

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

DAWN V. MARTIN, ESQUIRE
Petitioner

v.

**HOWARD UNIVERSITY,
HOWARD UNIVERSITY LAW SCHOOL
and
ALICE GRESHAM BULLOCK, ESQUIRE**

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT
OF APPEALS FOR THE D.C. CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

Dawn V. Martin, Esquire
Law Offices of Dawn V. Martin, LLC
1725 I Street, N.W., Suite 300
Washington, D.C. 20006
(202) 408-7040/(703)642-0207
dvmartinlaw@yahoo.com
www.dvmartinlaw.com
Counsel for Petitioner

QUESTIONS PRESENTED

1) Since 80% of stalking victims are women, should a disparate impact theory of discrimination be applied to find that workplace/campus stalking constitutes sexual harassment, pursuant to Title VII of the Civil Rights Act of 1964?

2) Where a woman is sexually harassed in her workplace by a non-employee, what “magic words” must she use in order to be protected from retaliation, as guided by EEOC Regulation 29 CFR § 1604.11(e)?

3) Must a plaintiff prove that she was “groped” or “touched” to prevail on a claim of sexual harassment?

4) Is harassment “based on sex” when the harasser uses gender-specific language, referring to the victim as his “wife”?

5) Where a stalker selects his *female* victim because she fits the “profile” of a fictitious *female* character, is the harassment “gender profiling,” using a “sex-plus” analysis?

6) Where an employer cancels an advertised job vacancy, and leaves additional vacancies unfilled to avoid consideration of an applicant/employee who has complained of sexual harassment, does this conduct constitute actionable retaliation under Title VII, as defined by *Burlington Northern v. White*, 548 U.S. 53 (2006)?

7) Can a defendant escape liability in a Title VII retaliation case by admitting to *age discrimination* in its closing argument, without subjecting itself to a

claim under the Age Discrimination in Employment Act (ADEA)?

8) Under what circumstances should the court order a Title VII plaintiff to pay the litigation costs of the defendant?

9) Can a magistrate judge, *sua sponte*, dismiss a previously upheld claim where the Defendant never challenged the validity of that claim, as a matter of law?

10) Can the tort of “wrongful termination,” in violation of public policy, be applied where an employee is terminated for reporting stalking in the workplace?

11) Can a plaintiff establish a claim of intentional infliction of emotional distress where an employer subjects her to a workplace stalker, lies about its efforts to ban the stalker from the workplace, and retaliates against the stalked employee by terminating her employment?

12) May a court place a decision on a plaintiff’s motion for mandatory Rule 37 sanctions – in excess of \$364,000 -- in indefinite abeyance and close the case without deciding it?

13) Where the court publishes a decision that relies on testimony that it ordered *excluded*, and that disputed testimony is harmful to plaintiff’s professional reputation, may the court deny the plaintiff’s *unopposed* motion to vacate it?

14) Does a court violate due process, the law of the case and/or Rule 56(d)(1) where it established facts and identified jury questions pre-trial, but post-trial, submitted a previously decided material question of fact to the jury?

15) Does a judge unduly prejudice a jury against a *pro se* party, by ordering her to talk to herself on the witness stand and speak of herself in the third-person, particularly where the court has excluded admissible evidence that would have enhanced her credibility?

16) Does perjury constitute a “fraud” upon the court and require vacating a jury verdict, pursuant to Rule 60(b)(2)?

TABLE OF CONTENTS

Questions Presented.....i
Table of Contents.....iv
Table of Authorities.....vii
Opinions Below.....1
Jurisdiction.....4
Statutes and Regulations.....4
Statement of the Case.....4
The Jury Verdict.....9

Reasons for Granting the Writ.....11

I. *Martin* Squarely Presents the Issue of whether Women can be Fired for being Stalked in the Workplace.....11

II. The D.C. Circuit Decision Violates the Law of the Case, Due Process and Rule 56(d)(1).....14

III. “Legally Protected Activity” Must be Defined by a Court....20

IV. Title VII Protection should not be Denied Simply because Non-Employee Harassment -- as Described in EEOC Regulation 29 CFR 1604.11(e).16 -- is Reported Differently than C0-Worker Harassment.....21

V. Under *Oncale*, *Martin-Marietta*, *Meritor* and *Harris*, the Jury did not have Sufficient Evidence, as a Matter of Law, to Find that the Stalker’s Harassment was not “Based on Sex”.....23

VI. The District Court Decision -- Left Intact by the Circuit Court -- Sets Precedent in Retaliation Claims that Violates <i>Burlington Northern</i> and Creates Conflict within the Circuits.....	32
VII. Age Discrimination is not a “Legitimate, Non-Discriminatory” Defense to a Retaliation Claim.....	33
VIII. Taxing Defendants’ Costs to Appellant Will Have a Chilling Effect on Civil Rights Plaintiffs.....	34
IX. Facts Establishing Sexual Harassment and Retaliation may also Constitute an Independent Claim of Intentional Infliction of Emotional Distress	35
X. Terminating a Woman for being Stalked Constitutes Wrongful Termination, in Violation of Public Policy.....	36
XI. A Court May not Place Mandatory Rule 37 Sanctions in “Perpetual Abeyance”	36
XII. The Court Unduly Prejudices a Party by Ordering her to Ask herself Questions <i>on the Witness Stand</i> and Talk about herself in the Third-Person.....	37
XIII. An <i>Unopposed</i> Motion to Vacate a Published Decision that the Parties Agree is Replete with Errors, Should be Granted.....	39

Conclusion.....40

Addendum

Appendix

U.S. Court of Appeals Decisions

- 1) March 31, 2008 Decision, 2008 WL 1885434 (D.C. Cir. 2008) (A-1)
- 2) May 20, 2008 Order denying rehearing *en banc* (A-11)
- 3) March 31, 2008 Order (A-12):
- 4) April 7, 2008 Order (A-13)
- 5) April 11, 2008 Order (A-14)
- 6) June 4, 2008 Mandate (A-15)

District Court Decisions

- 7) December 15, 1999 Decision, 1999 U.S. Dist. LEXIS 19516 (A-17)
- 8) May 31, 2001 Decision (A-34)
- 9) May 23, 2002 Decision, 204 F. Supp. 1 (D.D.C. 2002) (A-61)
- 10) June 27, 2002 Decision (A-67)
- 11) September 24, 2002 Order (A-69)
- 12) October 20, 2003, Magistrate Judge Facciola's *Report and Recommendation*, 2003 U.S. Dist. LEXIS 18501 (D.D.C. 2003) (A-72)
- 13) September 16, 2005 Order adopting MJ Facciola's *Report and Recommendation* (A-97)
- 14) October 21, 2005 Order (A-99)
- 15) January 10, 2006 Order (A-101):
- 16) March 30, 2006 Order (A-105)
- 17) March 31, 2006 Order (A-107)
- 18) April 28, 2006 Jury Note (A-111)
- 19) April 28, 2006 Jury Verdict (A-112):
- 20) August 21, 2006 Order (A-121):
- 21) October 4, 2006 Decision, WL 2850656 (A-122):

- 22) January 3, 2007 Order (A-140)
- 23) January 23, 2007 Order (A-142)
- 24) November 25, 1997 memo to Bullock re stalker (A-145)
- 25) December 2, 1997 memo from Martin to Bullock re: stalker (A-154)
- 26) December 1, 1997 memo from Bullock to Martin re: stalker (A-156)
- 27) December 18, 1997 memo from Martin to Newsom re stalker (A-157)
- 28) January 12, 1997 Harrison's letter to female attorney in Toronto (A-161)
- 29) March 6, 1998 memo from Martin to Bullock re: non-renewal, footnoting Harrison's stalking of *African-American female* professors (A-169)
- 30) Bullock's July 1, 1998 memo to Howard University General Counsel (A-173)
- 31) December 7, 1998 Howard's Position Statement to EEOC (A-182)
- 32) April 9, 2002 Derrick Bell's affidavit re Harrison (A-188)
- 33) March 17, 2008 Transcript of Oral Argument (A-192)

TABLE OF AUTHORITIES

CASES

<i>Angeles-Sanchez v. Alvarado</i> , 1993 U.S. App. LEXIS 10509 (1 st Cir. 1993).....	21
<i>Back v. Hastings on the Hudson</i> , 365 F.3d 107(2d Cir. 2004).....	24
<i>Baez v. the United States</i> , 684 F.2d 999 (D.C. Cir. 1982).....	35
<i>Bales v. Wal-Mart Stores, Inc.</i> , 143 F.3d 1103 (8 th Cir. 1998).....	21
<i>Beard v. Southern Flying J, Inc.</i> , 266 F.3d 792 (8 th Cir. 2001).....	23
<i>Burlington Northern v. White</i> , 548 U.S. 53 (2006).....	i, 32
<i>Burns v. McGregor Elec. Indus.</i> , 989 F.2d 959 (8 th Cir.1993).....	25
<i>Caminetti v. United States</i> , 242 U.S. 470 (1917).....	23
<i>Chontos v. Rhea and Indiana University</i> , 29 F. Supp. 931 (N.Dist. Ind. 1998).....	21
<i>Chrisner v. Complete Auto Transit</i> , 645 F2d. 1251 (6 th Cir. 1981).....	23
<i>County of Suffolk v. Secretary</i> , 76 F.R.D. 469 (E.D.N.Y. 1977).....	28
<i>Crawford Fitting Co. v. Gibbons</i> , 482 U.S. 437 (1987).....	35
<i>Crowley v. L.L. Bean</i> , 303 F.3d 387 (D. Me. 2002)..	21
<i>District of Cook County</i> , 207 F. Supp. 764 (D. Ill. 2002).....	21
<i>Dolman v. Williamette University</i> , 2001 U.S. Dist. LEXIS 7772 (D. Or. 2001)	21
<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977).....	12
<i>Dual v. Cleland</i> , 79 F.R.D. 696 (D.D.C. 1978)	35

<i>EEOC v. Crown Zellerbach Corp.</i> , 720 F.2d 1008 (9th Cir. 1983).....	22
<i>EEOC v. National Ed.</i> , 422 F.3d 840 (9 th Cir. 2005).....	23
<i>EEOC v. PVNF, LLC</i> , 487 F.3d 790 (10 th Cir. 2007).....	20
<i>Elemary v. Holzmann</i> , 2008 WL 316376 (D.D.C. 2008).....	36
<i>Frazier v. Delco Electronics Corporation</i> , 263 F.3d 663 (7 th Cir. 2001).....	21
<i>George M. v. Mary Ann M.</i> , 171 A.D.2d 651, 567 N.Y.S.2d 132 (NY 1991).....	24
<i>Gibson v. Old Town Trolley Tours of Washington, D.C. Inc.</i> , 160 F.3d 177 (4 th Cir. 1998).....	27
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971).....	12
<i>Harris v. Forklift Systems, Inc.</i> , 510 U.S. 17 (1993).....	25
<i>Howard v. State</i> , 697 So.2d 415 (Miss. 1997).....	37
<i>Howard University v. Green</i> , 652 A.2d 41 (D.C. 1994).....	20
<i>Judge v. Marsh</i> , 649 F. Supp. 770 (D.D.C. 1980)....	20
<i>Kassem v. Washington Hospital Center</i> , 513 F.3d 251 (D.C. Cir. 2008).....	35, 36
<i>Kopp v. Samaritan Health Sys., Inc.</i> , 13 F.3d 264 (8 th Cir. 1993).....	12, 23
<i>Lovelace v. Sherwin-Williams Co.</i> , 681 F.2d 230 (4 th Cir. 1982).....	27
<i>Lynch v. Freeman</i> , 817 F.2d 380 (6 th Cir. 1987).....	12, 23
<i>Martin v. Howard University</i> , 2008 WL 1885434 (D.C. Cir. 2008).....	1, 11, 16, 18-19, 20, 24, 25, 26, 27, 29, 30, 32, 34, 36

<i>Martin v. Howard University, et. al</i> , 1999 U.S. Dist. LEXIS 19516, 1999 WL 1295339, 81 FEP 964; IER 1587 (D.C.C. 1999).....	1, 2, 3, 4, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 24, 26, 27, 28, 31, 32, 33, 35, 38
<i>Martin v. Howard University</i> , 204 F. Supp. 1 (D.D.C. 2002).....	2, 36
<i>Martin v. Howard University</i> , 2003 U.S. Dist. LEXIS 18501 (D.D.C. 2003).....	2, 3, 9, 17, 32, 38
<i>Martin v. Howard University</i> , 2006 WL 285056 (D.D.C. 2006).....	3, 9, 13, 25, 28
<i>Maupin v. Howard Co. Bd. of Educ.</i> No. 13CO506262 (Howard County Circuit Ct., July 2, 2007).....	14
<i>McFarland v. George Washington University</i> , 2007 WL 3284016 at 11 (D.C. 2007).....	20
<i>Meritor Savings Bank v. Vinson</i> , 477 U.S. 57 (1986).....	23, 25
<i>Mertes v. Wynne</i> , 2007 WL 3203004 (E.D. Cal. 2007).....	24
<i>Nixon v. Majors</i> , 2007 WL 4592277 (W.D.N.C. 2007).....	36
<i>Oncala v. Sundower Offshore Services</i> , 523 U.S. 75 (1998).....	23, 30
<i>Pannonia Farms v. RE/Max International, Inc</i> , 2005 WL 3262902 (D.D.C. 2005).....	35
<i>People v. Hill</i> , 732 Ill.App.3d 691 (Ill.App. 1999).....	37
<i>Phillips v. Martin Marietta Corp.</i> , 400 U.S. 542 (1971).....	24
<i>Powell v. Las Vegas Hilton Corp.</i> , 841 F. Supp. 1024 (D.Nev. 1992).....	22
<i>Soto v. Runnels</i> , 2006 WL 183706 (E.D.Cal. 2006).....	37
<i>Spina v. Forest Preserve District of Cook County</i> , 207 F. Supp. 764 (D. Ill. 2002)	21

<i>State v. Johnson</i> , 551 N.W.2d 742 (Neb. App. 1996).....	37
<i>Sullivan v. Sullivan</i> , 180 Misc.2d 433, 689 N.Y.S.2d 378, (NY 1999).....	24
<i>Summit v. Technology, Inc.</i> 435 F.3d 1371 (Fed. Cir. 2006).....	35
<i>Tedford v. Tedford</i> , 856 So.2d 753 (Miss App. 2003).....	24
<i>Whitmore v. O'Connor Management, Inc.</i> , 156 F3d 796 (8 th Cir. 1998)	21

STATUTES

Title VII of the Civil Rights Act of 1964, 28 U.S.C. §2000(e), <i>et seq.</i>	i, ii, iv, xi, 1, 4, 8, 9, 10, 11, 12, 13, 14, 20
<i>The Age Discrimination in Employment Act (ADEA)</i> , 29 U.S.C. §§621-634, <i>et seq.</i>	i, 34
U.S.C. §1254(1).....	4
28 U.S.C. §1332.....	4
D.C. Criminal Code Ann. §22-404(b), "Stalking Statute".....	20, 22

UNITED STATES SUPREME COURT RULES

Rule 10(a).....	4
Rule 10(c).....	4

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 8(c).....	33
Fed. R. Civ. P. 11.....	37
Fed. R. Civ. P. 12(b)(6).....	18
Fed. R. Civ. P. 37(a).....	ii, 2, 36
Fed. R. Civ. P. 50(a)(1).....	27
Fed. R. Civ. P. 56.....	14
Fed. R. Civ. P. 56(d)(1).....	iii, 14, 15

FEDERAL RULES OF EVIDENCE

Fed. R. Ev. 403.....37
Fed. R. Ev. P. 404.....37

FEDERAL REGULATIONS

EEOC Regulation, 29 C.F.R. 1604.11(e).....i, 1, 14,
20, 40

OTHER AUTHORITIES

*EEOC Policy Guidance on Current Issues of Sexual
Harassment*, N-915-050,
particularly Section C, 3, *Non-physical
Harassment*,
<http://www.eeoc.gov/policy/docs/currentissues.html>.
.....25

Bureau of Justice Statistics, National Crime
Victimization Survey, Violence in the Workplace,
1993-1999 (December 2001) at
www.pjp.usdoj.gov/bjs/pub/pdf/vw99.pdf;
Workplace Stalking, published by the U.S.
Department of Justice.....12

OPINIONS BELOW

U.S. Court of Appeals for the D.C. Circuit

1) **March 31, 2008 Decision:** 2008 WL 1885434 (D.C. Cir. 2008) (A-1): affirmed District Court's decisions.

2) **May 20, 2008 Order** (A-11): denied rehearing *en banc*.

3) **March 31, 2008 Order** (A-12): denied Ms. Martin's motion for sanctions against Howard for misrepresentations of the record in its Brief.

4) **April 7, 2008 Order** (A-13): denied Ms. Martin's motion for sanctions against Howard and its counsel for misrepresentations of the record in Oral Argument.

5) **April 11, 2008 Order** (A-14): denied Ms. Martin's motion for reconsideration of April 7, 2008 Order and instructed Clerk to reject motions for sanctions from her.

6) **June 4, 2008 Mandate.** (A-15)

U.S. District Court for the District of Columbia

7) ***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) (A-17): a) adopted EEOC Regulation 29 CFR § 1604.11(e), holding that, pursuant to Title VII, employers are liable for the sexual harassment of employees by non-employees if they knew or should have known of the harassment and failed to take reasonable steps to end it (A-21-22); b) held "it is clear that Prof. Martin was only the object of Harrison's attention because she was a female" (A-24); c) identified jury questions on sexual harassment claim as: (1) whether the harassment was severe and pervasive, creating a hostile work

environment (A-25-26), and (2) whether Howard took reasonable steps to end it (A-26); d) upheld retaliation claims (A-26-29); c) upheld breach of contract claim (A-30-31); and e) dismissed intentional infliction of emotional distress claim (A-29-30).

8) **May 31, 2001 Decision** (A-34): a) granted, in substantial part, Ms. Martin's motions to compel discovery; b) held plaintiff's motions for Rule 37 sanctions against Howard in abeyance (A-52, 57, 60).

9) **May 23, 2002 Decision**, 204 F. Supp. 1 (D.D.C. 2002) (A-61): magistrate referred Contempt of Court proceedings against Howard to Judge Hogan.

10) **June 27, 2002 Decision** (A-67): held Howard in Contempt of Court for discovery violations that delayed litigation by several years.

11) **September 24, 2002 Order** (A-67): precluded Howard from using Prof. Gavil's testimony in summary judgment motions.

12) **Magistrate Facciola's Report and Recommendation**, 2003 U.S. Dist. LEXIS 18501 (D.D.C. 2003) (A-72): a) reiterated Judge Hogan's 1999 holding that Harrison stalked Prof. Martin "based on her sex" (A-75); b) recommended denying both parties' cross-motions for summary judgment, except to dismiss, *sua sponte*, retaliation claims based on cancellation of vacancies, deemed not to be "adverse actions" (A-92-95); c) denied cross-motions on the breach of contract claim, stating that Judge Hogan dismissed the claim in 1999 (A-95);¹ d) claimed that both parties failed to file Rule 56.1

¹ Judge Hogan actually upheld the claim. (A-30-31, 99).

Statement of Disputed Material Facts, so he would “divine” the disputed facts² (A-73-75).

13) **September 16, 2005 Order** (A-97): adopted MJ Facciola’s October 20, 2003 *Report and Recommendation*.

14) **October 21, 2005 Order** (A-99): corrected two misrepresentations in MJ Facciola’s *Recommendation* (1) that Judge Hogan dismissed breach of contract claim in 1999; and (2) that neither party filed a Rule 56.1 *Statement of Disputed Material Facts*.

15) **January 10, 2006 Order** (A-101): limited retaliatory non-renewal claims to rejection for the EEO/Labor position, made on December 18, 1997.

16) **March 30, 2006 Order** (A-105): redefined limits of retaliation claims.

17) **March 31, 2006 Order** (A-107): reaffirmed dismissal of retaliation claims.

18) **April 28, 2008 Jury Note** (A-111): requests instruction

19) **April 28, 2008 Jury Verdict** (A-112)

20) **August 21, 2006 Order** (A-121): taxed Howard’s litigation costs to Ms. Martin.

21) ***Martin v. Howard University***, 2006 WL 2850656 (October 4, 2006) (A-122): a) denied both parties’ post-trial motions for judgment as a matter of law; b) found sufficient evidence that the stalker’s conduct did not constitute sexual harassment because: (1) the stalker did not engage in behavior that is “typical” of sexual harassment cases, like “groping” or “touching” (A-129); (2) Prof. Martin’s

² Ms. Martin *did* file a *Statement of Material Disputed Facts*. (A-96) Howard failed to file one, but Judge Hogan excused its non-compliance. *Id.*

entitled some memoranda “*Security Problem on Campus*” (A-145, 154, 157); and 2) the stalker “stalked”³ a male professor at another University (A-129).

22) **January 3, 2007 Order:** rejected *Plaintiff’s Opposition to Howard’s Bill of Costs* (A-140);

23) **January 23, 2007 Order:** denied *Plaintiff’s Motion for Reconsideration of January 3, 2007 Order* (A-142).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) and Supreme Court Rules 10(a) and (c), with pendant jurisdiction over state claims, pursuant to 28 U.S.C. § 1332. *Martin* presents issues of national importance, particularly with respect to workplace violence, campus violence and stalking, which primarily victimizes women. The D.C. Circuit’s March 31, 2008 decision (rehearing *en banc* denied May 29, 2008) creates a split in the circuits regarding several civil rights issues. It requires interpretations of Title VII of the Civil Rights Act of 1964, particularly sexual harassment, retaliation and assessing defendant’s litigation costs against plaintiffs.

STATUTES AND REGULATIONS

See Addendum.

³ Harrison’s one-time confrontation with Prof. Derrick Bell did not constitute stalking. See V,E,4.

STATEMENT OF THE CASE

Facts.⁴ Dawn Martin was a law professor at Howard University from July 1996 through June 1998. She taught Equal Employment Opportunity (EEO) law and other courses for four years. Prior to teaching, she served as a trial attorney with the U.S. Department of Justice, Civil Rights Division (Honors Program), the New York State Office of the Attorney General, Civil Rights Bureau, and as a Special Assistant to Commissioner Tucker at the Equal Employment Opportunity Commission (EEOC).⁵ Prof. Martin helped develop national policy and published in the area of EEO law. She graduated from Columbia University (1978) and New York University School of Law (1981).

Howard recruited Prof. Martin from a tenure-track position at Cleveland-Marshall College of Law to begin with Howard as a “Visitor.” Howard promised that it would be converted to a tenure-track position as soon as one became available. Prof. Martin received excellent student evaluations. The Dean consistently awarded her summer grants based on her satisfactory progress in scholarship.

Beginning on November 20, 1997, Prof. Martin was harassed on campus by a delusional, homeless, serial stalker with a criminal record, Leonard Harrison. Harrison roamed freely through Howard Law School buildings, leaving Prof. Martin letters under her office door, messages on her voicemail and visiting her office. He stated that he was pursuing Prof. Martin to become his “wife.” He described this “*natural wife*” as the physical embodiment of a

⁴ The 1999 opinion details the facts. (A-18-19, 23-24, 26-27, 30-31).

⁵ She received “outstanding” evaluations.

fictitious female character, Geneva Crenshaw, in a book, written by NYU professor, Derrick Bell, *And We are Not Saved*. (A-163-168) His letters discussed other women that he had pursued, indicating that he was a serial campus stalker of African-American women teaching civil rights and “race” courses.

Prof. Martin immediately reported Harrison’s conduct to the Dean’s office.⁶ The Associate Dean refused to assist her, but suggested that she call the police on her own. Prof. Martin enlisted a campus police officer who attended the meeting with the police and took a campus police report. The D.C. Metropolitan Police Department (MPD) characterized Harrison’s harassment as “stalking,” pursuant to D.C. Code § 22-404 (b) and processed her criminal complaint. MPD advised Howard to ban Harrison from campus and hold him for arrest if he returned.

On November 25, 1997, Harrison was escorted off campus based on a student complaint, but was not barred or held for arrest. Prof. Martin therefore wrote her first memo to Dean Bullock detailing Harrison’s conduct, again asking the administration to bar Harrison from the law school. (A-145) Dean Bullock responded in writing, stating that she was discussing the matter with the Director of Campus Security, Lawrence Dawson (A-156).⁷ Harrison

⁶A-140, 146, 148, 163.

⁷ Contrary to Howard’s 1998 response to the EEOC (A-172), and its 2001 Answers to Interrogatories, Mr. Dawson and Dean Bullock’s 2002 depositions revealed that Dean Bullock *never* discussed the stalking with Mr. Dawson or any other member of Howard’s Campus Security Force. Bullock deposition at 48:5-64:4 (JA6,278-6,289); Tr. 426:20-434:25 (JA11,220-11,228); 658:4-665:25 (JA11,459).

continued to enter the law school and confronted Prof. Martin in her office on December 1, 1997. (A-154) Harrison was chased off campus, but still *not* barred from campus. (A-157-160)

In a July 1, 1998 internal University memorandum, Dean Bullock expressly acknowledged that both she and Associate Dean Newsom perceived Harrison as a threat to Prof. Martin and "*other women*" whom he might "*stalk or otherwise harass*" on campus. (A-173)

Shortly before the Appointments ("APT") Committee's decision, Dean Bullock told Prof. Andrew Taslitz, the Committee Vice Chair, that she was having a "bad day" because she had just received Prof. Martin's memorandum regarding the stalking and had "a lot to do" with respect to it.

In fact, Dean Bullock did *absolutely nothing* with respect to the stalking. Instead, she engaged in private discussions regarding Prof. Martin's continued employment. She told Dean Newsom that *she* had decided not to select Prof. Martin for a permanent position; yet, APT Committee members testified that the Committee is an independent body and it would be *improper* for the Dean to influence its decisions.

On December 18, 1997, less than a month after the stalking began, Howard rejected Prof. Martin for the advertised tenure-track position teaching (EEO) law -- a course she had been teaching at Howard for two years. She was replaced by a less experienced, lower ranked, Visiting *Assistant* Professor who had never taught EEO law and who was then publishing her *first* article.

No fewer than eighty (80) law students sent letters and/or signed petitions praising Prof. Martin

as a professor and protesting her non-renewal. Dean Bullock ignored their protests. She left positions vacant while students protested the shortage of courses and professors. In her Answer to the Complaint ¶¶313, 326, Dean Bullock admitted that, as of May, 1998, there were *at least three vacant faculty positions for which Prof. Martin was “well qualified;”* but Dean Bullock *lied* to an APT Committee member, Prof. Nolan, telling her there were no vacant positions for which Prof. Martin could be considered. Dean Bullock also told Prof. Martin that she could not even be renewed for one more year because there were no “Visitorships” available.

Dean Bullock even withheld from the APT Committee information that the advertised Civil Rights/Constitutional Law position was still unfilled. When Prof. Martin learned of this vacancy from an outside source, she reapplied for it. (A-169) Prof. Martin was the only candidate for the position during the spring of 1998. Bullock immediately responded by converting the Civil Rights position to a tax position. Non-tenured professors – whether they are tenure-track or visitors – must have their contracts renewed each year. Although “non-renewal” has less of a stigma than a “firing,” the practical effect is the same -- the employee loses her job.⁸

⁸*Walker v. Board of Regents of University of Wisconsin System*, 300 F. Supp. 2d 836, 853 (W.D Wis. 2004), another case against a University with employees holding renewable contracts, held: “Whether this action is considered a termination or a refusal to re-hire, I conclude that it is a cognizable injury for the purpose of ...Title VII.” Accord *Silk v. City of Chicago*, 194 F.3d 788, 800 (7th Cir.1999), *citing, inter alia, Delaware State College v.*

Because Howard rejected her application after the “hiring season” had ended, Prof. Martin was unable to secure another teaching position for the following year. Her teaching career therefore ended in June of 1998.⁹

Dean Bullock expressed resentment toward Prof. Martin because she was stalked and even *mocked* her requests for protection to the EEOC investigator:

“Martin did not seem satisfied with my response. I was left with the impression that she wanted me to wrestle the stalker down.”¹⁰

On May 14, 1999, Ms. Martin filed this action, pursuant to Title VII of the Civil Rights Act of 1964 and the D.C. Human Rights Act, alleging sexual harassment/hostile work environment and retaliation, as well as the common law claims of breach of contract and intentional infliction of emotional distress. A jury returned a verdict for Howard. The Court of Appeals affirmed; however,

Ricks, 449 U.S. 250 (1980). See also *Mintz v. District of Columbia*, 2006 U.S. Dist. LEXIS 34446 at *12-13 (D.D.C. 2006). See also fn. 32.

⁹ The circumstances of Prof. Martin’s departure from Howard – and the district court’s October 20, 2003 published decision (A-73) -- have impeded her efforts to gain comparable employment. As a 41 year old single mother in 1998, Ms. Martin was forced to begin her career anew. She established a solo civil rights practice. Her income is sporadic, dependent largely on winning cases and collecting judgments. Had she remained at Howard, she would have been eligible for tenure the following year and would have met Howard’s written requirements.

¹⁰ Tr. 1092:7-1093:2 (JA11,885-11,886).

these decisions were based on egregious errors of law and fact.

The Jury Verdict

The jury answered a series of questions for each of Prof. Martin's claims:

(A-112)

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

a) Mr. Harrison subjected her to conduct that was sufficiently severe and pervasive to alter the terms and conditions of her employment?

YES NO

b) Mr. Harrison's conduct was unwelcome?

YES NO

c) Mr. Harrison's conduct was sexual in nature or because of Plaintiff's gender?

YES NO

d) Howard University knew or should have known of the alleged conduct?

YES NO

e) Howard University failed to take proper remedial action that was reasonably calculated to end the harassment?

YES NO

Because the jury found that Harrison's harassment was not based on sex/gender, Prof.

Martin's complaints did not meet the legal definition of "legally protected activity" under Title VII. There is no federal statute that explicitly protects an employee from being fired for being stalked. The jury therefore never reached the questions of whether Howard had a legitimate, non-retaliatory reason for her non-renewal (Verdict Questions #6 and 7, left blank, A-115-116)

REASONS FOR GRANTING THE WRIT

I. *Martin* Squarely Presents the Issue of whether Women can be Fired for being Stalked in the Workplace

A. *The Policy of Terminating Stalking Victims has Disparate Impact on Women*

The D.C. Circuit held:

We need not decide whether and under what circumstances stalking might amount to harassment "based on gender." Rather, we merely hold that on the facts of this case, the jury's verdict must stand.

(A-7)

If stalking does not constitute sexual harassment on the facts of *this case*, it is difficult to imagine a fact pattern qualifying for Title VII protection. Prof. Martin was doing nothing more than "*working while female*" as a law professor at Howard University.

In effect, the D.C. Circuit *has* decided that stalking, *per se*, is not based on gender and that an employee can therefore be fired for being stalked. The *National Association of Women Lawyers* ("NAWL") filed an *Amicus Curiae* Brief in the D.C.

Circuit because this case sets precedent for all stalking victims -- eighty-percent (80%) of which are women.¹¹ If this case is not reversed, any woman at work *or on a campus* may be targeted by an obsessed stalker and fired for reporting it.

In 1999, Judge Hogan acknowledged Ms. Martin's argument that "stalking is primarily a crime against women, with sexual connotations." (A-24). Even when conduct affects both men and women, the conduct may constitute discrimination on the basis of sex if it disproportionately affects women. *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (height and weight requirements); *Lynch v. Freeman*, 817 F.2d 380 (6th Cir. 1987) (unsanitary portable toilets). *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993) (harassment affected "*primarily women*").

Ms. Martin has established a *prima facie* case of sex discrimination under Title VII because the effect of firing or otherwise punishing stalking victims has a disparate impact on women. The burden should now shift to the employer to demonstrate that the practice is job related and consistent with business necessity. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-432 (1971). In order to defeat her *prima facie* case, Howard would have to demonstrate that it had a job-related business necessity for failing to renew Prof. Martin's contract -- while leaving positions vacant for which, Howard admits, she was well qualified.

¹¹ Bureau of Justice Statistics, *National Crime Victimization Survey, Violence in the Workplace*, 1993-1999 (December 2001), at www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf; *Workplace Stalking*, published by the U.S. Department of Justice, 2002.

It is not clear whether Judge Hogan adopted the disparate impact theory to conclude “it is clear” that the stalker’s harassment of Prof. Martin was because of sex. In 2006, however, he ignored his own 1999 decision and set precedent that conflicts with decisions of this Court and other circuits. The Circuit Court affirmed, without addressing the disparate impact theory raised by both Ms. Martin and NAWL in their Briefs. The argument is based on long-standing Title VII precedent, set by this Court, and should not have been ignored.

B. The D.C. Circuit’s Decision Permits Employers to “Punish” Innocent Stalking Victims

Martin is a case that does not lend itself to the “blame the victim” prejudices that might be imposed upon women who are stalked by former husbands or domestic partners. Howard has never argued that Prof. Martin *chose* Harrison or that the stalking was somehow her “fault;” nevertheless, at oral argument (A-203), Howard’s counsel played on the prejudices against domestic violence victims:

The law, we would submit, doesn't make every time a woman is the subject of a stalking or a domestic violence issue a Title 7 federal anti-discrimination case.

Neither Ms. Martin nor *Amicus* NAWL suggested that employers enter women’s homes and stop domestic violence; they sought only to hold employers liable for their *own* actions in the workplace. EEOC Regulation 29 CFR 1604.11(e) obligates the employer to take *reasonable* steps to

end sexual harassment in the workplace when it knew *or should have known* about it.¹² The denial of Title VII protection leaves women unprotected from workplace stalking and from being fired or castigated for reporting it.¹³

II. The D.C. Circuit Decision Violates the Law of the Case, Due Process and Rule 56(d)(1)

A. The 1999 Decision Complied with Rule 56(d)(1)

Fed. R. Civ. P. 56 (d)(1), states:

CASE NOT FULLY ADJUDICATED ON THE MERITS.

Establishing Facts. If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts – including items of damages or other relief – are not genuinely at issue. **The facts so specified must be treated as**

¹² This precedent also applies to race and other types of discrimination. See *Maupin v. Howard Co. Bd. of Educ.*, No. 13C0506262 (Howard Cir. Ct, July 2, 2007) (African-American teacher received call at work purportedly from the Ku Klux Klan and the school denied her security.)

¹³ Mr. Schwalb told the jury that Ms. Martin “*played the sexual harassment card.*” Tr. 2459:17 (JA13,354). He pointed to her accusingly and asked jurors, “Would you want Ms. Martin to teach *your children?*” (Tr. 2463:4-5, JA13,358) Law students are adults with college degrees.

established in the action. (Emphasis added)

In 1999, Judge Hogan properly identified facts established by the undisputed evidence and those to be decided by a jury. He concluded: "*it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female*" and that *Harrison "targeted women other than Plaintiff."* (A-23-24). Rule 56(d)(1) required that this factual determination remain "*established through the action*" -- not re-litigated by a jury.

In violation of Rule 56(d)(1), *after the trial*, Judge Hogan *abandoned* his own 1999 holding that Harrison's harassment was based on sex – also violating the law of the case¹⁴ and the right to procedural due process. It is fundamentally unfair to try a case, operating under court decisions identifying the facts to be proved at trial, and then *add a triable fact after trial*, when the plaintiff has lost any opportunity to prove it.

B. MJ Facciola's Reiteration of Judge Hogan's 1999 Decision is Clear and Accurate

The Panel stated:

The language in the Magistrate Judge's Report and Recommendation is admittedly inartful, but it did not (and could not)

¹⁴ Judges Edwards and Williams interrupted Ms. Martin's argument (A-182), exclaiming "No, no, no" (A-195) to her statement that "the law of the case" doctrine permits litigants to rely on the court's rulings and not continually re-litigate them. Judge Edwards indicated that her only possible argument could be a due process argument (A-195-199).

countermand the holding of the District Court.

(A-5)

The Panel did not indicate how MJ Facciola's decision was "inartful." He reiterated the issues that Judge Hogan had already identified as being resolved and those that would be tried by a jury:

I. Issues Resolved by Chief Judge Hogan Will Not Be Revisited

...I must note that in 1999, Chief Judge Hogan denied HU's motion for summary judgment and specifically held that there were factual issues that precluded an award of summary judgment. *Martin v. Howard Univ.*, 1999 U.S. Dist. LEXIS 19516 (D.D.C. Dec. 16, 1999). As hard as it is to believe, in its current motion, HU ignores that decision and once again advances the very arguments that Judge Hogan rejected.... [W]hat HU cannot do is ignore the Chief Judge's decision and expect me to ignore it as well. I cannot reconsider a decision that I did not issue, nor do I have any power to overrule the Chief Judge. Thus, his determinations control.

More specifically, **the Chief Judge concluded:**

1. *The alleged harassment by Harrison of the plaintiff was based on her sex;*
2. Whether Harrison's conduct was sufficiently severe or pervasive to be actionable under the rubric of a hostile environment claim was a jury question;

3. Whether plaintiff's letter was sufficiently detailed to place HU's Dean Alice Gresham Bullock ("Bullock") on notice that plaintiff believed that she had been the victim of a hostile work environment was a question of fact for the jury;

4. Whether plaintiff engaged in protected activity when she informed Bullock of Harrison's activities and complained about what she felt was the inadequacy of campus security was a question of fact for the jury;

....

I will not permit HU, in its second motion for summary judgment, to re-litigate those issues that were resolved against it. Triable issues of fact in 1999 remain triable issues of fact in 2003. (Emphases added)

(A-75-76).

It is difficult to imagine how MJ Facciola could have identified more clearly the issues that Judge Hogan decided in 1999 and those that would be tried by a jury.

C. Judge Hogan Expressly Adopted MJ Facciola's Interpretation of his 1999 Decision

On September 16, 2005, Judge Hogan *adopted* MJ Facciola's October 20, 2003 *Recommendation* as *his own decision*. (A-97). Ms. Martin therefore did *not* rely on a holding in which MJ Facciola "countermand[ed]" Judge Hogan but rather, on *Judge Hogan's own 2005 decision*.

D. The Undisputed Facts in Summary Judgment Motions Established the “Based on Sex” Finding

The Panel treated the 1999 decision as resolving only a Rule 12(b)(6) motion to dismiss (where allegations are presumed true) rather than as a Rule 56 *Motion for Summary Judgment*, stating:

At that stage of the litigation, the District Court assumed the accuracy of the facts alleged by Ms. Martin and, based on her allegations, decided that it could not find as a matter of law that appellees were entitled to judgment.

(A-5)

Judge Hogan did not “assume” facts in 1999. Howard filed its first *Motion to Dismiss, or in the Alternative, for Summary Judgment* on July 22, 1999, with the required Local Rule 56.1 *Statement of Material Undisputed Facts* (JA297). Howard never disputed Prof. Martin’s reports of Harrison’s conduct.

E. The Panel’s Interpretation of the 1999 Decision would Render it Internally Inconsistent and Grammatically Incorrect

The Appellate Panel stated:

... Chief Judge Hogan found only “that Mr. Harrison’s conduct *could* be considered sexual harassment” and thus properly rejected appellee’s motion to take the issue from the jury.

(A-5)

The Panel did not attempt to reconcile its interpretation with the excerpt “*it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female.*” (A-24) The sentences should be construed consistently, rather than taking one word – “could” -- out of context. The Panel renders the decision internally inconsistent -- or at least confusing.

The Panel’s reading of Judge Hogan’s 1999 decision would also render it *grammatically incorrect* in two places. The excerpt more fully states:

... the Court finds that Mr. Harrison's conduct could be considered sexual harassment and that the question of whether this behavior was sufficiently severe or pervasive to be actionable *is a* jury question.... (emphasis added).

The *singular* verb “*is*” and the article “*a*” indicate that *only one issue* in the sentence is identified as a jury question – the question of “sufficiently severe and pervasive;” otherwise, it is grammatically incorrect.

III. “Legally Protected Activity” Must be Defined by a Court

It is a question of law – and the duty of the judge, rather than the jury-- to determine whether the

plaintiff has engaged in “legally protected activity.”¹⁵ Judge Hogan’s 1999 determination that the harassment was based on gender necessarily meant that Prof. Martin’s complaints constituted “protected activity.” Not only did Judge Hogan erroneously submit this question to the jury, but he refused to instruct the jury on the law that he had set forth in his own 1999 decision that would have allowed them to apply the law to the facts. Since the jury was not provided with the law defining “protected activity,” they did not realize that the plaintiff need not use the words “sexual harassment” in order to invoke Title VII protection. *See also* IV.

Without discussion, the Panel upheld Judge Hogan’s refusal to provide it, along with his refusal to provide the jury with the D.C. stalking statute. (A-8)

IV. Title VII Protection should not be Denied Simply because Non-Employee Harassment -- as Described in EEOC Regulation 29 CFR 1604.11(e) -- is Reported Differently than Co-Worker Harassment

Judge Hogan set precedent for the District of Columbia, in 1999 by adopting EEOC Regulation 29 CFR § 1604.11(e) (A-21-22). He held that an employer is liable for the sexual harassment of an employee by a non-employee if it knew or should have known of the harassment, but failed to take reasonable steps to end it; however, both courts failed to analyze Prof. Martin’s requests for campus

¹⁵ *McFarland v. George Washington University*, 2007 WL 3284016 at 11 (D.C. 2007); *Howard University v. Green*, 652 A.2d 41, 45-47 (D.C. 1994); *EEOC v. PVNF, LLC*, 487 F.3d 790, 803-804 (10th Circ. 2007).

security in the context of addressing sexual harassment by a non-employee.

The first step in taking “reasonable measures” to end workplace harassment by a *non-employee* is to ban the *non-employee* from the workplace. Prof. Martin entitled her memos “Security Problem on Campus”¹⁶ to highlight the need for campus security to bar Harrison from campus.

The term “sexual harassment” may not receive immediate attention,¹⁷ but conduct that had been characterized by the police as “stalking” conveys its severity and urgency. Courts have long recognized that *stalking is one of the most egregious forms of sexual harassment*.¹⁸

Howard’s counsel told jurors that Ms. Martin was *not credible* when she testified that she complained of “harassment,” because her memoranda referred to

¹⁶Prof. Martin actually *did* refer to Harrison’s conduct as “sexual harassment” before MPD characterized it as “stalking.” Bruner deposition at 137:4-13 (JA6,808).

¹⁷ Sexual harassment complaints received little, if any, response from Howard administrators. *See, e.g.*, Sexual “jokes” circulated by Prof. Reggie Robinson, despite complaints by faculty members that it may constitute “sexual harassment.” PI’s Ex. 23 (JA14,730).

¹⁸ *Crowley v. L.L. Bean*, 303 F.3d 387, 396, 401-403 (D. Me. 2002); *Frazier v. Delco Electronics Corporation*, 263 F.3d 663, 668 (7th Cir. 2001); *Whitmore v. O’Connor Management, Inc.*, 156 F.3d 796, 798 (8th Cir. 1998); *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1108 (8th Cir. 1998); *Angeles-Sanchez v. Alvarado*, 1993 U.S. App. LEXIS 10509 (1st Cir. 1993); *Spina v. Forest Preserve District of Cook County*, 207 F. Supp. 764, 772 (D. Ill. 2002); *Ramirez v. New York Presbyterian Hospital*, 129 F. Supp. 2d 676, 678 (S.D.N.Y. 2001); *Dolman v. Williamette University*, 2001 U.S. Dist. LEXIS 7772 (D. Or. 2001); *Chontos v. Rhea and Indiana University*, 29 F. Supp. 931, 937 ((N. Dist. Ind. 1998).

Harrison's conduct as "stalking;"¹⁹ but the D.C. stalking statute, D.C. Criminal Code Ann. §22-404(b) defines "stalking" as:

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

"Stalking" is repeated "harassment." Deprived of the statute, jurors did not realize that Prof. Martin's "stalking" complaint was *necessarily* a *harassment* complaint, *by legal definition*.

In 1999, Judge Hogan relied on *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025 (D. Nev. 1992), holding that the plaintiff had engaged in "protected activity" when she told her employer simply, "I don't have to take this" because her employer observed customer behavior that he should have recognized as sexual harassment. (A-28) *Powell* held that a simple request to the employer to "do something" was enough to invoke Title VII. Judge Hogan continued: "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). (A-28) Judge Hogan refused to instruct the jury using words from his own 1999 decision.

The Panel's holding that a trial judge may withhold from jurors the legal instruction that an employee is not required to use the words "sexual harassment" to invoke Title VII protection nullifies

¹⁹Tr. 2477:21-2478:5 (JA13172-13373).

the 1999 decision. This nullification creates a split in the federal circuits.

V. Under *Oncale*, *Martin-Marietta*, *Meritor* and *Harris*, the Jury did not have Sufficient Evidence, as a Matter of Law, to Find that the Stalker’s Harassment was not “Based on Sex”

A. Since Harrison Harassed Prof. Martin in Gender-Specific Terms, as a “Wife,” he Sexually Harassed her

As Judge Hogan held in 1999, sexual harassment includes not only harassment that is “sexual in nature,” but also harassment that is “based on sex” – or directed solely or disproportionately at members of one sex. (A-22-23, citing *Oncale v. Sundower Offshore Services*, 523 U.S. 75, 118 (1998)). Sex discrimination cases are established where offensive conduct affects “*primarily women*” even if it also affects some men.²⁰ The D.C. Circuit’s decision conflicts with *Oncale* and sister circuits. Where a stalker *prowls campuses*, studying *female* professors in search of a *woman* to fulfill his vision of a fantasy “*wife*,” his harassment is based on sex.²¹ A “wife” is “a married *woman*.” Cambridge University Press Dictionary, 2006.

²⁰*EEOC v. National Ed.*, 422 F.3d 840, 846 (9th Cir. 2005); *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d at 269; *Beard v. Southern Flying J, Inc.*, 266 F.3d 792 (8th Cir. 2001); *Lynch v. Freeman*, 817 F.2d 387; *Chrisner v. Complete Auto Transit*, 645 F.2d. 1251, 1257 (6th Cir. 1981). *See also* I.

²¹ *Caminetti v. United States*, 242 U.S. 470, 485-86 (1917), requires that courts interpret words using “in their ordinary and usual sense.” Although same-sex marriages may result in an evolving definition of “wife,” this stalker used the word consistently with its 1997 dictionary meaning and pursued only women to be his “wife.”

Where a harasser targets a woman because he fantasizes that she is related to him in any gender specific terms, such as “wife,” “mother,” “sister,” “aunt,” “grandmother,” the target can only be a woman.²² Harrison’s gender specific language and conduct compel the finding that Harrison pursued Prof. Martin on the basis of her sex/gender.

In addition, marriage is inherently “sexual in nature,” as a matter of law. Courts grant divorces where a spouse withholds sex. *Tedford v. Tedford*, 856 So. 2d 753 (Miss App. 2003); *Sullivan v. Sullivan*, 180 Misc.2d 433, 689 N.Y.S.2d 378, N.Y.Sup. (NY 1999); *George M. v. Mary Ann M.*, 171 A.D.2d 651, 567 N.Y.S.2d 132 (NY 1991). Harrison’s pursuit of Prof. Martin to make her his “wife” constitutes sexual harassment not only because it was based on sex, but also because it was “sexual in nature,” as a matter of law.

B. The D.C. Circuit Ignored this Court’s “Sex-Plus” Analysis in *Phillips v. Martin Marietta Corp*

Harrison harassed *women* lawyers and professors on the basis of “sex *plus*” *profession*. The Panel failed to address Ms. Martin’s and NAWL’s arguments that a “sex-plus” case constitutes discrimination on the basis of sex. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Back v. Hastings on the Hudson*, 365 F.3d 107, 108 (2d Cir.

²² Where harassment includes gender-specific language, it is based on sex. *Mertes v. Wynne*, 2007 WL 3203004 at *12 (E.D. Cal. 2007).

2004); *Judge v. Marsh*, 649 F. Supp. 770, 779-780 (D.D.C. 1980).²³

C. Pursuant to *Meritor* and its Progeny, a Sexual Harassment Claim should not be Defeated because the Harasser did not “Grope” or “Touch” the Victim

The Panel left intact Judge Hogan’s October 4, 2006 decision holding that Harrison’s stalking of Prof. Martin was not “sexual in nature” or based on her sex because the harassment did not involve “groping” or “touching” which he found to be “conduct typical of sexual harassment cases.” (A-129)

The D.C. Circuit’s affirmance allows juries to dismiss sexual harassment cases where there has been no physical assault. This precedent arguably requires women to be sexually *assaulted* before they can sustain sexual harassment claims, in direct violation of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) and their progeny. *Accord, Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 965 (8th Cir.1993) (a woman need not be “propositioned, touched offensively, or harassed by sexual innuendo” in order to prevail in a sexual harassment claim); *EEOC Policy Guidance on Current Issues of Sexual Harassment*, N-915-050, particularly Section C, 3, *Non-physical Harassment*, <http://www.eeoc.gov/policy/docs/currentissues.html>.

²³ Judge Hogan decided *Marsh*, which was a “sex plus race” case.

D. Ms. Martin was Prevented from Presenting Evidence on the Determinative “Based on Sex” Question, Depriving her of Due Process

The Appellate Panel held: “it is absolutely clear from the record in this case that both sides addressed the ‘based on gender’ question at trial and that neither side was foreclosed from presenting its case on this issue.” (A-6) The Panel did not cite *anything* the record to support its conclusion; moreover, Ms. Martin specified, in her Briefs and at oral argument, how *she was foreclosed* from presenting evidence on this issue. (A-196-197, 208-210) Most notably, when Ms. Martin’s counsel attempted to cross-examine Dean Bullock on her understanding of the sexual nature of Harrison’s conduct, Judge Hogan *stopped the examination*, proclaiming that *the question had “no evidentiary value,”* specifying that “[i]t doesn't go to prove or disprove the fact at issue.”²⁴

Judge Hogan’s pronouncement again reaffirmed his 1999 decision holding that the question of whether Harrison’s harassment was based on sex was not “a fact at issue.” In addition, because he cut off her questions when she approached this subject, Ms. Martin did she even have the *opportunity* to elicit testimony at trial to prove the issue that morphed into the determinative jury question. She was thereby deprived of due process.

²⁴ (A-184-185) Tr. 1534:9-1535:4 (JA12,328-12,329).

E. The Panel Relied on Howard’s Misrepresentations, Undisputed Perjury and Misconduct

On a motion for judgment as a matter of law, “[t]he court should draw reasonable inferences on behalf of the non-moving party, but *it must not slip into sheer speculation*” (emphasis added).²⁵ Even if Judge Hogan had not decided the “based on gender” question in 1999, and even if Ms. Martin had addressed this question at trial, any “evidence” that the Court *speculated* might have justified the jury’s conclusion was woefully insufficient to support the verdict. The Court stated:

[t]here was ample evidence – including the fact that Harrison had stalked at least one man in the past – from which the jury could have concluded that Harrison’s conduct was not based on Ms. Martin’s gender. Indeed, the jury reasonably may have concluded that Harrison’s stalking was attributable to his *misidentification* of Ms. Martin as his wife, not bad behavior based on Ms. Martin’s gender.”

(A-6-7) The Court’s conclusions are fatally flawed, as discussed below.

²⁵ *Gibson v. Old Town Trolley Tours of Washington, D.C. Inc.*, 160 F.3d 177 (4th Cir. 1998), citing *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 (4th Cir. 1982); Fed. R. Civ. P. 50(a)(1).

1. Dean Bullock Admitted that she Perceived Harrison as a Stalker/Harasser of Women Only

The jury overlooked the *conclusive* evidence that Dean Bullock perceived Harrison as harassing *women only*. In her July 1, 1999 memo to Howard's General Counsel, Dean Bullock admitted that she and Dean Newsom were concerned that Harrison might "*stalk or otherwise harass*" Prof. Martin or "*other women*" on campus. (A-173). Dean Bullock's self-serving testimony at trial cannot serve as sufficient evidence to rebut her own contradictory July 1, 1998 written admission that Harrison was targeting *women* as stalking victims.

Howard repeated Dean Bullock's conclusive admission in its Response to the EEOC, through a sworn affidavit of its Assistant General Counsel (A-183) and again, in its Answers to Interrogatories in 2001. Since this factual finding had been determined both in Judge Hogan's 1999 decision and by Dean Bullock's own admission, repeated by its counsel – and the court -- for six years, it was a complete surprise to Ms. Martin when it was submitted to the jury in 2006 and a verdict returned in favor of Howard.

2. Harrison had no "Wife," but Used "Gender Profiling" to Harass Women who fit the Profile of his Ideal "Wife"

Harrison could not possibly have "misidentified" Prof. Martin for a fictitious, *non-existent woman*. For the first time, three years into this litigation, Howard asserted a *completely baseless* fabrication of an "estranged wife" to argue that Harrison's harassment was not "severe and pervasive."

Howard's September 30, 2002 *Motion for Summary Judgment*, at 2 (JA5,415) Howard lost this issue at trial. Jury Verdict #1(a) (A-111). On appeal, Howard changed the purported purpose of this fabrication and argued that it proved that Harrison did not target Prof. Martin based on her gender.

Ms. Martin repeatedly exposed Howard's sanctionable misrepresentations of the record. She even filed three motions for sanctions.²⁶ Not only was there never an iota of *evidence* to support Howard's *fable*, but *even the delusional Harrison understood that he had never been married to the fictional character, "Geneva Crenshaw."* (A-163)

Harrison "explained" that he pursued women of vastly different physical descriptions and different names searching for the woman who might meet his fantasy of a "perfect wife." (A-163-168) For example, Harrison described another woman whom he identified as his "natural wife" in 1988, as 6'4" tall, with long straight black hair and a long, straight nose.²⁷ (A-165) Ms. Martin is 5'5," with brown curly hair and a small, round nose. Clearly, no one could "misidentify" these two women for the same "wife."

The Court's errors of law are based, in part, on its false statements of fact. Rather than punish

²⁶ The District Court ignored, and never decided, her November 13, 2002 *Motion to Strike Defendant's Motion for Summary Judgment and to Preclude Defendants Eleventh Hour Defense, Alleging Bad Judgment*. The Appellate Panel denied each of her motions with one sentence. (A-12, 13) On April 11, 2008, the Panel ordered the Clerk not to accept any further motions for sanctions from *Appellant*. (A-14)

²⁷ This description fits Prof. Lani Guinier, then at the University of Pennsylvania Law School, whom Harrison also targeted. (A-190)

Howard for its flagrant frauds upon the court, the Panel published Howard's fabrications as truth. Due process, the interests of justice and the integrity of the judicial system require reversal.

3. "Gender Profiling" is the Same whether the "Model" Woman is Real or Imagined

As a matter of law, even if Harrison had harassed Prof. Martin because he believed that she resembled an *actual* person, or an *estranged wife*, the harassment would be *based on sex*. At oral argument, Howard *conceded* that anytime a person is targeted based on resemblance to a *real* person, *gender is necessarily part of the criteria used to target the person*. (A-204) Judge Henderson asked, "*Why isn't that enough?... I mean, if she had been a man, he wouldn't have misidentified her as he did.*" (A-203). Indeed, it is enough to satisfy *Oncale*.

The potential number of women that Harrison has harassed – and may still be harassing in his quest for the unobtainable – is endless. He might as well have been looking for "*Wonder Woman*." This "gender profiling" constitutes harassment based on sex.

4. There is No Evidence that Harrison ever "Stalked" a Man

There was *never any evidence* that Harrison "*stalked*" any *man*. Howard improperly referred to Harrison's *one-time contact* with Prof. Derrick Bell, in 1990, as "stalking." Prof. Bell's affidavit (A-188-190), as well Harrison's letter to another woman

whom he pursued (A-166, 164)²⁸ (*both hearsay*)²⁹ explain that Harrison confronted Prof. Bell – for the sole purpose of asking him to identify the “real Geneva Crenshaw” -- his next *female* stalking victim. This one time contact, at *Harvard* Law School, seven years earlier, does not meet the definition of “stalking,” which is *repeated* harassment.³⁰ The court’s impermissible *speculation* that that the jury concluded that Harrison “stalked” Derrick Bell is completely unfounded.

5. A Woman’s Sexual Harassment Claim should not be Defeated Simply because the Harasser Once Threatened a Man

Under the D.C. Circuit’s analysis, a woman’s sexual harassment claim can be defeated by a simple showing that the harasser, at some point in his life, demonstrated threatening behavior toward a man, for any reason. The court could similarly conclude that John Hinckley did not stalk Jodie Foster based on her sex because he also shot Ronald Reagan. Aggressive behavior in other contexts does not negate the fact that a man pursued a particular woman based on romantic or sexual desire and that

²⁸A law firm in Toronto contacted Prof. Martin because Harrison mentioned her as one of the women whom he had pursued. Harrison compared and described these women in sexual terms, such as “prettier,” “more voluptuous,” and being “infatuated with her legs.” (A-164-165) In 1999, Judge Hogan relied on these statements, in part, to conclude that Harrison’s harassment was based on sex. (A-23)

²⁹ Judge Hogan refused to allow Prof. Bell, Prof. Guinier or other professors who had contact with Harrison to testify. (A-103)

³⁰ See III.

he would not have so targeted her if she had been a man.³¹

VI. The District Court Decision -- Left Intact by the Circuit Court -- Sets Precedent in Retaliation Claims that Violates *Burlington Northern* and Creates Conflict within the Circuits

A. Where an Employer Cancels Vacancies to Exclude an Employee who Engaged in “Protected Activity,” it Constitutes Actionable Retaliation

Ms. Martin alleged that, in retaliation for reporting Harrison’s stalking, Dean Bullock orchestrated her non-renewal by canceling and concealing vacant faculty positions. In 1999, Judge Hogan sustained these retaliation claims (A-26-28); however, on October 20, 2003, MJ Facciola dismissed them (A-89-95), holding: “*Title VII applies only to ultimate employment decisions such as hiring or discharging....*”³² (A-93). Judge Hogan adopted this decision as his own (A-97) over Ms. Martin’s detailed *Objection* -- even though Howard agreed that it was replete with errors.

MJ Facciola’s dismissal of these claims flies in the face of *Burlington Northern v. White*, 548 U.S. 53, 64 (2006). *Burlington* expressly held that *actionable retaliation under Title VII is not limited to “hiring, firing and promotion.”* This precedent also conflicts

³¹ See also Section I.A.

³² In the same decision, MJ Facciola actually characterized Prof. Martin’s non-renewal as a “firing” (A-88), a “dismissal” and “loss of her job” (A-92) and a tenure turn-down (A-82-83). He also stated: “[p]laintiff lost her job and it was given to Cunningham.” (A-82)

with other circuits that protect employees from retaliation through of vacancy cancellations. See *Terry v. Gallegos*, 926 F. Supp. 679, 709-10 (W.D.Tenn.1996); *Ruggieri v. Merit Systems Protection Board*, 454 F.3d 1323, 1326-1327 (Fed. Cir. 2006) (“whistleblower”). See also fn. 8.

B. The Trial Court Violated Rule 8(c) by Dismissing Retaliation Claims, Sua Sponte

When MJ Facciola dismissed Ms. Martin’s retaliation claims, he effectively reversed Judge Hogan’s 1999 decision³³ -- and he did so *sua sponte*.³⁴ Fed. R. Civ. P. 8(c) requires the defendant to *assert its own defenses or waive them*. A judge commits reversible error by dismissing a case based on a *sua sponte* waivable defense. *Erline Co. S.A. v. Johnson*, 2006 U.S. App. LEXIS 6621 at *24 (4th Cir. 1996); *Haskell v. Wash. Twp.*, 864 F.2d 1266, 1273 (6th Cir. 1988); *Wagner v. Fawcett Publ'ns*, 307 F.2d 409, 412 (7th Cir. 1962).

VII. Age Discrimination is not a “Legitimate, Non-Discriminatory” Defense to a Retaliation Claim

Even as of its closing argument, Howard could not make up its mind as to its defense. At trial, then APT Committee Chair, Prof. Leggett – now the

³³ With these claims restored, Howard’s argument that the junior selectee was more qualified than Prof. Martin to fill the EEO/Labor position is almost irrelevant. Dean Bullock excluded Prof. Martin from consideration where her “competition” consisted of *three empty chairs*.

³⁴ MJ Facciola stated that Howard raised this argument (A-73), but it was *not* in Howard’s motion.

County Executive for Montgomery County, Maryland – shockingly resorted to a football analogy, comparing Martin to an *aging* “veteran” *football player*. Howard’s counsel told the jurors that the “team” decided to go with the “rookie quarterback” even though she had “less experience” than Prof. Martin, because “that rookie” might be the team’s “franchise player one day.”³⁵

Howard’s desperate finale constitutes an admission of a *per se* violation of the *Age Discrimination in Employment Act* (ADEA), 29 U.S.C. Section 621-634, *et seq.* Ms. Martin raised her ADEA claim in her post trial motions for judgment, although she did not formally move to amend the Complaint. Even had she not raised it at all, however, an appellate court may consider an issue – even belatedly raised on appeal -- “where injustice might otherwise result.” *IRS v. Murphy*, 493 F.3d 170, 172 (D.C. Cir. 2007).

VIII. Taxing Defendants’ Costs to Appellant Will Have a Chilling Effect on Civil Rights Plaintiffs

The district court taxed Howard’s litigation costs to Ms. Martin. (A-121)³⁶ Judge Hogan flatly *refused to consider any arguments* in her *Opposition to Costs*. (A-140) A court must exercise restraint in assessing

³⁵ Tr. 2501:13-24 (JA13,396). Howard never explained how playing *football* is like teaching law school. Prof. Martin was 40. Only two years earlier, the APT Committee described Prof. Martin as a “*young*” scholar.

³⁶ The Panel held that her appeal was not ripe for review because costs (over \$11,000) would not be imposed until the mandate was issued (A-10); but the mandate had not yet issued only because Ms. Martin appealed. It has now been issued. (A-15)

whether costs should be assessed against a non-prevailing party in “public law litigation” cases such as Title VII of the Civil Rights Act of 1964.³⁷ Ms. Martin and NAWL urged the D.C. Circuit to adopt the *criteria* to prevent the financial hardship and a chilling effect on Title VII plaintiffs. See, e.g., *County of Suffolk v. Secretary*, 76 F.R.D. 469 (E.D.N.Y. 1977).

IX. Facts Establishing Sexual Harassment and Retaliation may also Constitute an Independent Claim of Intentional Infliction of Emotional Distress

In 1999, Judge Hogan dismissed Ms. Martin’s intentional infliction of emotional distress claim, stating that her allegations did not constitute “outrageous” conduct. (A-7) *Kassem v. Washington Hospital Center*, 513 F.3d 251, 255 (D.C. Cir. 2008) held that a plaintiff who was sexually harassed by her supervisor and/or retaliated against for opposing it, could sustain a claim of intentional infliction of emotional distress (IIED) in addition to Title VII. Such conduct violates public policy and constitutes “outrageous” conduct. *Id. Accord, Nixon v. Majors*, 2007 WL 4592277 at *5 .

³⁷ *Crawford Fitting Co. v. Gibbons*, 482 U.S. 437 (1987); *Baez v. the United States*, 684 F.2d 999, 1003-1004, 1007 (D.C. Cir. 1982); *Pannonia Farms v. RE/Max International, Inc*, 2005 WL 3262902 at * 3 (D.D.C. 2005); *Summit v. Technology, Inc*. 435 F.3d 1371, 1374 (Fed. Cir. 2006); *Dual v. Cleland*, 79 F.R.D. 696, 697 (D.D.C. 1978).

X. Terminating a Woman for being Stalked Constitutes Wrongful Termination, in Violation of Public Policy

Wrongful discharge claims are permitted where there is no statutory basis for a claim, but the discharge violates public policy. *Elemery v. Holzmann*, 2008 WL 316376 (D.D.C. 2008) at 14, citing *Kassem*, 513 F.3d at 254-255. If there is no Title VII protection, there is no statutory basis for her claim; however, *then* the facts constitute a claim of wrongful discharge.

XI.A Court May not Place Mandatory Rule 37 Sanctions -- in Excess of \$364,000 -- in "Perpetual Abeyance"

More than **\$364,000.00** worth of attorney time was necessary to obtain discovery improperly withheld by Howard. After three years of withholding and delaying discovery, Howard was held in Contempt of Court for violating repeated court orders to produce documents and witnesses. (A-67; 204 F. Supp. 1 (D.D.C. 2002) (A-61) Ms. Martin moved for mandatory sanctions, under Rule 37(A).

Howard never challenged her entitlement to the money, but MJ Facciola, *sua sponte*, placed the issue in abeyance. (A-52, 57, 60) Despite numerous motions to decide it, neither Judge Hogan nor MJ Facciola would address it; neither has the Appellate Panel.

Justice delayed is certainly justice denied -- and casting a motion into perpetual limbo certainly violates due process. By closing the case without deciding this motion, the district court avoided punishing Howard's egregious misconduct and

deprived Ms. Martin of her *mandatory* remedy for the hundreds of hours of legal work drained from her firm. Howard caused Ms. Martin severe financial hardship – and the court compounded it by assessing Howard’s litigation costs against *her*. See VIII.

XII. The Court Unduly Prejudices a Pro Se Party by Ordering her to Ask herself Questions on the Witness Stand and to Talk about herself in the Third-Person

The trial court abused its discretion and erred, as a matter of law, in numerous evidentiary rulings. Howard was permitted to raise false, irrelevant and prejudicial allegations to confuse, distract and “trick” jury into believing that Ms. Martin was lying – about anything. The Court thus violated Federal Rule of Civil Procedure 11 and Federal Rules of Evidence 403 and 404.

One error, in particular, sets unduly prejudicial precedent in *both civil and criminal trials* involving *pro se* litigants. During trial, Ms. Martin’s first attorney quit, at the urging of “lawyers all over town” (Tr. 1109:77-1138:5, JA11,903-11,932).³⁸ The “emergency” lawyer who replaced him was incapacitated by a medical disability and mind-altering medications. (Tr. 2164:12-24, JA13,059); 2183:7-2186:8 (JA13,078-13,082; 2195:4-2209:13, JA13,090-13,104) The day before closing argument, Ms. Martin had conclude her case *pro se*. She briefly cross-examined Prof. Gavil, rebutted his testimony with her own and gave her own closing statement.

³⁸ These 1999 Howard graduates were overwhelmed by Judge Hogan’s adverse rulings, their own conflicts litigating against Howard and Howard’s team of lawyers (four participating, with reinforcements in the audience).

Judge Hogan ordered Ms. Martin to *ask herself questions on the witness stand* and to *talk about herself in the third person*. This *spectacle* conjures up concepts of mental instability and can be “jarring.”³⁹ Ms. Martin’s examination *of herself* appeared *comical* and ridiculous. It distracted jurors from the seriousness and truthfulness of her testimony.

Ms. Martin’s credibility was material to several issues, including whether she perceived Harrison’s stalking as sexual harassment. Her breach of contract claim depended *entirely* on assessments of her credibility versus Andrew Taslitz. (A-30-31) Prof. Taslitz recruited Prof. Martin and conducted the hiring negotiations. (*Id.*; A-177, 185) As Judge Hogan determined in 1999, oral representations were part of the contract. (A-30-31) The court’s damage to Ms. Martin’s credibility may well have caused the jury to weigh credibility determinations against her. *Pro se* litigants should not be so prejudiced, in civil or criminal proceedings.

Further compounding the undue prejudice, upon Howard’s motion and over Ms. Martin’s vehement objection, Judge Hogan told jurors that she discharged two attorneys and repeated it in his 2006 decision. (A-124)

³⁹*Soto v. Runnels*, 2006 WL 183706 *7 fn.5 (E.D.Cal. 2006); *People v. Hill*, 732 Ill.App.3d 691 (Ill.App. 1999); *Howard v. State*, 697 So.2d 415 (Miss. 1997); *State v. Johnson*, 551 N.W.2d 742 (Neb. App. 1996).

XIII. An Unopposed Motion to Vacate a Published Decision that the Parties Agree is Replete with Errors that Damage a Party's Reputation, should be Granted

Both parties agreed that the October 20, 2003 *Recommendation* is replete with errors. Some of these statements (A-80, 82-86, 92, 95-96) would constitute defamation were they not cloaked in judicial immunity.

The decision also relies on the allegations by Prof. Gavil that MJ Facciola *ordered precluded*. (A-85-86) Howard defended its flagrant violation of the Order, by claiming that, in an *ex parte* court appearance, *Judge Hogan*:

appeared to indicate to defense counsel that it was possible that the Court did not mean to preclude them from asserting this factual matter as a defense.

Defendant's Opposition to Plaintiff's Motion to Strike, at 7 (JA8116).

MJ Facciola ignored Ms. Martin's *Motion to Strike Defendant's Motion for Summary Judgment and to Preclude Defendants Eleventh-Hour Defense, Alleging "Bad Judgment."* Howard did not oppose Ms. Martin's motions to vacate the published *Recommendation*; yet Judge Hogan adopted it, leaving it in the public domain to disparage Ms. Martin's character for posterity.

CONCLUSION

Petitioner respectfully requests that *certiorari* be granted.

Respectfully submitted,

Dawn V. Martin, Esquire
Law Offices of Dawn V. Martin, LLC

ADDENDUM

STATUTES AND REGULATIONS

I. Federal Statutes and Regulations Prohibiting Sexual Harassment

Federal Statutes

Title VII of the Civil Rights Act of 1964

42 U.S.C. § 2000e-2(a), Title VII of the Civil Rights Act of 1964, provides, in pertinent part:

“It shall be an unlawful employment practice for an employer –

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms and conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.

Federal Regulations

EEOC Guidelines, 29 C.F.R. Section 1604.11(e), in pertinent part, provides that:

an employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's

control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

Federal Statute Prohibiting Age Discrimination

Chapter 14. Age Discrimination in Employment

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

...

(1) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan....

§ 631. Age limits

(a) Individuals at least 40 years of age
The prohibitions in this chapter shall be

limited to individuals who are at least 40 years of age.

District of Columbia Statute Prohibiting Sexual Harassment and Age Discrimination

The D.C. Human Rights Act, D.C. Code, § 2-1402.11 provides, in pertinent part:

(a) General. -- It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, disability, matriculation, or political affiliation of any individual:

(1) By an employer. -- To fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee