

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Dawn V. Martin,)
)
v.)
)
Howard University, *et. al.*)
_____)

Case No. 1:99CV01175
Judge: TFH/AK

PLAINTIFF’S MOTION TO RETAX COSTS,
PURSUANT TO LOCAL RULE 54.1(E)

Pursuant to Fed. R. Civ. P. 54 and Local Rule 54.1(e), Plaintiff, Dawn Martin, respectfully moves this Court to “retax” the costs assessed by the Clerk of the Court against her, in favor of Howard University, in the amount of \$9,945.95. As set forth below, pursuant to Fed. R. Civ. P. 54 and the controlling law of the U.S. Supreme Court and the D.C. Circuit, a trial court should exercise discretion in assessing costs against plaintiffs, particularly in civil rights cases. Applying the factors to be considered in making this discretionary determination to the case at bar, it would be an abuse of discretion and against the interests of all semblance of justice to force Ms. Martin to pay the litigation costs of Howard University in this action.

Currently pending before this Court is Plaintiff’s February 11, 2009 Supplemental Motion to Set Aside Judgment , Pursuant to Rule 60(B), Based on New, Controlling Supreme Court Law Set Forth in *Crawford v. Nashville*, during Pendency of Appeal (Dkt. # 551). If this motion is granted, the present Motion to Retax Costs will be moot. In addition, the issue of Fed. R. Civ. P. Rule 37 sanctions against Howard University for its blatant, repeated and egregious discovery violations has been held in abeyance for more than **eight and a half (8 1/2) years**, per MJ Facciola’s May 30, 2001 Memorandum Opinion, page 22 and 23. The monetary amount, \$364,120.00 is undisputed and mandatory; however, pursuant to Rule 37, the Court may additionally sanction the offending party – the Defendant, Howard University – with an

additional, more severe sanction, including a default judgment or judgment as a matter of law. If this Court grants Plaintiff judgment, as a matter of law, as a sanction in this case, the present motion will also be made moot. Despite the possible mootness of this *Motion to Retax*, Plaintiff files it, employing an abundance of caution, in the event that the Court deems it appropriate to decide all of the pending motions at once. Since it is not clear whether the Court will consider Plaintiff's arguments in her November 10, 2006 *Opposition to Defendant's Bill of Costs* (Dkt. #s 510; see also *Plaintiff's Motion for Reconsideration*, # 515), and in order to ensure that the Court is provided with an updated state of the law on this issue, Plaintiff files the present *Motion to Retax*.

Certainly, Plaintiff believes that she is her pending motions should be decided in her favor and that she should be granted a new trial – or judgment as a matter of law; however, if the Court deems otherwise, at minimum, the decision to tax costs against Ms. Martin, or, in the alternative, at least to order Howard to pay the Rule 37 mandatory payments to Ms. Martin and to deduct whatever costs the Court assesses against Ms. Martin from what Howard owes her.

Respectfully submitted,

/s/

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MEMORANDUM IN SUPPORT
OF PLAINTIFF’S MOTION TO RETAX COSTS

I. Overview

Precedent in the D.C. Circuit, and the majority of jurisdictions, favors denying costs to defendants in Title VII or other civil rights cases where one or more of the following factors are present: 1) the plaintiff brought the case in good faith; 2) the issues litigated are of public importance; 3) the issues are complex; 4) the defendant engaged in misconduct, or otherwise thwarted the progress of the litigation; 5) taxing the costs to the plaintiff will cause her/him undue financial hardship; 6) the defendant has substantial financial resources such that denying costs would cause it no financial hardship; 7) imposing costs on the plaintiff would have a “chilling effect” on the filing of similar civil rights cases.

In the present case, all of these factors are present. The *National Organization for Women* (NOW), the *National Association of Women Lawyers* (NAWL) and various other women’s groups crime victims’ advocacy groups joined in filing *Amicus Curiae* Briefs at the D.C. Circuit Court level and at the U.S. Supreme Court level, in support of Ms. Martin’s Petition for *Certiorari*. The President of NOW appeared in a documentary about this case, along with the renowned civil rights Professor, Derrick Bell, and the former Howard security officer who originally took the report from Prof. Martin regarding the delusional stranger who was pursuing her on campus to be his *wife*. See <http://www.insiderexclusive.com/show-titles/48-justice-for->

[women-stalked-in-the-workplace-and-retaliation-.html](#) (28 minutes long). There is also a shorter version of this documentary on U-Tube, which has provoked many posted comments on the subject. See http://www.youtube.com/watch?v=MxyzwRGYIgA&feature=channel_page.

In his opening statement at trial, counsel for Howard University stated that Plaintiff, Ms. Martin is a “very talented attorney,” but that she should “move on;” yet, Howard has destroyed the prestigious and lucrative career that Ms. Martin once enjoyed and even now, thwarts her ability to function in her struggling, solo, civil rights practice, to saddle her with its litigation costs of nearly \$10,000.00. Howard has done everything possible to prevent Ms. Martin from “moving on” to support herself, assist family members and/or further civil rights through her litigation for clients. Instead of “moving on” itself, Howard University has opted to vindictively pursue Ms. Martin for nearly \$10,000, to punish her for daring to sue the University.

In fact, since Howard now has eight (8) outside attorneys, working for Venable, P.C., as attorneys of record -- in addition to its Office of General counsel, receiving service of all Court filings in this case, Howard is likely to spend more than \$10,000 litigating this issue. In fact, over the past ten years throughout this litigation, Howard has retained four different law firms, in addition to its own attorneys assigned to this case from its Office of General Counsel. Plaintiff has repeatedly stated, in her filings, that Howard must have spent *millions* of dollars litigating against her – most of the time, alone. \$10,000 is a “drop in the bucket” to Howard. It is clearly not the money that Howard wants, but rather, *revenge*.

Prof. Martin only asked Howard to employ its own established security procedures to protect her from a delusional, homeless stranger who was stalking her in the law school building where she held office hours and taught her classes – to try to make her his “*wife*.” Prof. Martin sought only to keep her job as a law professor – a job which Howard administrators and her

students agreed, she performed extremely well. After destroying her career and her financial stability over the past 11 years, *now* Howard wants to jeopardize the very roof over Ms. Martin's head, take food from her table, put her law firm out of business and jeopardize her bar license and her clients cases, than to either try to make things right with her or just let her live her life and make the best of it.

Ironically, if Defendant, Howard University, is granted the costs that it seeks in this case, it will not only drain her of the financial resources that she needs to maintain her law firm to help other civil rights plaintiffs, but this case would set precedent for imposing costs on virtually all Title VII and other civil rights cases. This would be a particularly disgraceful precedent to be set by an historically Black University that hails itself as the bastion of civil rights.

Ironically, Howard University will further enrich a mammoth national law firm that specializes in opposing civil rights/EEO plaintiffs to oppress and persecute an African-American woman lawyer who has devoted her life to furthering civil rights and equal opportunity for others. This case is the epitome of Howard's betrayal of its legacy of Charles Hamilton Houston, Thurgood Marshall, and the other civil rights icons that created the legacy Howard touts. Charles Hamilton Houston said that a lawyer who was not a "social engineer" for justice is a parasite on humanity. Howard's enrichment of opponents of civil rights for the express purpose of attacking Ms. Martin turns Howard's legacy on its head. In its vengeful pursuit of Ms. Martin, Howard has gone *beyond* being a parasite and has moved into being *an opponent of civil rights and justice.*

II. Background Facts

On May 14, 1998, Plaintiff, Dawn V. Martin, Esquire, a former law professor at Howard University, filed this action, alleging sexual harassment/hostile work environment, in the form of stalking by a delusional, homeless stranger roaming freely through the law school building where she conducted her classes and held office hours. Prof. Martin also alleged retaliatory non-renewal of her contract because she asked Howard to employ its own security policies and campus security officers to ban the stalker from campus.

In a 1999 precedent-setting decision, *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516 (D.D.C. 1999), Judge Hogan reviewed the undisputed facts and then designated the questions to proceed to the jury for factual determinations. Judge Hogan stated that the case should proceed to a jury trial to determine whether: 1) Harrison's harassment was severe and pervasive enough to constitute a hostile work environment; and 2) Howard took reasonable steps to end it.

On April 18, 2006, the jury found, as Plaintiff alleged, that Harrison's harassment was severe and pervasive and *did* create a "hostile work environment" for her while she was employed by Howard Law School. The jury further concluded, as Plaintiff alleged, that Howard administrators knew or should have known of the harassment and failed or refused to take reasonable steps to end it.

Despite the jury's specific findings in favor of Plaintiff on the issues of fact designated for jury determinations in the 1999 decision, the jury issued a verdict *for Defendant*. The jury dismissed Ms. Martin's claims because it concluded that that Harrison's harassment was *not* "sexual" in nature or *based on her gender*. This conclusion meant that Martin's complaints were not "protected activity" under Title VII of the Civil Rights Act or any other statute. This

left Prof. Martin with absolutely *no remedy at law for being stalked in her workplace or for being terminated in retaliation for complaining about it* – although the jury’s verdict reflects that it believed the facts as she alleged them with respect to this issue.

On August 21, 2006, the Clerk of the Court issued a judgment on that verdict. The judgment, *sua sponte*, taxed Defendant Howard University’s costs of litigation to Plaintiff, Dawn Martin. Pursuant to Fed. R. Civ. P. 54, the Clerk of the Court may tax costs against the losing party unless the Court orders otherwise. Plaintiff filed a *Notice of Appeal* on September 11, 2006. This Court issued an order on post trial motions on October 4, 2006. Howard filed a Bill of Costs on September 25, 2006 (Dkt. # 502). Ms. Martin filed an *Opposition to Howard’s Bill of Costs* on November 10, 2006 (Dkt. #s 510; *see also* Motion for Reconsideration, # 515). On September 26, 2006, Ms. Martin also moved to *Stay the Decision on Costs* (Docket #s 548 and 550), both because the case was pending on appeal and also because the Court had left Ms. Martin’s 2001 Motion for mandatory sanctions against Howard, in the undisputed amount of \$364,120.00, in abeyance since May 31, 2001 (May 30, 2001 *Memorandum Decision*, Dkt. #106, page 22 and 23), despite her many requests the Court release the issue from abeyance and order Howard to pay the mandatory sanctions.¹ In a December 29, 2008 Minute Order, this Court issued Minute Order granting Plaintiff’s *Motion to Stay Decision on Taxing Costs*.

¹ Plaintiff’s July 8, 2002 *Modification of June 25, 2002 Order to Increase \$1,000.00 Contempt Sanction on Defendant Howard University and Other Relief* (Dkt. # 236), Plaintiff’s July 28, 2002 *Assessment of Discovery Produced by Howard* (Dkt. #510-8; *see also* # 254), Plaintiff’s August 3, 2001 *Motion for a Default Judgment Based on Defendant’s Production of Late, Incomplete and Falsified Discovery* (Dkt. #143); and Plaintiff’s December 21, 2005 *Motion to Compel Depositions of Dean Denise Purdie-Spriggs, Prof. Steven Jamar* (Dkt. # 361), at 15. *See also* reference in Plaintiff’s December 18, 2005 *Opposition to Defendant’s Motion in Limine to Preclude Plaintiff from Offering Argument of Evidence Regarding Alleged Damages* (Dkt. #350), at 9. Plaintiff detailed the attorney time that she spent in pursuit of the requested discovery, totaling more than **\$ 364,120.00**, as of June 25, 2002, applying the appropriate *Laffey* rate, not including the fees of consulting attorneys, of counsel attorneys or her paralegal. Plaintiff’s July 8, 2002 *Modification of June 25, 2002 Order* (Dkt. #236), at 13-15 and supporting Exhibit A. Some of Howard’s discovery violations and other misconduct are also discussed in Plaintiff’s October 9, 2002 *Motion for Summary Judgment* (Dkt. #273, 289, 313-6); Plaintiff’s *Reply to*

On October 10, 2009, Howard filed a *Motion to Lift the Stay* on costs (#552). The Clerk assessed the costs at \$9,945.95. On December 19, 2009 (pursuant to grants of enlargements of time to respond), Ms. Martin filed her *Opposition to Defendant's Motion to Lift the Stay*. Ms. Martin pointed out that there are currently two motions pending before the Court that should be decided before costs can be assessed against her, if they are to be assessed at all. These motions are as: 1) Plaintiff's February 11, 2009 *Supplemental Motion to Set Aside Judgment, Pursuant to Rule 60(B), Based on New, Controlling Supreme Court Law Set Forth in Crawford v. Nashville, during Pendency of Appeal* (Dkt. # 551); and 2) the **mandatory** Rule 37(A) attorneys' fees/sanctions that Defendant is required to pay to Ms. Martin for its egregious discovery violations, but that have been held in abeyance for more than **eight and a half (8 1/2) years**, per MJ Facciola's May 30, 2001 *Memorandum Opinion*, page 22 and 23.

Certainly, Plaintiff believes that her pending motions should be decided in her favor and that she should be granted a new trial – or judgment as a matter of law; however, if the Court deems otherwise, at minimum, the decision to tax costs against Ms. Martin, or, in the alternative, at least to order Howard to pay the Rule 37 mandatory payments to Ms. Martin and to deduct whatever costs the Court assesses against Ms. Martin from what Howard owes her.

III. The Court should Exercise Discretion when Considering Taxing Costs to Title VII Plaintiffs

Rule 54(d) of the Federal Rules of Civil Procedure provides, in relevant part:

Defendant's Opposition to Plaintiff's Motion for Summary Judgment (Dkt. #293, 313-8), *Plaintiff's Opposition to Defendant's Motion for Summary Judgment* (Dkt. #283, 313-2); *Plaintiff's Motion to Strike Defendant's Motion for Summary Judgment, pursuant to FRCP 56, and to Preclude Defendant's "Eleventh Hour" Defense, Alleging "Bad Judgment"* (Dkt. # 288, 290, 313-4); and *Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion to Strike Defendant's Motion for Summary Judgment and to Preclude Defendant's "Eleventh Hour" Defense, Alleging "Bad Judgment"* (Dkt. # 313-5). All of the filings referenced herein, including supporting citations to the record and exhibits, are incorporated into this motion, by reference.

Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party **unless the court otherwise directs**.... (emphasis added)

The United States Supreme Court has specifically acknowledged that Rule 54(d) “grants a district court the discretion to award the defendant costs as the “prevailing party,” but does not require it to do so.” *Delta Airlines, Inc., v. August*, 450 U.S. 346, 370 (1981); *see also* 450 U.S. at 351. The high Court specifically recognized trial courts’ discretion, under Rule 54, in taxing costs to the losing party in litigation. *Id.*; *Crawford Fitting Co. v. Gibbons*, 482 U.S. 437, 441-442 (1987). The Court must take special considerations into account in civil rights cases, including Title VII, before taxing Rule 54 costs against plaintiffs. Title VII plaintiff are “the chosen instrument of Congress to vindicate ‘a policy that Congress considered of the highest priority.’” *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 98 S. Ct. 694, 699, 54 L. Ed 2d 648 (1978), *quoting Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263.

Following the Supreme Court’s edicts, in the D.C. Circuit, the controlling cases consistently hold that a trial court should exercise its discretion in Title VII cases and that, in the exercise of that discretion, low and middle income Title VII plaintiffs should not bear the litigation costs of either private corporate or government defendants when they have filed their Title VII cases in good faith. In *Dual v. Cleland*, 79 F.R.D. 696, 697 (D.D.C. 1978),² the D.C. Circuit Court established that the “special qualities of the Title VII plaintiff” before taxing the defendant’s costs against the plaintiff under Rule 54. *Dual v. Cleland*, 79 F.R.D. 696, 697

² The Court reluctantly awarded costs to the defendant under Rule 68, from the time that the defendant made an offer of judgment, holding that Rule 68 did not permit the trial court discretion that exists in Rule 54; however, the Supreme Court overruled the portion of the decision, holding that Rule 68 does not apply to a plaintiff who ultimately lost the case, but only to a plaintiff who prevailed, but was awarded less favorable relief than was offered by defendant in the offer of judgment. *Delta Airlines, Inc., v. August*, 450 U.S. at 352.

(D.D.C. 1978). Citing *Christianburg* and *Piggie Park*, the D.C. Circuit Court held that trial court should exercise its sound discretion in determining 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. *Id.* The Court refused to tax costs against the Title VII plaintiff before it.

Unless the plaintiff has brought an action that is frivolous, unreasonable, or without foundation, costs should not be imposed on an unsuccessful Title VII employee-plaintiff under Rule 54(d). In this case, the plaintiff had a good faith claim, and, in the interests of justice, **the plaintiff should not be forced to bear the defendant’s costs.** (*Emphasis added*)

79 F.R.D. at 697.

Both before and after *Dual*, trial courts within the District of Columbia independently arrived at the same conclusion. In *Allen v. D.C.*, 812 F. Supp 1239 (D.D.C. 1993), this Court denied costs to the prevailing party, the District of Columbia government, in favor of the plaintiff class of African-American firefighters contesting promotional exams as allegedly racially discriminatory. This Court held that:

because the Plaintiffs are individuals of limited financial means, a great disparity exists between the financial resources of the plaintiffs and the Defendant, and the litigation raised issues of public concern, the Court, in its discretion, will not assess costs against the plaintiff in this case. See, e.g., *Wighten v. Metropolitan Hospital, Inc.*, 762 F.2d 1346 (9th Cir. 1984); *Badillo v. Central Steel Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983).

In *Jaspers v. Alexander*, 1077 WL 15396 (D.D.C.) 15 FEP Cases (BNA) 1234 (D.D.C. 1977),³ the trial court granted the plaintiff’s motion for review of the taxation of costs and vacated the clerk’s taxation of costs to her. The plaintiff had sued the Department of the Army, under Title VII, alleging sex discrimination in the denial of a promotion. Although the plaintiff lost the case, the Court determined that she had brought the case in good faith and that it would

³See also EEOC Decision 05810091, 1981 WL 382968 at 6 (EEOC), quoting *Jasper* and *Boas Box Co.*, refusing to tax costs on a Title VII plaintiff alleging race discrimination, although he lost his discrimination claim.

be unjust, and against the policy goals of Title VII to saddle her with the government's litigation costs – even though the cost was passed on to the taxpayers. The Court reasoned as follows.

[FEDERAL RULES]

....

In exercising its discretion to reduce the amount of costs taxed or to require the parties to bear their own costs, a court should consider a number of factors. The most important factor to be considered is that the party to be taxed was the plaintiff in a Title VII case who presented a claim that was not patently frivolous nor pursued for reasons of harassment. In *Copeland v. Martinez* where Judge Pratt awarded costs and attorneys' fees to the government in a Title VII case, the court found that the plaintiff acted vexatiously, maliciously, and in bad faith, that she abused the judicial process and that she failed to establish even a prima facie case. Civ. Action NO. 76-1156, Findings of Fact and Conclusions of Law, at 6, 15 FEP Cases 453 at 456 (D.D.C. August 23, 1977). Although a finding that plaintiff did not prove a prima facie case or that she acted in bad faith is not necessary to award costs to a prevailing defendant, the lack of bad faith and the closeness of the decision is relevant to the exercise of a court's discretion. In *Thomas v. Secretary of the Navy*, Judge Richey reduced the taxation of deposition costs by one-half where the defendant did not object to the reduction and the court found that the plaintiff had performed a public service in bringing the suit even though he did not prevail. Civ. Action NO. 75-1883, Order of Aug. 31, 1977, 15 FEP Cases 572.

[ABILITY TO PAY]

The parties' ability to pay costs is also a factor to be considered by the court. See *Boas Box Co. v. Proper Folding Box Corp.* 55 F.R.D. 79, 81 (E.D.N.Y. 1971); cf. *United States Steel Corp. v. United States*, 519 F.2d 359, 363, 10 FEP Cases 1106, 1108 (3rd Cir. 1975). As the court stated in *Boas Box Co.* "where the antagonists are very unevenly matched in size, resources and stability, it would be unfortunate to use the possible taxation of costs as a sword of Damocles and so prevent a good faith defense." 55 F.R.D. at 81. This observation is particularly appropriate in dealing with the pursuit of Title VII cases by low and middle income plaintiffs. The government is a formidable opponent and potential plaintiffs should not be discouraged by the fear of the taxation of costs – especially where the merits of a case involve close questions. The court in *Chicago Sugar Co. v. American Sugar Refining Co.*, stated that, "where it is clear that the action was brought in good faith, involving issues as to which the law is in doubt, the court may in its discretion require each party to bear its own costs although the decision is adverse to the plaintiff." 176 F.2d 1, 11 (7th Cir. 1949).

In *United States Steel Corp.*, the Third Circuit, in discussing an attorneys' fee award in a Title VII case, stated:

“Traditionally where a fee-shifting determination is committed by statute to a court’s discretion, equitable considerations govern. A court’s judgment may be guided by a number of elements, including the public interest in encouraging particular suits, the conduct of the parties and economic considerations.”

519 F.2d at 363, 10 FEP Cases at 1108 (footnotes omitted). Although we are concerned with cost, these considerations are still relevant to the court’s decision. Congress attempted to achieve lofty goals in enacting Title VII to eliminate discrimination in employment through private enforcement of the Act, especially in regards to government employment. The balance of the public interest in this case would appear to tip towards the denial of costs to the government.

The awarding of costs to the government when it successfully defends itself against a Title VII claim should not become a mechanical process that will discourage potential plaintiffs from pursuing debatable claims. Although the defendant accurately and convincingly asserts the need to deter baseless litigation in the Title VII area, this suit can hardly be characterized as baseless.⁴ A Court should exercise its informed discretion in awarding costs and should consider the conduct of the losing parties, and the public interest in the prosecution or defense if the suit in question. In the present case, the plaintiff did not act in bad faith in presenting an arguable claim. The plaintiff’s income is only approximately \$12,000 per year.⁵ Finally, the public interest weights heavily in favor of the pursuit of Title VII claims to end discrimination in government employment.

1077 WL 15396 at *10-12.⁶

⁴ Contrast with *Thomas v. George Washington University*, 286 F. Supp.2d 38, 40 (D.D.C. 2003), wherein the Court expressly found that the plaintiff’s lawsuit was “baseless” and actually “harms” the “cause of civil rights.” In addition, Fed. R. Civ. P. 11 exists specifically to deter baseless or frivolous lawsuits and permits the defendant to recover not only costs, but attorneys’ fees from the plaintiff.

⁵ *Jaspers* was decided in 1977; accordingly, this \$12,000 income would have to be translated into 2009 dollars to make any comparison to the present case and time.

⁶ The present case is contrasted with another case in which Howard University was the defendant. In *Long v. Howard University*, 561 F. Supp. 2d 85 (D.D.C. 2008) a former doctoral student at Howard University filed a lawsuit for failure to make a reasonable accommodation, under the Americans with Disabilities Act (ADA). *Long* was ultimately dismissed as time-barred. The plaintiff attempted to offset the costs claimed by Howard with sanctions for discovery violations, but he raised the discovery violations years after the alleged violations. The court found no misconduct by Howard in the *Long* case. In sharp contrast, in the present case, Ms. Martin timely filed and prevailed against Howard in three motions to compel discovery – and Howard violated them all. Howard was held in Contempt of Court on June 27, 2002 (Dkt. # 231); yet, the Rule 37 sanctions remained in abeyance and continue to do so even now, 7 ½ years later.

“If the losing party is of such modest means that it would be unjust or inequitable to enforce Rule 54(d)(1) against him, then the court acts within its discretion to deny costs to the prevailing party.” *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506, 516-517 (D. Md. 2005). Federal courts in various jurisdictions agree that the financial status of the plaintiff is a proper factor to be considered in granting or denying taxable costs.⁷

Even in cases not involving equal employment opportunity (EEO) issues or other civil rights issues, other Circuit and District courts have denied defendants Rule 54 costs when they prevailed. In the Sixth Circuit, courts exercising their discretion under Rule 54, as to whether to award costs to a prevailing defendant examine the losing party’s good faith, the difficulty of the case, the winning party’s behavior, and the necessity of the cost.⁸

Also distinguished from the present case, in *Baez v. the United States*, 684 F.2d 999, 1003-1004, 1007 (D.C. Cir. 1982), the Court awarded the U.S. Department of Justice \$365.00 in photocopying costs when the plaintiff. The plaintiff, Joan Baez (a well-known singer) lost her Freedom of Information Act (not Title VII) lawsuit attempting to obtain the full file held by the F.B.I. on her. The Court determined that Ms. Baez did not argue, or provide any evidence indicating, that it would cause her financial hardship to pay the meager \$365.00 in costs or misconduct by the government; accordingly, the Court found no reason to deny Rule 54 costs.

⁷ *Knology v. Insight Communications Co.*, LP, 460 F.3d 722 (6th Cir. 2006) (anti-trust case); *Hurd v. American River Transportation Co.*, 306 Fed.Appx. 954, 956 (6th Cir. 2009) (personal injury/negligence case); *White and White, Inc. v. American Hospital Supply Corp.*, 786 F.2d 728 (6th Cir. 1986) (anti-trust). In *Lee v. Metropolitan Government of Nashville*, 2009 WL 2462209 at * 14-16(M.D. Tenn. 2009) (§ 1983 and wrongful death), the court applied the *Knology* criteria and particularly stressed the “chilling effect” of taxing costs against plaintiffs in close cases raising importance legal issues. Accord, *Badillo v. Central Steel and Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983); *Delta Airlines v. Colbert*, 690 F.2d 489 (7th Cir. 1992); *Rodriguez v. Whiting Farms*, 360 F.3d 1180, 1190 (10th Cir. 2004); *Lampkins v. Thompson*, 337 F.3d 1009, 1017 (8th Cir. 2003); *Whitfield v. Scully*, 241 F.3d 264, 273 (2^d Cir. 2001); *Chapman v. AI Transp.*, 229 F.3d 1012, 1039 (11th Cir. 2000); *In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449, 462-68 (3^d Cir. 2000); *U.S. Bank Trust Nat. Ass'n v. Venice MD LLC*, 92 Fed. Appx. 948, 955 (4th Cir. 2004); *Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 446 (4th Cir. 1999); *Wyne v. Medo Industries, Inc.*, 329 F.Supp.2d 584, 589 (D.Md.,2004); *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1079 (9th Cir. 1999).

⁸ Accord, *Barber v. Overton*, 2005 WL 2018134 at *1 (W.D. Mich. 2005); *Pickens v. GLR Constructors, Inc.*, 196 F.R.D. 69, 77 (S.D. Ohio 2000); *Rosser v. Pipefitters Union Local 392*, 885 F. Supp. 1068 (S.D. Ohio 1995) (§ 1981 race discrimination case against union).

The Second Circuit has similarly denied costs to prevailing defendants where there are issues of misconduct by the defendant and the plaintiff has brought the case in good faith. *McFarland v. Gregory*, 425 F.2d 443 (2d Cir. 1970). District courts within the Second Circuit, particularly several jurisdictions in New York and Connecticut, have also addressed the discretionary nature of Rule 54 costs. Similar to the rulings in the D.C. and Sixth Circuits, these courts were unwilling to “chill” the pursuit of the objectives of Title VII by individuals who believed, in good faith, they were injured by illegal discrimination. In *Surprise v. GTE Service Corp.*, 202 F.R.D. 79, 81 (D. Conn. 2000), the court held that a trial court may deny costs “upon a showing that such an award would be inequitable,” quoting *DLC Management Corp. v. town of Hyde Park*, 45 F. Supp.2d 314, 315 (S.D.N.Y. 1999).

Relevant factors in determining whether to award costs include the plaintiff’s good faith, the financial hardship that it would cause the plaintiff and the bad faith or misconduct by the prevailing party. *Id. County of Suffolk v. Secretary*, 76 F.R.D. 469 (E.D.N.Y. 1977), held that the following factors should be considered before deciding whether to impose Rule 54 costs on a plaintiff in a civil rights case:

- 1) whether the action was brought and carried forward in good faith; 2) whether the prosecution of the action provided direct benefits to the public; 3) whether the action resulted in direct or indirect benefit to the defendant; 4) whether novel and substantial issues of law or fact were resolved; 5) whether costs were required to reimburse needy defendants; 6) whether costs would unduly burden non-affluent plaintiffs; and 7) whether the imposition of costs would unduly inhibit future similar challenges.

Accord, Evans v. American Import Merchants Corp., 82 F.R. D. 710 (S.D.N.Y. 1970) (Title VII).

See also Joe Hand Promotions, Inc., v. Nekos, 1998 WL 23819 (N.D.N.Y. 1998) (FCC issues).

In *Remington Products, Inc. v. North American Philips, Corp.*, 763 F. Supp. 683, 687-688 (D. Conn. 1991), the Court denied the defendant’s request for costs because its “initial

refusal to provide any discovery was a bad-faith effort to avoid complying with the rules governing the discovery proceedings.” *Surely*, in the present case, Howard University’s refusal to provide discovery, even in the face of three orders to do so and being held in contempt of court, *delaying discovery by three years* and causing hundreds of thousands of dollars in attorney hours and many hours of court time to obtain the discovery, constitutes the type of misconduct that should justify denying Howard University costs -- and this justification is only compounded by the disparities in financial resources of the parties, the financial hardship that imposing such costs on Ms. Martin would cause her and her family, and the “chilling effect” imposing such sanctions would have on other Title VII plaintiffs.

Particularly since the sexual harassment at issue here was stalking by a dangerous homeless stranger who was, in fact, a serial campus stalker with a criminal record and a history of violence, it is of the utmost importance that women are not discouraged from reporting this type of harassment in the workplace. It is precisely this type of stalking that could result in a violent – even deadly – episode in the workplace.

As detailed below, Ms. Martin is a Title VII, civil rights plaintiff who set important precedent in this case in 1999. In his December 13, 1999 decision, Judge Hogan held that an employer may be held liable for the sexual harassment of an employee by a non-employee if the employer knew or should have known of the harassment and failed to take reasonable steps to end it. *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516 (D.D.C. 1999). There can be no question that Prof. Martin brought this case in good faith. The jury vindicated Prof. Martin by finding factually in her favor regarding her allegations that a delusional, homeless stalker created a hostile work environment for Prof. Martin in her workplace and that her employer, Howard University, failed to take reasonable steps to end the hostile work environment.

IV. Plaintiff Clearly Brought this Action in Good Faith

A. The Jury's Factual Conclusions are Evidence of Plaintiff's "Good Faith"

Plaintiff's causes of action withstood *numerous* motions to dismiss and for summary judgment filed by Howard University. In its 1999 decision, this Court reviewed the undisputed facts and then designated the questions to proceed to the jury for factual determinations. This Court stated that the case should proceed to a jury trial to determine whether: 1) Harrison's harassment was severe and pervasive enough to constitute a hostile work environment; and 2) Howard took reasonable steps to end it.

On April 18, 2006, the jury found, as Plaintiff alleged, that Harrison's harassment was severe and pervasive and *did* create a "hostile work environment" for her while she was employed by Howard Law School. The jury further concluded, as Plaintiff alleged, that Howard administrators knew or should have known of the harassment and failed or refused to take reasonable steps to end it.

B. The Jury Verdict Turned on Interpretation of "Sexual in Nature" and "Based on Sex" – not an Issue of "Good Faith"

Despite the jury's specific findings in favor of Plaintiff on the issues of fact designated for jury determinations in the 1999 decision, the jury issued a verdict *for Defendant*. The jury dismissed Ms. Martin's claims because it concluded that that Harrison's harassment was *not* "sexual" in nature or *based on her gender*. This conclusion meant that Martin's complaints were not "protected activity" under Title VII of the Civil Rights Act or any other statute. This left her with absolutely *no remedy at law for being stalked in her workplace or for being terminated in retaliation for complaining about it*; however, the jury's verdict does not reflect any indication that it found Plaintiff to be acting in bad faith or to have fabricated the facts.

C. The Undisputed and/or Proven Facts are Evidence of Plaintiff’s “Good Faith”

1. It is Undisputed that Plaintiff was Harassed/Stalked on Campus by Leonard Harrison

Even though the jury verdict was for the Defendant on an interpretation of law, Plaintiff was vindicated with respect to her factual claims and her credibility. It was always undisputed that the Plaintiff, former Howard University Law Professor, Dawn V. Martin, was stalked on campus by a delusional, homeless stranger with a criminal record, Leonard Harrison, who stated that he was pursuing her to be his “wife.” According to the information in Harrison’s letters to Prof. Martin, which she immediately turned over to Howard’s administration, Harrison had been targeting African-American female professors since the mid-1980s, claiming that he was searching for his “natural wife.” Harrison described this “wife” as the physical embodiment of a fictitious female character, Geneva Crenshaw, in a book, written by the renowned New York University Law School Professor, Derrick Bell.⁹

2. It is Undisputed that Prof. Martin Notified Howard Administrators of Harrison’s Harassment of her on Campus

Dean Bullock’s own memoranda demonstrate that Prof. Martin directly notified her and other Howard administrators and security personnel, as well as the D.C. Metropolitan Police Department of Harrison’s harassment of her. The police department labeled it “stalking” and took a criminal stalking report. The police provided Howard with specific instructions to help keep Harrison away from Prof. Martin and to assist the police in apprehending them if he returned. Howard did not follow any of these instructions.

⁹ In an affidavit prepared for this litigation (**Ex. A**), Prof. Bell said that Harrison accosted him in 1990, at Harvard, demanding that he name the “real” Geneva Crenshaw. Harrison told Bell that he would return and “blow [his] head off” because he did not name this *fictitious woman*. Bell described the confrontation as the “most frightening experience of my career.” The Court did not allow Prof. Bell to testify at trial, so the jury did not hear his testimony.

3. It is Undisputed -- and Howard's Administrators Admitted -- that they did not Take Reasonable Measures to Stop Harrison from Harassment/Stalking Prof. Martin or "Other Women" on Campus

Both Dean Bullock and Associate Dean Newsom perceived Harrison as a threat to Prof. Martin and to "other women" that he might "stalk or otherwise harass" on campus. (**Ex. B**) Dean Newsom so testified in his deposition and at trial. Prof. Martin also testified that Dean Newsom specifically told her that Harrison's stalking was not just "about you," but affected all other women on campus.

Dean Bullock wrote a memorandum to Howard's General Counsel stating that both she and Dean Newsom perceived Harrison as a threat to Prof. Martin and "other women." (**Ex. B**) Howard's attorneys provided this memo to the EEOC as an exhibit to its official "Position Statement" to Prof. Martin's EEOC charge and repeated the claims in the letter as Howard's Response to Ms. Martin's EEOC charge (**Ex. D**); yet, at trial, former Dean Bullock actually testified that she never perceived Harrison's conduct toward Prof. Martin as a threat to her *as a woman* or as a threat to other women in particular, as opposed to men -- a statement that obviously constituted perjury, in light of her former written admission to the contrary in her memo to Howard's General Counsel (**Ex. B**). Nowhere in her memo, or in Howard's official EEOC Position Statement, did they claim that Dean Bullock or Dean Newsom perceived Harrison as an "equal opportunity" stalker, nor did Howard defend, at the EEOC level, by claiming Harrison's stalking of Prof. Martin did was not based on sex or sexual in nature. Instead, Howard *falsely* reported to the EEOC that Deans Bullock and Newsom were completely responsive to Prof. Martin's concerns about Harrison, involved the Director of Security, Lawrence Dawson, in the process of protecting Prof. Martin and "*other women*" whom he might "stalk or otherwise harass." (*See Exs. B and C*)

In their depositions and at trial, Dean Bullock and other Associate Dean Newsom admitted that Howard took none of the actions recommended by police. Dean Bullock also admitted that she falsely stated, in a memorandum to Prof. Martin, that she was discussing the matter with Security Director, Lawrence Dawson, when, in fact, she never spoke to Mr. Dawson or any other security or police officer regarding Prof. Martin's complaints about Harrison. Bullock did not even attempt to discuss the issue with Howard's Campus Security personnel or the police, despite her ready access to them and their express purpose of protecting persons on campus.¹⁰

4. **The Admissions of Bullock and Taslitz Prove Retaliatory Motive**

Both Dean Bullock and Prof. Taslitz testified that Bullock had told Taslitz that she did not want Prof. Martin on the faculty and that Prof. Martin was "causing problems" for her office. Bullock specifically told Taslitz that she was "having a bad day" because of Prof. Martin's complaints about the stalking and that she had "a lot to do" with respect to it; yet, Bullock admittedly did *absolutely nothing* to address Harrison's stalking.

Dean Bullock's animus toward Prof. Martin, as a result of her complaints about

¹⁰ In another sexual harassment case against a University, setting forth the obligations of a University to promptly act on a complaint of sexual harassment, *Wilson v. Tulsa Junior College*, 164 F.3d 534 (10th Cir. 1998), a custodial employee of the University was harassed by her supervisor on the University's campus, while on duty. The plaintiff prevailed because the University failed to take "prompt and appropriate corrective action" to eliminate the sexual harassment. 164 F.3d at 539. Once University management (in the form of campus police) became aware of the first reported incident of conduct constituting harassment, "the response of the campus police was grossly inadequate." 164 F.3d at 540. The supervisor of Campus Security "did nothing for eight hours, neither reporting the incident to Personnel nor taking action to prevent (the harasser) from repeating his threatening sexual behavior." *Id.*

The incident of sexual harassment in *Wilson* occurred on only one occasion -- Wilson's supervisor exposed himself to her and asked for oral sex. The University was held liable, even though it permitted a police undercover investigation on its premises, suspended the alleged sexual harasser while conducting an investigation, and reassigned the alleged harasser to a post where the plaintiff had no interaction with him. The University's actions were held not to be immediate and appropriate. 164 F.3d at 539.

Howard's administration did absolutely nothing, not just for 8 hours, but for indefinitely, and instead, began a pattern of retaliatory harassment against Prof. Martin, orchestrating her non-renewal and the destruction of her career as a law professor.

Harrison's stalking in her workplace, was so great that she could not even contain it when she was interviewed by the EEOC investigator in 1999, in response to Plaintiff's EEOC charge

Bullock said:

Martin did not seem satisfied with my response. I was left with the impression that **she wanted me to wrestle the stalker down.** (Emphasis added)

Clearly, Prof. Martin never asked Dean Bullock to "wrestle" anyone; she, as well as the D.C. police department and Howard's own Security Officer, Officer Sirleaf, simply asked Dean Bullock to work with Campus Security and employ the procedures already set forth in Howard's Security policies to ban Harrison from the workplace, post/circulate notices to the University community that campus security should be notified if they saw Harrison on campus and call D.C. police if Harrison appeared on campus so that they could arrest him for stalking Prof. Martin, as well as for trespassing on Howard's property.

5. APT Committee Members All Testified that Prof. Martin was a Good Professor and a Good Colleague

Howard admits that it refused to renew Prof. Martin's contract, as a permanent faculty member or even as a continued visitorship. The Appointments Committee (APT) Chair, Prof. **Isaiah Leggett**, *who is now the elected Montgomery County Executive*, testified that Prof. Martin was "a very good teacher," "a good colleague," and someone who "contributed to the law school community," but that he was "confused" about her publications. Three other professors on the APT Committee, Profs. J. Clay Smith, Laurence Nolan and Homer LaRue, independently gave similar assessments of Prof. Martin, describing her as "terrific," "excellent teacher" and a "friend." The one remaining Committee member, Vice Chair, Prof. Andrew Taslitz, misrepresented Prof. Martin's publications and those of a competing junior visiting professor after Bullock told him that she wanted Prof. Martin removed from the faculty; yet, even Taslitz

testified that he found Prof. Martin to be a “warm person” and considered her his “friend.”

6. Howard’s Stated Reason for Prof. Martin’s Rejection is Proven False by Profs. Martin and Cunningham’s Applications and Resumes

Since the jury found that Prof. Martin’s complaints about Harrison were not “protected activity” because Harrison’s pursuit of her was not sexual in nature or based on sex, the jury never reached the issue of whether Howard retaliated against her for those complaints. If the jurors had answered the questions on the verdict form that formed the elements of the retaliation charge, they would have been compelled to answer “yes” to the question of whether Howard’s stated reasons for selecting Prof. Cunningham over Prof. Martin were false.

Taslitz’ representations that he believed that Prof. Martin had not completed an article since joining Howard’s faculty, is proven false by the very application, resume and *completed article* that Prof. Martin submitted to the APT Committee before it made its December 18, 1999 decision to reject her. Taslitz’ claim was also proven false by his own testimony, as well as the testimony of *all* four of the other APT members, that they knew, prior to the December 18, 1999, that Prof. Martin’s article (**Ex. I**) was completed *and accepted for publication*. Prof. Martin’s application also stated that she had a draft of a second article, since joining Howard, which had been submitted to Dean Bullock as part of her application for a summer grant. Dean Bullock testified that she granted the summer grant request based on Prof. Martin’s demonstrated satisfactory progress in scholarship.

The junior visiting professor, Christi Cunningham, that APT Vice Chair recommended be selected instead of Prof. Martin had no publications since her graduation from law school in 1992 – in contrast to Prof. Martin’s four publications;¹¹ yet, Taslitz led the other members of the APT Committee to believe that Prof. Cunningham had more publications than did Prof. Martin

¹¹ Prof. Cunningham also had less legal experience, less EEO experience than Prof. Martin, who had seventeen years of experience and national recognition as an expert in EEO law.

and that the article that Cunningham had begun since joining Howard was actually *published, in print*, as of December 18, 1997. Cunningham's article, an exhibit since 2002, shows its publication date as "Winter of 1998" (**Ex. J**) – *a full year after* Taslitz represented that Cunningham's article was already published! Prof. Martin's article was also published in the Winter of 1998 and was more than twice as long as Cunningham's article. (**Ex. I**) Both articles had been accepted approximately a year earlier, which is a common phenomenon in academic scholarship. (*Compare* Exs. I and J)

7. It is Undisputed – and Bullock Admitted -- as Plaintiff Alleged, that she Withheld Faculty Positions from the APT Committee and Withheld an Advertised Constitutional Law/Civil Rights Position while Plaintiff was the Only Candidate and Qualified for the Con Law and other Positions

In her *Answer to the Complaint*, former Dean Bullock admitted that there were at least three vacant faculty positions for which Prof. Martin qualified; however, Dean Bullock left these needed positions *vacant* rather than to allow the APT Committee to consider Prof. Martin to fill any of them. (*Plaintiff's Motion for Judgment on her Retaliation Claims*) One position was an advertised Constitutional Law/Civil Rights position, which the original selectee turned down. Months after the "hiring season" had ended, Prof. Martin learned, from an outside source, that the candidate declined the position. She so informed the APT Committee members and applied for the position. In response to Prof. Martin's application, Bullock immediately converted the position to a tax position and told Prof. Martin that she would never hire her to teach tax.

Howard students sent letters and petitions protesting Martin's non-renewal and praising her as a professor; however, Dean Bullock ignored their requests to renew Prof. Martin and left positions vacant while students clamored for scarce courses, due to the shortage of necessary law professors. But for MJ Facciola's *sua sponte* dismissal of Plaintiff's strongest retaliation claims, in his October 20, 2003 *Report and Recommendation*, the jury would have been compelled to

find that Dean Bullock had no legitimate business justification for withholding and concerting faculty positions to remove Prof. Martin from the faculty. Plaintiff's retaliation claims were based on sound legal principles and cannot be said to have been filed in "bad faith." The soundness of her arguments is established first by the fact that Judge Hogan upheld these very claims in his 1999 decision demonstrates that Plaintiff's legal analysis was well founded.

V. The Prosecution of the Present Case Provides Direct Benefits to the Public

The prosecution of this case benefits the public because it will foster a dialogue about legal remedies for violence against women in the workplace, and an employer's duty to prevent it when on notice of potential danger. Workplace violence, particularly against women, is a serious problem that must not be ignored.¹²

If a woman can be stalked in her workplace by a violent, delusional stranger, and then fired for asking her employer to take reasonable steps to stop it, then there is a deficiency in the law that needs to be addressed, either through case law applying existing statutes, such as Title VII, and/or through legislation. *New York City Human Rights Law*, § 8-101, 8-107.1 expressly protects stalking victims and victims of domestic violence against employment discrimination. It may be that Title VII needs to be amended to mirror New York City's statute. This case additionally moves women's advocates, the public, the courts – and perhaps the legislature – to protect a woman from losing her job if she requests that her employer take reasonable steps to prevent stalking in the workplace, when on notice of it. Such notice also benefits men, who may also become "collateral damage" in workplace violence directed at women.

¹² See, e.g., *Workplace Stalking*, published by the U.S. Department of Justice, 2002, and citations therein. www.doc.sc.gov/VictimServices/WorkplaceStalking.doc.

VI. Plaintiff Arguments Indirectly Benefit the Defendant

During trial and elsewhere, Howard University has touted itself as the cornerstone of civil rights advocacy, repeatedly invoking the name and legacy of the late Honorable Thurgood Marshall professing to educate social engineers for justice. Ironically, Howard is advocating narrow interpretations of sex discrimination, sexual harassment and actionable adverse actions under Title VII. If Howard's arguments are adopted by the Court of Appeals, the holding will adversely affect women and minorities, both in identifying gender discrimination and in Title VII cases for retaliation for protesting any type of illegal discrimination, including race. Since Howard is an historically and majority African-American University, with a majority African-American administration, faculty and student body, members of *Howard University's own community* will be adversely affected in the workforce by the position that Howard advocates.¹³

Although the present case is based on sex discrimination, a harasser could just as easily select a target for harassment based on other protected categories, such as race, national origin, color, religion, age or disability. A harasser could target a victim based on an obsession with Dr. Martin Luther King and harass only African-American men (triggering Title VII protection, based on race and sex). The obsession could be Mahatma Ghandi and the target would be Indian men (triggering Title VII protection, based on national origin and sex); Buddha, with the target being Chinese men (national origin, sex and/or religion); Helen Keller, blind women (ADA and sex), or John Lennon (national origin and sex). Where the category of people targeted for harassment is a discreet minority group, or member of such a group, the decision -makers in that

¹³ Howard did not initially raise the argument narrowing the definition of adverse actions. Howard even agreed with Plaintiff that MJ Facciola's October 20, 2003 *Report and Recommendation* should be vacated in its entirety, since it was replete with factual errors. Judge Hogan denied Plaintiff's *unopposed* motions to vacate the *Report* even though the Court eventually recognized several errors in the *Report* and corrected two of them.

employment environment, not personally threatened by the harasser, may callously refuse or fail to act to protect the person targeted.¹⁴ There must be a legal obligation to do so.

Various civil rights groups, representing women and racial minority groups joined the *amicus* brief in *Burlington*. All of these organizations recognized the importance of *expanding*, rather than limiting, the definition of “adverse action” under Title VII. If Howard’s position is adopted, an African-American man would have no remedy if he applied for a promotion, for which he was the most qualified candidate, and the employer cancelled that vacancy, or left it unfilled, to avoid filling the position with the African-American man.

Similarly, the employer could decide not to “renew” or “rehire” the African-American man where a written contract is expiring, but there was an expectation of renewal, or rehiring into another available position for which he is well qualified. This non-“renewal” is effectively a termination; yet, under the district court’s opinion in this case, as well as the position now taken by Howard University, he would have no cause of action against his employer, no matter how clear the evidence was that the reason for canceling or failing to fill the vacancy was racial discrimination or retaliation for opposing illegal discrimination.

Howard’s position is antithetical to its history of civil rights, the legacy of Thurgood Marshall and even the interests of its own graduates. If Plaintiff prevails in her argument, expanding, rather than limiting, the definition of “adverse action” under Title VII to include the withholding and conversion of vacancies, then Howard will indirectly benefit from this ruling of the law. Howard’s own graduates (and employees, whether while still at Howard or elsewhere) will be able to rely on *Martin v. Howard University* for protection against such adverse actions if they are based on retaliation for protesting illegal discrimination.

¹⁴ In this case, the primary decision-maker is also an African-American female; however, she did not otherwise fit the profile of Geneva Crenshaw. Dean Bullock was a tax professor with no background in civil rights law.

VII. This Litigation has Raised and/or Resolved Substantial Issues of Law

A. The Present Case Set Precedent in Title VII Sexual Harassment Law

1. The Present Case Established Precedent in this Jurisdiction for the Principle that an Employer may be Held Liable for the Sexual Harassment of an Employee by a Non-Employee in the Workplace

In 1999, this Court set precedent within the D.C. Circuit, in the present case. *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516. This Court held that an employer can be held liable for the sexual harassment of an employee, by a non-employee, if the employer knew or should have known of the harassment and failed to take reasonable steps to stop it. This Court's 1999 decision adopted the EEOC Regulation, [29 C.F.R. § 1604.11\(e\)](#). It was a case of first impression. The D.C. Circuit Court of Appeals did not disturb it, although Howard argued that 1999 decision is wrong and should be reversed. This Court adopted the rationale espoused by other jurisdictions to make this determination, citing *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1992) ("the environment in which an employee works can be rendered offensive in an equal degree by the acts of supervisors, coworkers, or even strangers in the workplace."); ("An employer may also be responsible for the acts of non-employees with respect to sexual harassment of employees in the workplace"); *Otis v. Wyse*, 1994 U.S. Dist. LEXIS 15172, 1994 WL 566943 at *7 (D. Kan., Aug. 24, 1994).¹⁵ Beyond adopting the EEOC regulation is applying

¹⁵ The Second Circuit adopted 29 C.F.R. Section 1604.11(e) in *Murray v. New York University*, 57 F.3d 243 (2d Cir. 1995) (student intern allegedly harassed by patient at dental clinic). The Fifth Circuit resolved this issue in *Waltman v. International Paper Co.*, 875 F. 2d 468, 471 (5th Cir. 1989) (employee harassed by independent contractor of employer while on a travel assignment) and *Dornbecker v. Malibu Grand Prix*, 828 F. 2d 307, 309 (5th Cir. 1987) (employee harassed by consultant and employer took swift corrective action). The Eighth Circuit similarly adopted the regulations in *Christ v. Focus Homes*, 122 F.3d 1107 (8th Cir. 1997) (employees harassed by mentally incapacitated residents). The Ninth Circuit found a hostile work environment, based on sexual harassment, where a corporate service manager was terminated after reporting that she was raped by a customer during a business dinner. *Little v. Windermere Relocation, Inc.*, 301 F.3d 968 (9th Cir. 2001) The Ninth Circuit had precedent for employer liability for sexual harassment by a non-employee in *Folkerson v. Circus*

it. There are few cases on point, and absolutely no other cases reported in this jurisdiction, that apply the EEOC regulation. Even in other jurisdictions, the cases are so fact specific that new law is made in each case, particularly in determining whether the employer took reasonable measures to stop the harassment.

As NOW President Gandy stated in her interview about this case in a documentary, this case has is of great significance to women and to women's interests. See

<http://www.insiderexclusive.com/show-titles/48-justice-for-women-stalked-in-the-workplace-and-retaliation-.html> or a shortened, ten minute version with comments from viewers, at

http://www.youtube.com/watch?v=MxyzwRGYIgA&feature=channel_page. As stated in the Overview, NOW, NAWL and various other women's groups crime victims' advocacy groups

Enterprises, Inc., 107 F.3d 754 (9th Cir. 1997) (employee of circus harassed by patron while performing pantomime act). Cases in the Tenth Circuit are often cited by other circuits on this issue. *Turnbull v. Topeka State Hospital*, 255 F.3d 1238 (10th Cir. 2001) (psychiatrist harassed by patient); *Lockard v. Pizza Hut*, 162 F.3d 1062 (10th Cir. 1998) (waitress harassed by customer); *Adler v. Wal-Mart Stores*, 144 F.3d 664 (10th Cir. 1998) (employer liability for co-worker harassment is analyzed using the same standard as is harassment by a non-employee).

Decisions of district courts within Fourth Circuit have been consistent with other circuits. *McGuire v. Virginia*, 988 F. Supp. 980 (W.D. Va. 1997) (executive secretary sexually harassed at worksite by son of Chairman of Board); *Mullis v. Mechanics and Farmers Bank*, 994 F. Supp. 680 (M.D. N. C. 1997) (loan secretary sexually harassed by bank Vice President at work site to which she was temporarily detailed by another employer). District Courts have also consistently adopted EEOC Regulation, 29 C.F.R. 1604.11(e). *Ligenza v. Genesis Health Ventures of Massachusetts, Inc.*, 995 F. Supp. 226 (D. Mass. 1998) (respiratory therapist harassed by patient at employer's health clinic); *Jarman v. City of Northlake*, 950 F. Supp. 1375 (N.D. Ill. 1997) (deputy clerk sexually harassed by elected official); *Kudatsky v. The Galbreath Co.*, 1997 U.S. Dist. LEXIS 14445 (S.D. New York 1997) (real estate sales person sexually harassed by client); *Mart v. Dr. Pepper Co., et al.*, 923 F. Supp. 1380 (D. Kan. 1996) (account sales manager sexually harassed by client); *Hallberg v. Eat "n Park*, 1996 U.S. Dist. LEXIS 3573; 70 Fair Empl. Prac. Cas. (BNA) 361 (waitress sexually harassed by custom); *Otis v. Wyse, et al.*, 1994 U.S. Dist. LEXIS 15172 (D. Kan. 1994) (nurse trainer harassed by independent medical provider); *Hernandez v. Miranda, et al.*, 1994 U.S. Dist. LEXIS 10598 (D. P. R. 1994) (office manager harassed by a customer). *Powell v. Los Vegas Hilton, Corp.*, 841 F. Supp. 1024, 1029 (D. Ct. Nev. 1992) (casino liable for sexual harassment of employee by customers); *Churchman v. Pinkerton*, 756 F. Supp. 515, 518-519 (D. Ct. Kan. 1991) (female security officer harassed by employer's client); EEOC Decision 84-3, 1984 (waitress subject to unwelcome sexual conduct by customer).

joined in filing *Amicus Curiae* Briefs at the D.C. Circuit Court level and at the U.S. Supreme Court level, in support of Ms. Martin's Petition for *Certiorari*. The President of NOW appeared in a documentary about this case, along with the renowned civil rights Professor, Derrick Bell, and the former Howard security officer who originally took the report from Prof. Martin regarding the stalker on campus.¹⁶

2. No "Magic Words" are Necessary to Invoke Title VII Protection

This Court's 1999 decision holds that there are no "magic words," to describe sexual harassment. A victim need not use the words "sexual harassment" to invoke Title VII, but need only report to her employer *conduct that constitutes sexual harassment*. Howard has consistently argued, even in its post trial motions, that the victim is required to form her request for protection from sexual harassment like an EEO charge. The present case helps to clarify and develop the

¹⁶ Some of the legal commentators that have recognized the precedential importance of this case have included the following: 1) **Fair Employment Practice Reporter**, 81 FEP Cases (BNA) 964 (D.C. D.C. 1999); 2) **Individual Employee Rights Reporter**, 15 IER Cases 1587 (BNA) (D.C. D.C. 1999); 3) **EEOC Newsletter**, January 2000; 4) **BNA Daily Labor Report**, ISSN 0418-2693, January 11, 2000; 5) **Daily Labor Reporter**, ISSN 1043-5506, January 17, 2000; 6) 3-46 Larson on Employment Discrimination @46.05n.127; 7) 3-46 Larson on Employment Discrimination @46.034 n.62; 8) **The Twenty-Fourth Annual Law Review Symposium: Sexual Harassment in the Workplace: Fifteen Years after Meritor Savings Bank: Symposium Article: Have We Come Full Circle?** 27 Ohio N.U.L. Rev 439 (2001); 9) 5 No. 12 **Andrews Sex. Harassment Litig. Rep.** 5 (February 2000); 10) **WOL A.M. radio**, May of 2000; 11) **WPFW, F.M. radio**, June of 2000; 12) Holland and Knight, P.C. (law firm representing Howard University warned other universities not to act as Howard did) <http://www.hklaw.com/newsletters.asp?ID=95&Article=467>; 13) Lawroom, www.lawroom.com/download/CR005.pdf; 14) Venable Bates, P.C., <http://www.venable.com/newsletters/wlu/2003/newsltr1.pdf>; 15) <http://www.ncbl.com/archive/02-00labor.html>; 16) Hand Arendall, P.C. <http://www.handarendall.com/0400NLRev.htm>; 17) <http://www.michbar.org/publications/labor2000.html>; 18) College Publications, www.collegepubs.com/ref/SfxNdx35.shtml; 19) Presentation before American Association of University Professors, <http://www.cg2consulting.com/AAUP-Presentation.html>; 21) National Association of College and University Attorneys Annual Meeting, June 2006, "Keeping the Bad Ones Out and the Good Ones Safe," nacua.org/meetings/VirtualSeminars/June2006/Documents/021Lannon.DOC. Cases citing Judge Hogan's 1999 decision include *Mitchell v. AMTRAK*, 407 F. Supp. 2d 213, 218 (D.D.C. 2005) and *Coles v. Kelly Servs.*, 287 F. Supp. 2d 25 (D.D.C. 2003).

law under the “Opposition” clause of the retaliation provision of Title VII. It is not necessary to file a charge or formal complaint of discrimination to qualify for Title VII protection.

3. The Adverse Impact of Stalking on Women Established Sex Discrimination

In its 1999 decision, this Court acknowledged Prof. Martin’s argument that stalking has a disparate or adverse impact on women and therefore constitutes sex discrimination. *Martin v. Howard University, et. al*, 1999 U.S. Dist. LEXIS 19516 at *10. This issue was further developed on appeal, in both Ms. Martin’s Briefs and the *Amicus Curiae* Briefs of the *National Organization for Women* (NOW) and the *National Association of Women Lawyers* (NAWL) both before the D.C. Circuit Court and the Petition for Certiorari before the U.S. Supreme Court.

Where a woman is stalked in her workplace, the disparate impact analysis should be used in determining if the harassment is based on sex. 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*”); *Turnbull*, 255 F.3d at 1244; *see also Crist v. Focus Homes*, 122 F.3d 1107, 1111 (8th cir. 1997). Statistics compiled by the U.S. Department of Justice reflect that women are disproportionately affected by workplace violence, such as sexual assault and stalking. See Bureau of Justice Statistics, *National Crime Victimization Survey, Violence in the Workplace, 1993-1999* (December 2001) at www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf. Stalking is one of the most egregious forms of sexual harassment.¹⁷

¹⁷ *Crowley v. L.L. Bean*, 303 F.3d 387, 396, 401-403 (D. Me. 2002); *Frazier v. Delco*

4. This Case Presents Issues of Sex Discrimination, as a Matter of Law, Based on Sexual and Specific Terms

In 1999, this Court cited Harrison’s desire for Prof. Martin to be his “wife” and his references to Prof. Martin as “voluptuous” to conclude that “it is clear” that Harrison’s pursuit of her was “sexual in nature” or “based on sex” yet, on October 4, 2006, this Court held that he had not included, in 1999, that Harrison’s harassment was “sexual in nature” or “based on sex.” *Martin v. Howard University*, 2006 WL 2850656 (D.D.C.) This issue is an important one and should be resolved in this case. If not, the discussion raised by this case will result in it being resolved in a future case.

5. Where Female specific language is Used to Identify and Target the Female Harassment Victim(s), the Harassment is Per Se Based on Sex

Where the harasser targets women because he fantasizes that they are related to him in sex specific terms, such as “wife,” “mother,” “sister,” “aunt,” “grandmother,” again, the target can only be a woman, although the harasser may need to see additional qualities in particular women in order for him to cast her in the role he has chosen for her. Whatever his reasons are, from a legal standpoint, this harassment is just as much harassment based on sex, as any other case where the harasser does not harass all women in the universe, but selects particular women, or even one particular woman to harass, based, in part, because she is a woman.

6. Where a Harasser Targets His Victim to be a “Wife,” the Harassment is Inherently Sexual Harassment

Electronics Corp., 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. LEXUS 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. Willamette 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).

Where a harasser targets his victim because he is looking for a woman to be his “wife,” his quest to make her his “wife” is inherently sexual in nature. Sex is an inherent part of marriage, and is even so recognized by law. In the District of Columbia, as in most states, a spouse’s refusal to participate in sexual relations with his/her spouse constitutes grounds for divorce. Howard’s own Campus Security Officer, Officer Sirleaf, testified that, when Plaintiff reported Harrison’s harassment to him, showing him the letters and playing Harrison’s voicemail messages to her, he immediately understood Harrison’s harassment of Plaintiff to be sexual in nature, particularly because Harrison’s pursuit of her as his “wife” clearly indicated that he wanted a sexual relationship with her.

7. Where a Harasser Expresses his “Infatuation with the Body Parts of his Female Targets, Describing their Bodies as “Voluptuous,” No Reasonable Jury could Conclude that the Harassment is not “Sexual in Nature”

Harrison referred to his physical attraction to Prof. Martin and other women that he pursued in his search of “Geneva Crenshaw,” referring to Prof. Martin as “more youthful,” “prettier” and “more voluptuous” than a previous object of his “Geneva Crenshaw” obsession, purportedly named Valerie Edwards. With respect to the original Valerie Edwards (as contrasted with an attorney in Canada whom he later pursued) Harrison stated that he was “infatuated with her legs.” This Court’s 1999 decision quoted these passages of Harrison’s letters and concluded that “it is clear” that Harrison’s pursuit of Plaintiff was “sexual in nature” or based on sex; yet, in the October 4, 2006 decision held that there was sufficient evidence to find that he harassment was not based on sex/gender.

8. Where the Harasser Selects his Victim Based on his Perception of her Similarities to a Female Character, Real or Fictitious, the Harassment is *Per Se* Based on Sex or Gender

Where the harasser selects the victim based on his obsession with a female character, real or imagined, dead alive, the harasser has selected the victim based on the basis of her gender. Harrison targeted Prof. *Dawn* Martin, but he would not have targeted her if she were Prof. *Dan* Martin. Harrison was only looking for a woman because only a woman could be “Geneva Crenshaw.” Although “Geneva Crenshaw” is not a household name, the legal analysis would be the same if the harasser’s obsession were with any other female character or celebrity. The next delusional stalker could just as well be obsessed with “Wonder Woman,” Joan of Arc, Mary Magdalene, Mother Theresa, Hillary Clinton, Rosa Parks, Halle Barry, Jennifer Lopez or Connie Chung. The fact that the target may have additional characteristics that fit the profile does not negate the discriminatory nature of the harassment, based on gender. For example, although *all* women do not fit the profile of the comic book character of “Wonder Woman” (and none could fit the profile completely), *only* women could be considered for the “role.”

All men are “safe” from a harasser targeting a “Wonder Woman” prototype, while women may be targeted to the degree that the delusional stalker believes that they share characteristics with Wonder Woman. Although the concept may seem far fetched, it is no more far fetched that a delusional, criminal stalker would be infatuated with the fictional character of Wonder Woman than with the fictional character of “Geneva Crenshaw.”

9. The Court’s October 4, 2006 Decision’s Characterization of “Typical” Sexual Harassment Cases as Involving “Touching”

In its October 4, 2006 decision, *Martin v. Howard University*, 2006 WL 2850656 at * 4 (D.D.C. 2006), this Court examined the jury’s finding that Harrison’s harassment was not “sexual in nature” or “based on sex.”

The jury did not hear or see evidence that Mr. Harrison’s conduct involved conduct *typical of sexual harassment* such as groping, touching or making sexual advances. (Emphasis added)

Since the Court of Appeals did not address the issue of whether touching or groping constitutes “typical sexual harassment,” or whether it is necessary to establish a sexual harassment claim, there will likely be additional case law in this jurisdiction on this issue.

VIII. This Case Raised Issues of Precedent in the Area of Title VII Retaliation Law

This case raised issues with respect to retaliation and adverse actions within the meaning of Title VII cases that reached even the Supreme Court, while this case was pending, although the higher court did not address them in this case. On October 20, 2003, Magistrate Facciola actually reversed Judge Hogan’s 1999 decision, in part, dismissing Plaintiff’s strongest retaliation claims. MJ Facciola held:

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

....

Title VII applies only to ultimate employment decisions such as hiring or discharging.... (Emphasis added)

Martin v. Howard University, 2003 U.S. Dist. LEXIS 18501 at * 31-32 (D.D.C. 2003).

MJ Facciola repeatedly referred to Prof. Martin’s non-renewal as a "firing," "termination" and "denial of tenure" when it was undeniably none of the above, nor did Howard ever claim that it was any of the above. In June of 2006, after the trial in this case, the Supreme Court decide *Burlington v. White*, 126 S. Ct. 2405 (2006). Burlington specifically rejected the standards applied in the Courts of Appeals that have treated the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination provision and that have limited actionable

retaliation to so-called “ultimate employment decisions.” 126 S. Ct. at 2414. *Burlington*, 126 S. Ct. at 2410, continues:

...the proper formulation requires a retaliation plaintiff to show that the challenged action “well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”

Burlington expressly adopted the standard for proving actionable retaliation set forth in *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006). 26 S. Ct. at 2411, 2413, 2415. Post *Burlington*, courts have had to examine various employer practices under a new analysis.¹⁸ This

¹⁸ Even before *Burlington*, there was a stream of cases flowing from the D.C. Circuit clarifying, expanding and re-evaluating the definition of “adverse action” within the meaning of Title VII -- all of which Plaintiff cited in various motions for reconsideration of MJ Facciola's dismissal of her two strongest retaliation claims. *Holcomb v. Powell*, 433 F.3d 889 at 902 (D.C. Cir. 2006) (Jan.10, 2006), held that adverse actions included acts that affected future employment opportunities *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006), held that Title VII makes unlawful any act of retaliation by an employer that might dissuade a reasonable employee from making or supporting a charge of discrimination pursuant to Title VII – whether it is related to current employment opportunities, future employment opportunities, or even potentially adverse consequences completely unrelated to employment.

On March 17, 2006, the D.C. Circuit decided *Chappelle-Johnson v. Powell*, 440 F.3d 484 (D.C. Cir. 2006). The Court held that it is not necessary that the plaintiff “show that the position remained open and that the employer continued to seek applicants.” It was enough that the plaintiff alleged that the employer “denied her an opportunity for advancement.” In *Chappelle-Johnson*, the adverse action was the denial of “the opportunity to compete for a vacant position with a grade for which she would otherwise be ineligible.” As discussed in Plaintiff’s *Motion for Judgment on her Retaliation Claims*, at 15-18, as in *Chappelle-Johnson*, Dean Bullock denied Prof. Martin the opportunity to compete for a vacant position when she left positions vacant and converted the Constitutional Law/Civil Rights position, rather than permit the APT Committee to fill the needed positions, for fear that it would fill one of the positions with Prof. Martin.

Mastro v. Potomac Electric Power Company, 447 F.3d 843, 855 (2006) reversed the lower court holding that plaintiff had not established a *prima facie* case under Title VII because his position was not filled on a permanent basis. *Mastro* explained that the only purpose of this original requirement was to require the plaintiff to prove that the position from which he or she was terminated was not simply eliminated for non-discriminatory reasons. Plaintiff presented substantial evidence that Dean Bullock eliminated the advertised Constitutional law position and withheld at list three undesignated faculty positions, to retaliate against her for her complaints about Harrison by eliminating or withholding any position that she could fill.

On July 11, 2006, the D.C. Circuit’s neighboring sister Circuit, the U.S. Court of Appeals for the Federal Circuit, decided *Ruggieri v. Merit Systems Protection Board*, 2006 WL 1889897 (Fed. Cir. 2006), a case of first impression, involving the retaliation claim of an employee under the “Whistleblower Act” (The False Claims Act). Although *Ruggieri* is not a Title VII case, it does involve employer conduct constituting actionable retaliation for protected activity, under a federal statute. *Ruggieri* held that if an employer cancelled a vacancy, or failed to fill a vacancy, in order to prevent the plaintiff from being appointed to the vacancy, the employer’s conduct may

case offered an opportunity to examine the employer practices of withholding and converting job vacancies to exclude an applicant, based on a retaliatory motive.

IX. The Defendant is not Needy and Does not Need to be Reimbursed for Costs

The Defendant, Howard University, is a multi-billion dollar, major institution with nearly vast resources. In fact, Howard has chosen to hire a total of five outside law firms, including some of the most prominent and expensive law firms in the D.C. area that *specialize in opposing plaintiffs* in civil rights/employment discrimination cases. Howard never even *asked* for reimbursement of its costs prior to the Clerk’s taxation of costs. The \$11,000 in costs that Howard now requests is, as Howard’s counsel once remarked with respect to witness fees, “a drop in the bucket for Howard.”

Awarding Howard costs would certainly add insult, as well as further injury, to the injury that Plaintiff has suffered, due to Howard’s withholding of discovery, litigation conversion, changing defenses (see **Ex. C**, Chart of Changing defenses), filing of frivolous motions, thwarting of discovery, contempt of court and repeated violations of the rules and orders of this Court over the past eight years. See Section III, below, incorporated by reference herein.

X. It Would Unduly Burden Plaintiff, who was Deprived of her Livelihood by Howard’s Actions, to Order her to Pay Howard’s Costs in Addition to her Own

In sharp contrast to Howard’s “Goliath” resources and stature, Plaintiff’s taxable income as low as \$25,000 for some of the 11 years since Howard destroyed her teaching career. Howard cost Plaintiff thousands of dollars – *all of it borrowed* from a relative and still owed -- in deposition costs and hundreds, if not thousands of hours, over 11 years, in attorney time, to

form a basis for a claim of retaliation. When an employer cancels, withdraws or conceals a vacancy, to exclude a person who engaged in federally protected activity, that conduct constitutes actionable retaliation, as courts now specifically recognize. There is certainly no indication that Congress intended to afford less protection against retaliation to plaintiffs under Title VII than it does to whistleblowers.

combat it's actions to thwart discovery, conceal evidence and fabricate alleged facts. It would be an incredible additional miscarriage of justice to make Plaintiff pay an additional penalty for Howard's misconduct.

Ms. Martin has repeatedly informed the court of her low to modest income, for each of the years of the 11 years since her termination from Howard University, despite her diligent efforts to obtain another teaching job and to return to government employment. Because of the harm done to her previously exceptional civil rights career by Howard University, she had to establish her own solo practice and handles civil rights cases for plaintiffs. Since she represents the people who need it most, they are not able to pay market rate attorneys' fees. All of her cases either part or entirely contingency fee case. Her income is inconsistent and she has had great difficulty maintaining her household and her law practice. Since Ms. Martin is a civil rights attorney, solo practitioner, representing other EEO plaintiffs, any money that Howard takes from her thwarts her ability to further civil rights and the goals of Title VII on behalf of her clients and those who will benefit from the rulings she obtains for them.

Howard University has all of Ms. Martin's tax returns through 2005, pursuant to discovery in this case. These tax returns were submitted to the Court as potential trial exhibits. In addition, there was substantial testimony, at trial, about Ms. Martin's financial hardships since her termination from Howard and the destruction of her then 17 year history of stable, exceptional employment as a civil rights attorney and a law professor. Although her financial situation has recently begun to improve, with cases she has worked on for years coming to closure, she owes so much money in business and personal expenses, that \$9,000 would still cause her incredible hardship. Ms. Martin owns no property and rents her home and office. At this time, she does not even have a car because her 11 year old car was "totaled" in an accident

on September 26, 2009. She is attempting to replace it now. Howard and the Court should have enough information to determine that the costs assessed against her would cause her additional undue hardship, against all interests of justice; however, Ms. Martin is certainly willing to submit her 2007 and 2008 tax returns to the Court and Defendant, under seal and under a confidentiality order, along with any other documents that the Court deems appropriate to make its decision.

A. The Imposition of Costs would Unduly Inhibit Future Similar Challenges

Potential plaintiffs who learn that the Plaintiff in the present case was taxed Howard's costs, after Howard terminated her for complaining about a criminal, violent stalker in her workplace, and after Howard delayed and thwarted litigation for 8 years, draining her of her limited resources, with impunity, there will be a distinct chilling effect on other women, and civil rights plaintiffs generally, with respect to speaking up to oppose discrimination.

XI. Defendant's Violations of Rules 8(c), 26 and 37 Necessitated Depositions and Howard should Pay for them; Howard Should not be Rewarded for its Misconduct nor should Plaintiff and her Family Endure Further Hardship because of Howard's Repeated Misconduct

A. Howard Violated Rules 11 and 8 by Failing to Answer the Complaint, in Good Faith

Fed. R. Civ. P. 8 requires the Defendant to answer the Complaint. Howard never filed a valid Answer. In his May 30, 2001 decision, MJ Facciola specifically recognized that Howard's Answer did not qualify as a valid Answer under Rule 8. MJ Facciola deemed Dean Bullock's Answer, in her individual capacity, as an Answer for Howard as well; however, Dean Bullock did not respond to the questions that were outside of her personal purview, but known to the University. In addition, she also denied many of the basic allegations that she later admitted, particularly with respect to her own actions in response to Prof. Martin's complaint about the stalking and her own role in rejecting Prof. Martin for positions in December of 1997, as well as

in the spring of 1998.

As detailed in Plaintiff's May 6, 2001, *Motion for Rule 11 Sanctions for Defendant's Continuing Refusal to Provide a Proper Answer to Plaintiff's First Amended Complaint*, incorporated by reference herein, Howard denied nearly every allegation in Plaintiff's Complaint— even that Alice Gresham Bullock was the dean of the law school and that Plaintiff had been employed by Howard!

B. Howard Violated Rules 26 and 37 by Withholding Discovery, Repeatedly Changing its Answers, Defenses and Theories of the Case, Falsely Answering Interrogatories and Producing Fabricated Documents Years into the Litigation

Howard's thwarting of discovery cost Plaintiff her May 30, 2001 trial date and caused her to wait five (5) additional years for her day in court! See Chronology of litigation, up to August, 2002 (**Ex. E**), shortly after Howard was held in Contempt of Court, on June 27, 2002 (Dkt. # 231). In addition to filing a "non-Answer" *Answer to the Complaint*, Howard similarly violated discovery Rules 26 and 37.

In its *Answers to Interrogatories* (**Ex. F**), Howard falsely claimed that it had taken certain steps to keep Harrison out of Prof. Martin's workplace, the law school, and that Dean Bullock was working with Campus Security Director Lawrence Dawson, other security personnel and the D.C. Police Department, to address Harrison's stalking of Prof. Martin and threat to her and "other women" on campus. In her deposition, and at trial, former Dean Bullock admitted that she took no such action. Mr. Dawson also testified that Dean Bullock never told him of the stalking and that he first learned of it years later when Plaintiff noticed his deposition.

If Howard had admitted the facts that it knew to be true, that it later admitted and that the jury found to be true,¹⁹ Plaintiff would not have had to depose any of the security officers, Dean

¹⁹ The jury did not indicate, in any way, that Howard had legitimate reasons for not renewing Prof. Martin. Once it determined that her complaints did not constitute "protected activity," the reason

Newsom, of Dean Bullock, with respect to the background of the stalking. See also Plaintiff's August 3, 2001 *Motion for a Default Judgment Based on Defendant's Production of Late, Incomplete and Falsified Discovery*, incorporated by reference herein. Had Howard answered the Complaint and discovery requests honestly – as Rules 11, 26 and 37 require -- there would not have been a need for a trial at all, to determine any facts. The facts would have been undisputed and it would have been decided as a matter of law, in 1999.

In its *Answers to Interrogatories* (Dkt. # D) and court filings, Howard falsely alleged, in violation of Rules 11, 26 and 37, that Prof. Martin had not completed an article for publication, as of December 17, 2001, and/or that she had “no article accepted for publication.” When deposed, *all* five Committee members testified that they knew that Prof. Martin's article was *completed and accepted for publication before December 18, 1997*.

Howard clearly had no basis for answering the interrogatories as it did, since the persons who needed to be consulted on the reasons for the rejection were the five APT Committee members. Since every one of them testified that they knew that Prof. Martin's article was accepted for publication, Howard clearly did not employ due diligence in learning the answer to the Interrogatory and could not possibly have answered the Interrogatories with any semblance of good faith. To the contrary, Howard responded with answers that it knew to be false. Had Howard answered truthfully, as it was obligated to do, Plaintiff would not have had to depose any of the APT Committee members. It was only because of Howard's misconduct and repeated violations of Rules 11, 26 and 37, that Plaintiff had to take these depositions.

In its *Supplemental Answers to Interrogatories* (**Ex.G**), submitted three years into this litigation, Howard alleged, for the first time, a “kitchen sink” of purported reasons for Prof.

for her non-renewal was irrelevant. The jury then left the questions regarding the credibility of Howard's stated reasons blank.

Martin's non-renewal; however, Howard never produced *evidence* that any of the listed "reasons" for her non-renewal actually *was* a reason, or a consideration of the APT Committee in its deliberations regarding Prof. Martin's candidacy. To the contrary, Howard produced a May 11, 2001 statement from APT Chair, Prof. Leggett, on behalf of the APT Committee, specifically setting forth the four criteria used in the Committee's deliberations: 1) teaching ability; 2) collegiality; 3) scholarship; and 4) service to the law school and the community. (**Ex. H**) See Plaintiff's April 26, 2006 *Motion for Judgment on her Retaliation Claim* (Dkt. # 449).

The May 11, 2001 APT Committee Statement, signed by Prof. Leggett, specifically stated that the Committee viewed Prof. Martin favorably, both independently and as compared to Prof. Cunningham, with respect to teaching, collegiality and service (**Ex. H**). The statement specifically identified the issue of scholarship as the determining factor in selecting Prof. Cunningham over Prof. Martin; however, as previously discussed, the purported factual basis for determining that Prof. Cunningham had a superior record of scholarship to Prof. Martin – specifically that Prof. Cunningham's article was already "published" and that she had another article soon forthcoming, and that Prof. Martin had not even completed one article since joining Howard's faculty – was completely false and proven to be false by the applications and documentation submitted to the Committee by both Cunningham and Martin, as well as the final, published articles of both candidates, which were *both* accepted for publication in the fall of 1997 and *both* actually published in "Winter 1998" Law Journals. (Compare **Exs. H** and **I**) Howard had before it the actual publications, as well as the applications and resumes of Profs. Martin and Cunningham, throughout this litigation. Howard therefore knew full well that its repeated representations to this Court and in discovery, that Plaintiff's article was not completed or accepted for publication in the fall of 1997, and that Cunningham's article was already

“published” at that time, was a complete and utter lie.

Depositions of the five Committee members revealed that Prof. Martin’s collegiality was never questioned in deliberations and that it was not a factor in the decision, except to her credit, for at least four of the five Committee members. The only member of the Committee that was even ambivalent on the issue of Prof. Martin’s collegiality was Prof. Taslitz, was the instrument, or “henchman” through which Dean Bullock carried out her retaliatory removal of Prof. Martin from the faculty. Prof. Tazlitz claimed that he had received some negative feedback about Prof. Martin from colleagues, most notably, his good friend, Prof. Gavil; yet, Prof. Taslitz admitted that he never discussed Prof. Gavil’s comments with any other Committee member or Prof. Martin, even though Prof. Gavil’s comments were purportedly made to him in November of 1996 – more than a year before the Committee’s December 17, 1997 decision.

Prof. Taslitz testified that he considered himself Prof. Martin’s friend and mentor, and that he was an advocate for her to obtain a permanent position. Prof. Taslitz own description of his relationship with Prof. Martin after Prof. Gavil purportedly made the negative comments to him demonstrates that Prof. Gavil’s comments could not have been a significant factor in his recommendation to vote against Prof. Martin on December 18, 1997. All of the ATP Committee members (including Prof. Taslitz) testified that his stated reasons, during the meetings, was that Prof. Cunningham had published her article and that her record of scholarship was superior to that of Prof. Martin. As discussed, his representations were demonstrably and blatantly *false*.

Howard failed to produce minutes of the APT Committee meetings, although both APT Committee member, Prof. Homer LaRue and Faculty Services Director Delphyne Bruner both testified that such minutes were taken, typed and distributed to APT Committee members. APT Committee member Prof. Nolan *admitted* that she took contemporaneous notes of these

meetings, but that *she deliberately destroyed them* in order to conceal the Committee's deliberations. (Ex. K, Nolan depo at 131; *see also* 168-169) Prof. Nolan destroyed her notes *knowing* that Prof. Martin was challenging the Committee's decision as retaliatory and as a breach of contract. Certainly, as an attorney, Prof. Nolan knew that these notes would be requested in discovery if Prof. Martin's challenge developed into a lawsuit, as it did. Prof. Taslitz expressly anticipated a lawsuit. (Ex. L He asked Dean Bullock for legal representation by Howard if Prof. Martin sued him. (*Id.*))

Howard's spoliation of material evidence, and its withholding, concealment and falsification of discovery responses and production required the deposition testimony of all APT Committee members, as well as additional depositions of faculty members to rebut Howard's claims that her colleagues viewed her as "non-collegial." Had Howard not made the false claim that the Committee members believed that Prof. Martin was not-collegial, she would not have had to depose Profs. Boyer, Jones or Rogers. Howard also withheld Assistant Dean Denise Purdie-Spriggs from appearing for her a deposition, noticed in response to Gavil's new accusations. Purdie-Spriggs was privy to the actual events misrepresented by Gavil. MJ Facciola ordered Howard precluded from using Gavil's testimony in its motion for summary judgment; yet, Howard violated the Order and centered its *Motion for Summary Judgment* around Prof. Gavil's precluded testimony! MJ Facciola ignored Plaintiff's *Motion to Strike Howard's Motion for Summary Judgment* for its inclusion of precluded testimony. Instead, MJ relied on this precluded testimony, as well as Howard's blatant misrepresentation that Prof. Gavil was a member of the APT Committee in 1997-1998 (despite Plaintiff's proof – including Howard's admissions to the contrary) to deny Plaintiff's *Motion for Summary Judgment*. *Martin v. Howard University*, 2003 U.S. Dist. LEXIS 18501.

Finally, Plaintiff had to depose Cathy Miller because Howard refused to produce minutes of faculty meetings. In her deposition, Dean Bullock claimed that Prof. Martin talked too much in faculty meetings. Plaintiff therefore requested the minutes of those meetings, as the “best evidence” of how much she talked in meetings and what she said. Howard claimed that they were not available; however, Cathy Miller, Dean Bullock’s then secretary, testified that all of the minutes, for many years, are filed, along with the actual audio-tapes, in the Dean’s office. If Howard had complied with Rule 26 and produced the minutes and/or tapes, Plaintiff would not have had to depose Ms. Miller.

In a May 30, 2001 decision, MJ Facciola granted Plaintiff’s *Motion to Compel Discovery*; however, instead of granting Plaintiff’s motion to compensate her for her attorney time and costs necessary to obtain the withheld discovery, MJ Facciola held Plaintiff’s motion for Rule 37 costs in “abeyance” or “*limbo*.” In a published 2002 decision, MJ Facciola specifically warned Howard, quoting his own May 30, 2001 Order:

Defendant’s flagrant disregard for this Court’s Order is unacceptable. Accordingly, Howard University shall show cause in writing within ten (10) days of the date of this order why Howard University and its counsel should not be held in contempt for failure to comply with this Court’s order of April 11, 2001, directing defendant to provide plaintiff with answers to her interrogatories and document requests as compelled by the Order, and why defendant University should not be precluded from presenting a defense in this case altogether.

Martin v. Howard University, 204 F. Supp. 2d 1; 2002 U.S. Dist. LEXIS 9717 at *4(D.D.C. 2002). MJ Facciola further characterized Defendant’s “defense” by stating, “It is hard to imagine a process that more trivializes the obligation a litigant has to comply with a court’s orders.” Even a year after his May 30, 2001 warning, MJ Facciola did nothing to sanction Howard for its continuing violations of his orders to produce discovery.

Despite MJ Facciola’s harsh words for Howard, he has never ordered any sanctions

against Howard or otherwise addressed Plaintiff's Rule 37 motion. Even after being held in Contempt of Court, on June 25, 2002, Howard continued to withhold discovery, including and through trial. Plaintiff repeatedly implored the Court to take this issue out of abeyance and award her the sanctions to which she is entitled, both to ease the financial hardship caused by Howard's misconduct and to deter future misconduct by Howard. Plaintiff's July 8, 2002 *Modification of June 25, 2002 Order to Increase \$1,000.00 Contempt Sanction on Defendant Howard University and Other Relief*, Plaintiff's July 28, 2002 *Assessment of Discovery Produced by Howard*, Plaintiff's August 3, 2001 *Motion for a Default Judgment Based on Defendant's Production of Late, Incomplete and Falsified Discovery*,²⁰ and Plaintiff's December 21, 2005 *Motion to Compel Depositions of Dean Denise Purdie-Spriggs, Prof. Steven Jamar*, at 15. See also Plaintiff's December 18, 2005 *Opposition to Defendant's Motion in Limine to Preclude Plaintiff from Offering Argument of Evidence Regarding Alleged Damages*, at 9.

Plaintiff detailed the attorney time that she spent in pursuit of the requested discovery, totaling more than \$ 364,120.00, as of June 25, 2002, applying the appropriate *Laffey* rate, not including the fees of consulting attorneys, of counsel attorneys or her paralegal. Plaintiff's July 8, 2002 *Modification of June 25, 2002 Order* at 13-15 and supporting Exhibit A. All of these filings are hereby incorporated herein by reference. The Court left Plaintiff's 2001 motion in "abeyance" forever – allowing Howard to avoid the mandatory result of paying Plaintiff the fees

²⁰ Since this motion was filed prior to the adoption of the electronic filing system in this case, Plaintiff has attached it as an exhibit, for the Court's convenience. Plaintiff also notes, as she has in the past, that the case file that she has observed in the Office of the Clerk of the Court has repeatedly been taken from the Clerk's office and held for long periods of time by the Court, reportedly by "chambers." The Clerk's office never indicated whether "chambers" referred to Judge Hogan's chambers or MJ Facciola's chambers; however, Plaintiff provided courtesy copies to both judges' chambers, as well as filing two copies with the Clerk's office, one of which was intended for the assigned judge, pursuant to the rules and procedures of the Court. When given access to the Court file, Plaintiff observed that some of the filings, particularly those with extensive exhibits, had been disassembled. Some of the exhibits were either missing, placed in the wrong section or otherwise disorganized. The *Motion for Default Judgment* is one of the filings that Plaintiff identified as corrupted.

that Rule 37 obligates it to pay.

Fed. R. Civ. P. 37(a)(4)(A) states that if a motion to compel discovery is granted, the Court “*shall*” require the party whose conduct required the motion to pay the moving party the reasonable expenses incurred in making the motion, including attorneys’ fees. This *mandatory* language requires that the movant be compensated for the attorney time necessary to file the motion, unless the Court makes a specific finding that the movant failed to take reasonable measures to obtain the discovery before filing the motion or that the non-movant was substantially justified in withholding the discovery. *Cobell v. Norton*, 213 F.R.D. 16, 28 (D.D.C. 2003). The Court made no such finding in the present case. The purposes of Rule 37 sanctions are specifically to deter future misconduct, as well as to compensate the victimized party from being abused, overburdened, delayed and unfairly drained of his/her resources. In order to deter such conduct and to provide the injured party with resources lost due to the opponent’s misconduct, the sanction/compensation must be immediate. If not, the innocent plaintiff could be forced to abandon the litigation, simply for lack of money, drained by the Defendant.

In fact, as Plaintiff argued in her August 3, 2001 *Motion for a Default Judgment Based on Defendant’s Production of Late, Incomplete and Falsified Discovery*, Defendant so corrupted the discovery process that it would be impossible to proceed to a fair trial in this case. By delaying payment of sanctions, Howard continued these abusive tactics and continued to drain Ms. Martin of the resources she needed to litigate against Howard’s battalion of attorneys – including both inside and outside counsel, while she, alone, was handling her own case. Had the Rule 37 sanctions been timely paid – or paid at any point before trial, Ms. Martin would have been able

to hire *competent* counsel, with EEO trial experience and no ties to Howard University, which caused them a conflict of interest.²¹

Plaintiff has not found even *one* case, other than the present case, wherein Rule 37 sanctions, in the form of costs and attorneys' fees (as opposed to default) was held in indefinite abeyance. This case has, in effect, *ended*, without a resolution of Plaintiff's 8 year old Rule 37 motion for sanctions, after costing her hundreds of thousands of dollars in attorney hours. Defendant has never provided any justification to deny Plaintiff the Rule 37 sanctions that she has been waiting to be awarded for *eight years*, and which appears to be tossed into *oblivion* by this Court. It would be a tremendous miscarriage of justice – as well as a blatant example of bias in favor of Howard University, for this Court to continue to drop Plaintiff's motion for mandatory Rule 37 sanctions and yet, force a judgment upon Plaintiff that she and her family would suffer to pay, when she has *never* committed any misconduct, acted in bad faith or violated any order or rule of this Court. Howard's misconduct created the need to take all of the depositions taken; accordingly, Howard should pay for them – not Plaintiff.

CONCLUSION

Plaintiff should not be taxed with Howard University's litigation costs.

²¹ Without funds, Ms. Martin had to resort to hiring any attorney who would take the case – and, as it turns out, those who volunteered to take the case were all tied to Howard University. Ms. Martin's first trial attorney *quit*, in the midst of trial, overwhelmed by Howard's team of four lawyers at counsel table and additional attorneys in the courtroom, with "lawyers all over town" urging this Howard alumnus to quit during the trial. Ms. Martin was then forced to retain any attorney who would take the case in the middle of trial – and this attorney had conditions for which she was prescribed and was taking mind-altering drugs during the trial. When the Court indicated that it would order judgment for the defendant, taking the case from the jury, before closing statements, this second attorney told the Court, in the presence of opposing counsel, that she wanted to quit. After this second open betrayal by counsel, in open court, Ms. Martin took over the case herself, to give her closing statement. It was apparently too late to save the case, but the jury's questions and factual findings do indicate that this case was very close.

Respectfully submitted,

/s/

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