ - __; Pl's December 9, 2002 *Reply to Def's Opp to Pl's Motion to Strike Defendant's MSJ* (#545) at 13-15, JA __ - __

should not be permitted to make arguments, over and over, that it lost in 1999 (Tr. 2134:9-2152:2, JA __ - __). Judge Hogan rejected Ms. Martin's arguments (*Id.*) Within the confines of these rulings, *overruling Ms. Martin's objection*, she had no basis for objecting again.

Howard tried to "out-lawyer," overwhelm and intimidate the Howard Law graduates¹⁷ who alternately represented her. It was extremely difficult for them to compete with the "battalion of lawyers"¹⁸ hired by Howard; however, Ms. Martin, *pro se* at the end, did meet the challenge of preserving this issue on appeal -- under unconscionably difficult circumstances.

The Supreme Court has warned against the injustice that can result from the approach advocated by Howard:

Our rules "reject the approach that pleading is a game of skill in which one misstep .. may be decisive to the outcome.

Conley v. Gibson, 355 U.S. 41, 48 (1957).

The D.C. Court of Appeals rejected these litigation tactics in another case brought by a Howard professor against the University. *Carter-Obayuwana*, 764 A.2d at 787.

D. Judge Hogan's Incomplete Jury Instruction Resulted in Juror Confusion on the Crucial Issue of whether Harrison's Conduct Constituted Sexual Harassment

Not only did Judge Hogan improperly submit the crucial question to a jury, but he refused to properly instruct the jury on the law so that it could reach the "obvious" conclusion that he actually reached in 1999. Howard's entire defense to Prof. Martin's sexual harassment claim was to argue that she did not have a sexual harassment claim because she did not use the words

¹⁷ Due to finances, conflicts of interest, and reluctance of local counsel to oppose Howard, Ms. Martin had few options.

¹⁸ Ms. Martin correctly asserted that Judge Hogan cut off her closing argument – mid-sentence, with *nearly ten minutes left* – telling jurors that what she was saying was "irrelevant." Tr. 2529:14-2530:8, JA __ - __; Martin at 41. Howard claims that Judge Hogan ordered Ms. Martin not to refer to Howard's lawyers as a "battalion" (Howard at 35), but he never issued such an order. In a pre-trial conference, Howard asked for this ruling, but Judge Hogan denied it. Instead, he advised Howard on how to conceal its lawyers from the jury by having some of them sit in the audience rather than at counsel table.

“sexual harassment” in her memoranda complaining of Harrison’s conduct.¹⁹ Tr. 1849:15-1853:15, JA __ - __; 2459:8-2460:3, JA __ - __; 2463:22-2464:3, JA __ - __; 2502:15-24, JA __.

Judge Hogan refused to instruct the jury that Prof. Martin was not required to use the words “sexual harassment” to sustain her claim. Judge Hogan’s 2006 decision renders his own 1999 holding, that it is not necessary to use the words “sexual harassment” to establish a sexual harassment case, meaningless. This erroneous ruling was the *lynchpin* in the jury deliberations and verdict.

E. Howard has Changed its Position from Trial, Now Conceding that Title VII does not Require that a Woman be “Groped” or otherwise Assaulted in order to Sustain a Sexual Harassment Claim

Howard does not dispute Ms. Martin’s and NAWL’s representations the Judge Hogan’s October 4, 2006 decision incorrectly relies on the fact that Harrison did not “grope” or “touch” Prof. Martin to justify the jury’s finding that his harassment of her was not “sexual in nature” or “based on sex.”²⁰ See Martin at 15-16; *Amicus at* 13-14.²¹

Howard’s concession is markedly changed from its position at trial. Tr. 1848:4-10, JA __; 2133:16-24, JA __ - __; 2166:2-12, JA __ - __. Since the verdict was based on this improper argument, the verdict must be vacated.

F. “Protected Activity” Includes Complaints of Conduct that the Employee Perceives Constitute Sexual Harassment

Even if Judge Hogan had made no findings with respect to whether Harrison’s conduct was based on sex, Prof. Martin’s complaints about Harrison still constitute “protected activity”

¹⁹ In her March 6, 1998 memorandum, Prof. Martin actually did state that Harrison had a pattern of stalking “African-American women.” JEX 87, at 2, fn. 2, JA __; PI’s MSJ Ex. XX, at 2, fn. 1, JA __.

²⁰ Howard misrepresents Ms. Martin’s Brief, stating that she accused Judge Hogan of specifically instructing the jury on “groping.”

²¹ Contradicting Howard, Appellee Bullock actually adopted Judge Hogan’s position that the absence of touching constitutes evidence that there was no sexual harassment. Bullock at 14.

under Title VII since she *perceived* Harrison's pursuit of her as sexual in nature or because of her gender. *Carter-Obayuwana*, 764 A.2d at 790, citing *Goos v. Nat'l Ass'n of Realtors*, 715 F. Supp 2, 3 (D.C. 1989), *Parker v. Baltimore and Ohio R.R. Co.*, 652 F.2d 1012, 1019 (D.C. 1981).

The stalking began five days before Prof. Martin wrote her November 25, 1997 memorandum. JEX 71, JA __; Tr. 1659:20-1677:16, JA __ - __; Tr. #490 at 5:17-19:23, JA __ - __. Prof. Martin first reported Harrison's harassment to the administration, campus security, colleagues MPD verbally, on November 20th and 21st. *Id.* Administrators,²² colleagues,²³ staff members²⁴ and law enforcement officers²⁵ that Prof. Martin told about Harrison readily recognized that Harrison's stalking was sexual in nature. *See Pl's Reply MJSexH* at 1-7, JA __ - __. Prof. Martin recognized the "obvious" -- that Harrison had targeted her based on her sex. Stating it in her memoranda would have been like explaining to her colleagues that *water is wet*.

Prof. Martin's memoranda were not intended to be *legal Briefs* or to educate her supervisors (also lawyers) on the law of sexual harassment. They were entitled "Security Problem on Campus" to focus on *eliminating the danger at hand*. Howard's Title VII liability attached only when it failed to take reasonable steps to keep Harrison out of the workplace.

*Dean Bullock actually lied, in writing,*²⁶ representing that she was consulting the Director

²² Bullock and Newsom, *Pl's Facts* ¶ 38, JA __; *Pl's Tr. Exhibit 8B*, JA __; Tr. # 490 at 50:5-51:4, JA __ - __.

²³ Taslitz, Tr. 1666:2-15, JA __; *MJSex H* at 17, fn. 17, JA __, __ Prof. Taslitz' comment that Prof. Martin would be "*raped and killed*" by Harrison if the matter were left up to campus security (*Id.*) even found its way into Prof. Martin's nightmares. Tr. #490 at 47:1-9, JA __ - __

²⁴ Bruner depo, *Pl's MSJ* at 4, JA __; Ex. X at 137, JA __; *MJSex H* at 13, 17, fn. 17, JA __, __

²⁵ Sirleaf, *Pl's Opp to Def's MSJ* at 4, JA __, Ex. B at 22, 36-37, 100, JA __, __ - __, __

²⁶ When Dean Bullock and Lawrence Dawson were finally deposed, however, they both testified that Dean Bullock *never* reported anything about Harrison to him. *Pl's MSJ* at 7-8, JA __, Ex. H, Bullock depo at 49, JA __; Ex. EE, Dawson depo at 15, 24, JA __, __; Tr. 426:20-434:25, JA __ - __; 658:6655:25, JA __.

of Campus Security, Lawrence Dawson, to address Harrison's stalking. Dean Newsom claimed that he was requesting that a notice barring Harrison from campus. JEX 80, JA__ Prof. Martin could not have known that they were *not even trying* to protect her. This revelation did not come until Deans Bullock and Newsom began a pattern of *retaliation*, rather than the promised *protection*. Their response increased the hostile work environment by causing her to work in fear of *both* the stalker *and* termination from her job. Tr. # 490 at 18:7-99:1, JA__ -__

G. Howard Misrepresents “Sex Plus” Cases, Confusing it with “Intersectionality”

Howard misrepresents the “sex plus” doctrine, claiming that it requires that the non-sex factor be an independent protected category under Title VII; however, this is the theory of “intersectionality”²⁷ -- not the “sex plus” theory.

Howard appears to argue that, where a harasser chooses a victim because she is *both* female and a professor, she is not covered by Title VII. Howard states that if the criterion other than gender is not an “immutable characteristic,” the “sex plus” theory does not apply; however, in the very cases that Howard agrees are “sex plus” cases, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) and *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971) *cert. denied*, 404 U.S. 991(1971), the “plus” characteristics are rearing preschool age children and marital status and, respectively. These are not categories covered Title VII or any other federal employment discrimination statute. They are also *not* immutable characteristics. No one is born married or raising children. Marital status changes. Children grow up. The “sex plus” theory is if the criterion for discrimination or harassment is based on sex, plus *any other criterion*, it constitutes a violation of Title VII.²⁸

²⁷ See *BKB v. Maui Police Dept.*, 276 F.3d 1091, 1101 (Ha 2002); *Curley v. St. John's University*, 19 F. Supp. 2d 181, 192-193 (S.D.N.Y. 1998). See also Tr. 1656:13-1658:1, JA__ -__

²⁸ See Martin at 14-15.

Howard argues that the concept of “gender profiling” has only been applied to law enforcement harassment cases and therefore does not apply in this case; however, Howard has offered no reason that the law enforcement gender profiling cases (or racial profiling cases) should not be applied to employment cases as well. “Gender profiling,” used to harass women in their workplaces, creates the risk of “working while female,” just as racial profiling used to harass African-Americans creates the risk of “driving while Black” with respect to law enforcement.

V. Ms. Martin is Entitled to Judgment on her Retaliation Claims

A. Howard Cannot Justify the Dismissal of Ms. Martin’s Retaliation Claims by Relying on the Very Decision on Appeal as the Authority to Affirm that Decision

Howard quotes Judge Hogan as saying that Ms. Martin’s arguments “border on the frivolous” because she had previously raised them and lost (2006 U.S. Dist. LEXIS 34446 at *5); however, simply because she lost them does not mean that they were frivolous. The dismissal was erroneous when it was decided in 2003 and for additional reasons, based on cases decided thereafter. See Martin at 24-28.

This Court upheld a retaliation case where the plaintiff was deprived of the *opportunity* to compete for a position. *Chappelle-Johnson v. Powell*, 440 F.3d 484 (D.C. Cir. 2006). Prof. Martin was similarly deprived of *an opportunity to be considered* for a position because Dean Bullock withheld and concealed vacancies even from the APT Committee. *See also Wiley v. Glassman*, 2007 WL 4354431 at * 4 (D.C. Cir. 2007) (radio station excluded a plaintiff radio broadcaster from the managing editor rotation); *Holcomb v. Powell*, 433 F.3d 889, 902 (D.C. Cir. 2006); *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006); *Mastro v. Potomac Electric Power Company*, 447 F.3d 843, 855 (2006).

Ms. Martin’s *Motion for Summary Judgment* on these issues was never considered on the merits, and thus, was *never denied*. MJ Facciola dismissed these claims without consideration

on the merits. This dismissal is appealable. Once these claims are restored, Ms. Martin is entitled to judgment, as a matter of law, for the reasons stated in her MSJ at 41-44, JA __ - __.

Once the plaintiff has established a *prima facie* case in a Title VII action, the Defendant is obligated to come forward with evidence of a legitimate, non-discriminatory reason for the adverse action/non-selection. *Holcomb v. Powell*, 433 F.3d 889, 902 (D.C. Cir. 2006), *citing Reeves v. Sanderson*, 530 U.S. 133, 142 (2000). Howard's defense that it did not renew Prof. Martin's contract because it selected Prof. Cunningham to fill the only open position is clearly false and pre-textual since there were at least three other vacancies that Dean Bullock admitted Prof. Martin was well qualified to fill. The end of Prof. Levin's visitorship in 1998 left a specific void in the area of Constitutional Law²⁹ – a course that Prof. Martin was highly qualified to teach; however, Dean Bullock would not allow the Appointments Committee to even *consider* renewing Prof. Martin's contract for one year to fill this void. There could be no legitimate, non-retaliatory reason for this refusal to consider Prof. Martin for *any* available position – particularly since she had left a tenure track position in Cleveland, sold her house and forfeited interviews at other schools to join Howard's faculty.

B. No Reasonable Juror Could Find that Howard Produced Evidence of a Legitimate, Non-Retaliatory Reason for its decision since Both Profs. Martin and Cunningham had Articles Accepted and Published at the same Time

Howard argues that Ms. Martin's claim that she is entitled to judgment on her retaliation claim of non-selection/non-renewal, is based on "speculation;" however, it is based on the irrefutable evidence of record, based on the answer that any jury would be compelled to provide to Question # 6. Howard admits that the jury did not reach this question. (Howard at 20)

²⁹ See JEX 4 at 616-617, regarding the purpose of Prof. Levin's visitorship when she was hired in 1996.

The May 11, 2001 APT Statement (JEX 33, JA __)³⁰ is the Committee's only document identifying the purported factors it considered in selecting Prof. Cunningham over Prof. Martin. The Committee claimed that, as of the December 18, 1997 decision, that, since joining Howard's faculty:³¹

- 1) Prof. Martin "had not completed" an article for publication; and
- 2) Prof. Cunningham had actually *published* an article and she had two other articles nearly ready for publication.

Both of these statements are *irrefutably false*.

The Committee members admitted that, by December 18, 1997, *they actually knew* that Prof. Martin had not only *completed* her 141 page article, but also that it was *accepted for publication*. Pl's MSJ at 25, JA __; Pl's Facts ¶ 130, JA __; Tr. 873:20-24; JA __; 1144:17-1145:1, JA __.³² Howard failed to offer even an iota of evidence to substantiate its assertions regarding the status of these professors' scholarship; moreover, *Howard's own binding witnesses contradict its defense*.

Howard's statements regarding *the status of Prof. Cunningham's scholarship is equally false*.³³ *Prof. Cunningham's 67 page article was not published as of December 18, 1997, but*

³⁰ See page 1.

³¹ Howard claimed that the relevant time frame was the year and a half since these professors had joined Howard's faculty. Prof. Martin had published more articles than had Prof. Cunningham before they joined Howard's faculty. Tr. 587:6-18, JA __; Pl's MSJ at 32-35, JA __ - __

³² Prof. Martin had two additional articles in progress which she discussed in her application for renewal. Tr. Ex. 56 at 5, JA __; Tr. #490 at 51:21-67:22, JA __ - __; Pl's MSJ at 32-35, JA __ - __, Pl's MJRet at 24-27, JA __ - __ She had submitted a draft of one of these articles to Dean Bullock the previous spring and was granted a summer grant based on her *satisfactory progress in her scholarship*, referencing Prof. Martin's *two articles in progress*. JEX 47, 46, JA __; Tr. 702:19-708:10, JA __ It was a shock, then, to be rejected for renewal and accused of unsatisfactory scholarship.

³³ JEX Ex. 133, JA __; Pl's MJRet at 25, JA __; Pl's April 24, 2006 *Motion for Sanctions and Reapportionment of time for Defendant's Deliberate Misrepresentations to the Court and Jury* (# 439) at

was published **a year later**, in the Winter of 1998!³⁴ Professors have no control over when an accepted article is actually published. Law journals may take as long as eighteen months to *two years* to publish an article. Tr. 2238:24-2239:7, JA__ - __ The law students on the journals have to verify every source before an article is published. Both Profs. Martin and cunningham conveyed to the Committee the journals' representations that their articles would be published in the spring of 1998, but they were both actually published the following semester, in Winter of 1998.

Since both professors had articles accepted for publication, but not yet in print, at the time of the Committee's decision, no reasonable juror could conclude that Howard produced sufficient evidence to support its claims that Prof. Martin had not completed her article and Prof. cunningham's article was already in print. Howard's claims are undeniably false and pretextual.

VI. Howard may not Defend against a Sex Discrimination/Retaliation Claim by Admitting to Age Discrimination

A. Ms. Martin is Entitled to Amend her Complaint

Howard claims that Ms. Martin never raised the issue of age discrimination at the district court level and may not raise it on appeal; however, she *did* raise it in her post-trial motion, asking that she be permitted to amend her complaint to include a claim of age discrimination under the ADEA. *Pl's Reply MJRet* at 22-23, JA__ - __.

Ms. Martin had no reason or opportunity, prior to trial, to amend the complaint to include an ADEA claim. It was only at trial that Prof. Leggett only made the eleventh-hour admission –

1-2, JA__ - __. Howard's false accusations and irrelevant mudslinging also necessitated rebuttal time that Ms. Martin was not permitted. *Id.*

³⁴ Prof. cunningham never claimed that either of her "works in progress" was "nearly ready for publication; she only represented that she had begun one of them. JEX 4 at 622. She did not offer a draft. She never published either of the articles listed as "in progress," nor did she publish *any* other article until 1999 – two years after the Committee selected her over Prof. Martin. www.law.howard.edu/413.

that he selected Visiting Assistant Professor Cunningham over Visiting Associate Professor Martin to teach the EEO class because of her *age* that this issue arose.

Instead of mitigating the damage done by Leggett's testimony, in his closing argument, Howard's counsel actually adopted Ike Leggett's admissions of *age discrimination as a "defense" to retaliation for reporting sexual harassment*. In light of Howard's startling new argument, *in its closing statement*, Ms. Martin's request to amend her complaint should have been granted. Since Howard *admits* that age was a deciding factor in Ike Leggett's decision, Ms. Martin is entitled to summary judgment on a claim of age discrimination.

B. Age Discrimination is not a "Legitimate, Non-Discriminatory" Reason for Non-Selection

Age discrimination is not a *legitimate* or a *non-discriminatory* reason, since age discrimination is also illegal, prohibited by another statute, the ADEA; accordingly, Howard's defense must fail, as a matter of law. A jury cannot decide that *age* is a legitimate, non-discriminatory reason for rejecting a candidate for a position this conduct is prohibited by law. It is not, as a matter of law.

VII. Dean Bullock's Actions Violated Public Policy and were Outrageous, Causing Prof. Martin Severe Emotional Distress

The same conduct that constitutes sexual harassment in the workplace may also constitute a claim for intentional infliction of emotional distress. *Howard University v. Best*, 484 A.2d 958, 985 (D.C. App. 1984), *modified on other grounds*, 547 A.2d 144 (D.C. App. 1988). In *Gantt v. Security, USA*, 356 F.3d 547 (4th Cir. 2002),³⁵ Ms. Gantt, like Ms. Martin, was forced to work in an environment where she feared a violent predator who had targeted her for harassment. In

³⁵ Ms. Martin, represented Ms. Gantt, creating precedent in the Fourth Circuit and obtaining a jury verdict of \$2.25 million dollars (not yet paid).

Mintz v. District of Columbia, 2006 U.S. Dist. LEXIS 34446 at *6 (D.D.C. 2006),³⁶ the court upheld a claim of intentional infliction of emotional distress where one of the plaintiffs, Mr. Darbeau, had one year renewable contracts instead of permanent employee status, was denied certain training benefits and had his desk placed in an undesirable, isolated location. Mr. Darbeau used the same facts to support his claim of racial discrimination in the form of a hostile work environment, demonstrating again that conduct that violates public policy may be considered “outrageous.”

Dean Bullock callously allowed a stalker with a criminal record and a history of violence to freely roam Howard Law School’s premises, refusing to take even the smallest of measures repeatedly requested by Prof. Martin, MPD and even Howard’s own security officers. She committed additional intentional acts to terminate Prof. Martin, a single mother, leaving her without a means to support her daughter. She even *lied*, in a memorandum to Prof. Martin regarding communications with the Director of Security and to a member of the APT Committee, Prof. Nolan, regarding vacancies on the faculty to prevent the Committee from selecting Prof. Martin to fill one of them, forcing Prof. Martin out of the teaching profession, destroying her professional reputation and leaving her, a single mother, without a means of supporting herself and her daughter.

Dean Bullock’s conduct violated the current norms of our society and any sense of professionalism – particularly for the Dean of a nationally renowned law school, claiming a civil rights legacy.

³⁶Ms. Martin also represented both Plaintiffs Mintz and Darbeau, winning summary judgment on Mr. Mintz’ primary claim of a hostile work environment based on race.

VIII. Howard Admitted that Prof. Taslitz had the Authority to Bind Howard when he Negotiated Prof. Martin's Contract in 1996

Howard admitted that Taslitz had the authority to bind the University. Pl's Tr. Ex. 26b, JA__ ; Def.'s July 11, 2001 Answers to Interrogatories, ¶ 18, JA__ ; Pl's MSJ at 44-45, JA__ - __, Ex. G Taslitz depo at 68-69, 75, 87, JA__ - __, __, __. This issue should not have been submitted to the jury. Howard improperly confused the jury by asserting a defense that it had already waived.

IX. Howard has not Provided any Justification for Depriving Ms. Martin of Mandatory Rule 37 Sanctions by Holding it in Perpetual "Abeyance"

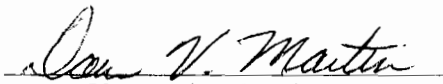
Howard correctly states that the district court never awarded Ms. Martin Rule 37 sanctions against Howard. (Howard at 38, fn. 20) That is the point. Howard responded to Ms. Martin's motion and Howard replied, making it ripe for a decision in 2001.

On June 25, 2002, Howard was held in Contempt of Court (#231) for violating the court's repeated Orders granting Ms. Martin's motions to compel discovery. Ms. Martin detailed the attorney time spent in pursuit of the discovery, totaling **\$364,120.00**, as of June 25, 2002. Pl's July 8, 2002 *Motion for Leave to File Motion to Increase \$1,000 Contempt Sanction on Defendant Howard University and Other Relief* (#236), at 13-15 JA__ Howard never disputed Ms. Martin's hourly rate or the number of hours claimed. There was no basis for withholding these mandatory sanctions. A court may not place a motion perpetual abeyance and close the case without deciding it.

CONCLUSION

Appellant respectfully requests that this Court reverse the decisions on appeal.

Respectfully Submitted,

A handwritten signature in black ink, reading "Dawn V. Martin", is written over a horizontal line.

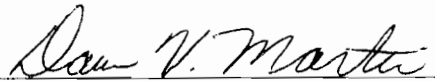
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CERTIFICATE OF COMPLAINT WITH FED. R. APP. P. 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This reply brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,985 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14 point Times New Roman font.

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**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

Dawn V. Martin,)	
Appellant,)	
v.)	Appeal No. 04-5417
Howard University,)	
Howard University Law School)	
and Alice Gresham-Bullock)	
Appellees.)	

CERTIFICATE OF SERVICE

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