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 RENEWED MOTION FOR RELIEF FROM JUDGMENT, PURSUANT TO RULE 60(B), BASED ON NEW, CONTROLLING SUPRME COURT LAW SET FORTH IN *CRAWFORD V. NASHVILLE*, DURING PENDENCY OF APPEAL

Plaintiff respectfully renews her May 8, 2006 motions for relief from judgment on her Title VII sexual harassment and retaliation claims, as a matter of law, pursuant to Fed. Civ. R. P. 60(B). Plaintiff incorporates, by reference, all arguments made in her May 8, 2006 motions for judgment. Plaintiff supplements that motion herein, to include the controlling precedent, just set by the United States Supreme Court in *Crawford v. Metropolitan Government of Nashville and Davidson County*, *Tenn*., -- U.S. --, 2009 WL 160424 (U.S.) (2009), a Title VII case, like *Martin*, involving sexual harassment and retaliation for opposing sexual harassment.

MEMORANDUM IN SUPPORT OF MOTION

I. Legal Standard under Rule 60(b)(1) and (6)

A court may relieve a party from an otherwise final judgment, pursuant to Fed. R. Civ. P. 60(b), based on "equitable factors." *Bestor v. FBI,* 539 F. Supp.2d 324, 327 (D.D.C. 2008). Rule 60(b)(1), which permits a court to correct a "mistake" of fact or law, "in the very limited situation when the controlling case law of the circuit changed between the time of the court's judgment and the Rule 60 motion." *Id*. at 328, relying on

Ctr. for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n, 781 F.2d 935, 939 (D.C. Cir. 1986). In *Ctr. for Nuclear Responsibility, Inc*., the D.C. Circuit developed its own position on the timeliness of Rule 60(b) motions by relying on the precedent set by other Circuits that it deemed proper rulings of law.[1] Rule 60 motions may be based on post judgment changes in the controlling law, as long as a timely appeal has been filed. *Ctr. for Nuclear Responsibility, Inc.*, 781 F.2d at 941; *Lairsey v. Advance Abrasive Co.,* 542 F.2d 928, 930-931 (5th Cir. 1976).

Rule 60(b)(6) permits relief from judgment "for any other reason justifying relief from the operation of judgment." There is no time limit for a Rule 60(b)(6) motion, except that it must be filed within a "reasonable time" from the date of the judgment. "Rule 60(b)(6) is a grand reservoir of equitable power to do justice in a particular case.'… [I]t should be liberally construed when substantial justice will thus be served." *Morris v. Adams-Millis Corp.,* 758 F.2d 1352, 1359 (10th Cir.1985), quoting *Pierce v. Cook & Co.,* 518 F.2d 720, 722 (10th Cir. 1975). Where a judgment of a trial court results in precedent that is inconsistent with other precedent in the same district, or is contrary to the controlling law in the jurisdiction, Rule 60(b)(6) should be applied to

[1] *Ctr. for Nuclear Responsibility, Inc* . adopted the rulings in *Morris v. Adams-Millis Corp.,* 758 F.2d 1352, 1357-59 (10th Cir.1985) (legal errors can be corrected by Rule 60(b)(1) motions if timely notice of appeal is filed); *Barrier v. Beaver,* 712 F.2d 231, 234 (6th Cir.1983) (legal errors can be corrected under Rule 60(b)(1) if motion is made within appeal period); *Liberty Mutual Ins. Co. v. Equal Employment Opportunity Comm'n,* 691 F.2d 438, 441 (9th Cir.1982) (errors of law may be corrected under Rule 60(b)); *Parks v. U.S. Life & Credit Corp.,* 677 F.2d 838, 840-41 (11th Cir.1982) (court may correct judgment when controlling law has changed under Rule 60(b)(1) motion even if filed after the appeal period, but only if a timely appeal has been filed); *Fox v. Brewer,* 620 F.2d 177, 180 (8th Cir.1980) (court may grant relief under Rule 60(b)(1) for "judicial inadvertence" when motion is filed within appeal period); *In re Texlon Corp.,* 596 F.2d 1092, 1100 & n. 7 (2d Cir.1979) (judicial errors may be corrected by Rule 60(b)(1) motions, motions must be made within appeal period); *Lairsey v. Advance Abrasives Co.,* 542 F.2d 928, 930 (5th Cir.1976) (court may correct judgment when controlling law has changed by Rule 60(b)(1) motion if a timely appeal has been filed); *D.C. Federation of Civic Ass'ns v. Volpe,* 520 F.2d 451, 453 (D.C.Cir.1975) (Rule 60(b)(1) may be used to correct judgment when controlling law has changed).

correct the inconsistency, as well as the injustice. *Barrier v. Beaver,* 712 F.2d 231, 235 (6th Cir. 1983).

Rule 60 requires the Court to strike a balance between finality and the interests in arriving at a fair and just result for the parties as well as the public. *Lairsey* , 542 F.2d at 931. Rule 60 "sacrifices some simplicity to achieve greater equity through the "reasonable time" test." *Id.* The Court should examine the reasonableness of the timing of a party's Rule 60 (B) motion based on the particular circumstances in each case. *Id.* at 930, 931. "The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner." *Id*. at 930.

A party acts reasonably and follows a logical course of action by filing a Rule 60(B) motion in the trial court where an intervening decision of a controlling Court issues a decision requiring its reversal. *D.C. Federation of Civil Associations v. Volpe*, 520 F.2d 451, 453 (D.C. Cir. 1975). Allowing the trial court to correct itself spares the time and effort of the respective Court of Appeals. *Id*.; *Parks,* 677 F. 2d at 840. When a case is on appeal, a trial court may decide an issue that the Court of Appeals did not address, or has not yet addressed. *Parks,* 677 F. 2d at 840; *Liberty Mutual Ins. Co*., 691 F.2d 438, 441-442 (9th Cir. 1982).

Martin is still in the appellate process.[2] The U.S. Court of Appeals for the D.C. Circuit did issue a short, unpublished, *per curiam* decision addressing some, but not

[2] The Supreme Court denied Ms. Martin's *Petition for Rehearing* on January 12, 2009; however, the *Crawford* decision, decided on January 26, 2009 – *only nine days later* – compelled her to file the attached February 9, 2009 *Motion for an Enlargement of Time and Leave to File Supplemental, or Second Petition for Rehearing, Relying on the Supreme Court's new, Controlling Decision in Crawford*. (**Exhibit A**)

nearly all of the issue that Ms. Martin raised on appeal. *See Martin v. Howard University*, 2006 U.S. Dist. LEXIS 34446 (D.C.D.C. 2006). Specifically, the D.C. Circuit never addressed Ms. Martin's argument that the issue of whether certain conduct constitutes "protected activity" within the meaning of Title VII, is an issue of law to be decided by a Court, not a jury. It was only because this question, and the underlying question of whether the harasser targeted Prof. Martin based on her gender, that Ms. Martin lost her Title VII claims of sexual harassment and retaliation. It is therefore appropriate – and in the interests of judicial economy, as well as justice, for the Supreme Court to reconsider its judgment in light of the Supreme Court's recent, controlling decision in *Crawford*.

A trial court should vacate its own judgment, "in the interests of justice, and in order to place appellants as nearly as possible in the position in which they would have been had the proper course been followed…." *D.C. Federation of Civil Associations*, 520 F. 2d at 453-454. "[A]ll the considerations relevant to the 'interests of justice appear from the record to be within our plain view." *Ctr. for Nuclear Responsibility, Inc.*, 781 F.2d at 945, Judge Ginsberg (dissenting).

II. *Crawford* Constitutes an "Intervening Circumstance of Substantial and Controlling Effect" Requiring Reversal in *Martin*, Based on its Definition of "Protected Activity" under Title VII

A. Controlling Supreme Court Precedent Set by *Crawford*

The Supreme Court's January 26, 2009 decision in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 2009 WL 160424 (U.S.) (2009), is an intervening circumstance of substantial and controlling effect in *Martin*. *Crawford* clarified the definition "protected activity," within the meaning of Title VII of the Civil

Rights Act of 1964 – a determinative issue in *Martin*.

During the employer's internal investigation, in response to questions about whether a supervisor engaged in "inappropriate behavior," Ms. Crawford detailed specific objectionable acts that she witnessed. 2009 WL 160424 (U.S.) at * 2 (2009). Shortly after the investigation, the Defendant fired her. After thirty years of employment, the Defendant claimed that it has just discovered that she had committed embezzlement. *Id*.

Reversing the Sixth Circuit's decision, the Supreme Court unanimously held that Ms. Crawford engaged in "protected activity" when she responded to questions asked during her employer's internal investigation about whether she had witnessed "inappropriate" behavior by a supervisor:

> Crawford's conduct **is** covered by the opposition clause [of Title VII]. (Emphasis added)

2009 WL 160424 (U.S.) at * 5. *See also* *3, 8.

The Supreme Court interpreted "protected activity" broadly in order to further Title VII's purpose eradicating discrimination in employment. The Supreme Court acknowledged that:

> "[F]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination."

2009 WL 160424 (U.S.) at * 5.

By establishing that Ms. Crawford's conduct *definitively* qualified as "protected activity," the Supreme Court made clear that it is *the province of the Court* and *not a jury* to assess whether undisputed conduct meets the legal definition of "protected activity."[3] The Supreme Court did *not* remand *Crawford* for a *jury finding* whether Ms. Crawford

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

engaged in “protected activity.” This question was properly decided, as a matter of law, by the Supreme Court and will not be revisited by a jury.[4]

Although there is no indication in the decision, Briefs or Oral Argument that Ms. Crawford used the words “sexual harassment” in describing the objectionable conduct, the Supreme Court concluded that the conduct constituted “sexually obnoxious behavior.”[5] Ms. Crawford’s report of this conduct therefore constituted harassment on the basis of sex/gender, bringing it within Title VII coverage.

B. Common Facts and Issues in *Crawford* and *Martin*

*Crawford c*onstitutes controlling law in *Martin*, with respect to: 1) whether the question of “protected activity” is properly decided by a Court, as a matter of law, or submitted to a jury, as an issue of fact; and 2) the manner in which sexual harassment must be reported in order to constitute “protected activity.”

In both *Crawford* and *Martin*, the respective trial courts and Circuit Courts held that the plaintiffs did not engage in “protected activity” because of *how* they reported conduct constituting sexual harassment to their employers. Both Ms. Crawford and Prof. Martin detailed the harassers’ specific conduct to their employers. Both Ms. Crawford and Prof. Martin lost their jobs shortly after reporting the harassment to their employers. At the respective trial and Circuit Court levels, both Ms. Crawford and Prof. Martin were deprived of the opportunity to prove that they lost their jobs due to retaliation for reporting the harassment because the lower courts concluded that they had not engaged in “protected activity” under Title VII.

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[4]The Court did remand Ms. Crawford’s retaliation claim for determinations on whether the Defendant’s stated reason for her termination was pre-textual and whether the real motive was retaliation. *Id*. at 5.

[5] 2009 WL 160424 (U.S.) at * 2.

C. ***Crawford*** **Compels Reversal of the Trial Court's Submission of the Question of "Protected Activity" to a Jury**

Prof. Martin was far more active in her opposition to the conduct than was Ms. Crawford. She complained both verbally and in memoranda to her supervisor, then Law School Dean Alice Gresham Bullock, about a homeless, delusional stranger roaming through the law school buildings and leaving her letters and messages expressing his desire for her to become his "wife."

Prof. Martin entitled her memos "Security Problem on Campus," in order to stress the need for employing campus security procedures to keep this non-employee stalker out of the law school buildings. She referred to Harrison as a "stalker" after he was so characterized by the D.C. Metropolitan Police Department.[6] She attached copies of Harrison's handwritten letters to the memos and transcribed his voicemail messages. Harrison's letters included his confession that he had pursued numerous other women of color, in addition to her, searching for the physical embodiment of a fictional character in a book, written by renowned Prof. Derrick Bell. Harrison stated that he believed that the woman who served as the model for this fictional character was meant to be his "natural wife."

Less than a month after the stalking began, and while she was still requesting that Howard ban the stalker from campus, Howard refused to renew Prof. Martin's teaching contract. Howard left, at least three faculty vacancies unfilled -- despite student protests praising Prof. Martin's teaching ability and dedication to students. The harm to Prof.

[6]She initially referred to Harrison's conduct as "sexual harassment." Bruner deposition at 137:4-13 (**JA**6,808) ("JA refers to "Joint Appendix," which includes the entire record at the district court level, including the entire trial transcript and all filings prior to the filing of the Appellate Briefs. The Joint Appendix was submitted on an electronic disk to the U.S. Court of Appeals and can be accessed on line at www.dvmartinlaw.com/MartinvHU.)

Martin's reputation caused by this "non-renewal," the year before she would have been eligible for tenure, ended her career in academia and thwarted her ability to obtain any legal or comparable position that she had held during her prestigious seventeen year legal career prior to being stalked.[7]

Not only *should* a reasonable person – particularly law professors – be expected to understand that Harrison's harassment was sexual in nature and/or based on her gender, but the people she told *did, in fact,* understand it. On November 20th and 21,st *all* persons whom she told about Harrison's stalking readily recognized that the Harrison was stalking her as a woman. These people included Howard administrators,[8] colleagues,[9] staff members[10] and law enforcement officers.[11]

In her July 1, 1999 to Howard's General Counsel in response to Prof. Martin's sexual harassment and retaliation charges, Dean Bullock expressly admitted that she understood that Harrison was targeting *women* to "stalk" and "otherwise harass." (A-196)[12] In 1999, this Court held: *"it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female"* and that *Harrison "targeted women*

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[7]Dawn Martin was a law professor at Howard University from July 1996 through June 1998 and at Cleveland State University from 1994-1996. She taught Equal Employment Opportunity (EEO) law and other courses for four years. Prior to teaching, she served as: 1) a trial attorney with the U.S. Department of Justice, Civil Rights Division (Honors Program); 2) the New York State Office of the Attorney General, Civil Rights Bureau; 3) Special Assistant to Commissioner Tucker at the Equal Employment Opportunity Commission (EEOC), helping to develop national policy; and 4) Assistant General Counsel for the D.C. Police Department. Prof. Martin published articles in the area of EEO law. She graduated from Columbia University (1978) and New York University School of Law (1981).

[8] Pl's Tr. Exhibit 8B (**JA**14,407); Tr. #490 at 50:5-51:4 (**JA**12,521-12,522).

[9] Tr. 1666:2-15 (**JA**12,460); Prof. Taslitz' comment that Prof. Martin would be "*raped* and killed" by Harrison if the matter were left up to campus security (*Id.*) even found its way into Prof. Martin's nightmares. Tr. #490 at 47:1-9 (**JA**12,518)

[10]Bruner depo at 137:4-13 (**JA**6,808).

[11]Sirleaf depo at 36:22-37:3 (**JA**6,658), 137:5-140:19 (**JA**6,698), 21:22-22:5 (**JA**6,652), 99:22-102:3 (**JA**6,683).

[12]Dean Bullock's trial testimony to the contrary constitutes perjury. See Pet. at 28; Reply Brief at 8-9.

other than Plaintiff." 1999 U.S. Dist. LEXIS 19516 at *11-12, 1999 WL 1295339; 81 Fair Empl. Prac. Cas. (BNA) 964; 15 I.E.R. Cas. (BNA) 1587 (D.D.C. 1999) (A-27).

In 1999, this Court held: "There are no 'magic words' which must be chanted in order to invoke Title VII protection," *citing EEOC v. Crown Zellerbach Corp*., 720 F.2d 1008, 1012-1013 (9th Cir. 1983) and *Powell v. Las Vegas Hilton Corp*., 841 F. Supp. 1024, 1025 (D. Nev. 1992) (A-28). He held that a simple request to the employer to "do something" was enough to invoke Title VII. *Id*.[13]

In 2006, when *Martin* finally went to trial, the jury determined that: 1) Harrison's harassment of Prof. Martin was severe and pervasive, creating a hostile work environment for her; 2) Harrison's conduct was unwelcome; 3) Howard administrators knew that Prof. Martin was being harassed by Harrison in her workplace; and 4) Howard failed to take reasonable steps to end the harassment -- or eliminate the hostile work environment. Jury Verdict, A-127; Pet. 10.

Based on the jury's factual findings, Ms. Martin was entitled to judgment, as a matter of law, on her Title VII sexual harassment claim. Had she prevailed on that issue, her complaints about that harassment would necessarily constitute protected activity" under Title VII; however, the court charged the jury with the determining whether Harrison's harassment constituted was "*sexual*" harassment and whether Prof. Martin's complaints about Harrison constituted "protected activity" (*see* Pet. at 19-20; A-129).

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[13]In *Crawford*, Justice Stevens indicated that "get the hell out of my office" is a response to sexual harassment that would constitute "opposition" to it and thus, protected activity. Oral Argument at 36. In *Crawford*, both parties and *Amici Curiae*, which included the Solicitor General, agreed that no "magic words" are necessary to qualify it as "protected activity" when reporting conduct that constitutes sexual harassment. Tr. Oral Argument at 17, 29. The Supreme Court's decision in *Crawford* indicates agreement with this position.

After the trial, the question was submitted to the jury.[14] The Court denied Ms. Martin's requests for more specific jury instructions on the definition of "sexual harassment" and harassment based on sex. The jury's express request for additional instruction was also denied.

Howard repeatedly told the jury that Ms. Martin's claim must be defeated because she entitled her memos "Security Problem on Campus" rather than "Sexual Harassment;" yet, courts have long recognized that stalking is one of the most egregious forms of sexual harassment.[15] Ms. Martin requested a jury instruction that it is not necessary for a plaintiff to use the precise words "sexual harassment" to sustain her claim, but her request was refused.

Without the proper legal framework for analyzing harassment based on sex, jurors were confused into accepting Howard's improper argument that the stalker's harassment was not sexual in nature or based on sex. The D.C. Circuit Court affirmed, without discussion of the applicable law. Supreme Court *Petition for Certiorari* at 19-23.

Ms. Martin lost the case only because the trial court improperly submitted this question of law to the jury and refused to provide them with adequate instruction on Title VII definitions; however, as the Supreme Court demonstrated in *Crawford*, the question of whether specific conduct constitutes "legally protected activity" is one of law for the courts – not a question of fact for the jury. *Crawford* therefore compels reversal of the D.C. Circuit's decision and a restoration of her sexual harassment and retaliation claims.

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[14] Rule 56(d)(1) required that this factual determination remain "*established through the action*" -- not re-litigated before a jury.

[15] *See* Pet. at 21, fn. 18.

III. The Interests of Justice, to Ms. Martin and to the Public at Large, Requires that the Verdict be Vacated, in Accordance with *Crawford*

The issues presented in *Martin* are of paramount importance to the public good, particular to the safety and employment of women. The National Organization for Women (NOW), the National Association of Women Lawyers (NAWL) and various other women's advocates' groups, anti-workplace violence groups and anti-domestic violence groups collectively filed an *Amicus Curiae* Brief at the U.S. Supreme Court level. This collective *Amicus* Brief Court echoed the arguments made by NAWL, in its *Amicus* Brief, filed at the D.C. Circuit Court level. NOW is the pre-eminent collective voice of, and advocate for, women in this country. NAWL speaks on behalf of women lawyers. In the interests of the people whom they represent, their voices should be heard in this case.

Stalking in the workplace is an issue of transcendental importance to women. Seventy-eight (78%) of stalking victims are women and 87% of stalkers are men.[16] Eight percent of all women in this country are stalked.[17] 54% of female murder victims reported their stalkers to the police before they were killed by their stalkers.[18] Stalking victims may be rendered unemployable, or under-employed, due to physical injury, mental/emotional injury, or simply due to employer retaliation against stalking victims.

A television documentary about this case was recently filmed and will soon be broadcast. *See* Insider Exclusive www.insiderexclusive.tv. This documentary features esteemed national leaders, including the renowned civil rights Professor Derrick Bell,

[16]"Stalking in America: Findings from the National Violence Against Women Survey" (Washington, DC: National Institute of Justice, U.S. Department of Justice, 1998), 2, http://www.ncjrs.gov/pdffiles/169592.pdf.
[17] *Id.*
[18] The Stalking Resource Center, "Stalking Fact Sheet," www.ncvc.org/src.

Kim Gandy, the President of NOW, Roberta Wright, counsel for NOW, NAWL and other *Amici*, and a former Howard University Security Officer, who all strongly support Ms. Martin. *Martin* continues to be discussed extensively on the internet, with commentators overwhelming urging reversal in this case. *See* some links www.dvmartinlaw.com/MartinvHowardU. Ms. Martin has been interviewed on several radio shows, including American Airlines' Sky Radio as part of its series on "*Salute to Women in Leadership*." She was featured in Time Magazine, December 15, 2008 Global Edition.

This case has sparked a frenzy of support for Ms. Martin on the internet and is prompting efforts to lobby Congress to amend Title VII to expressly protect stalking victims against employer retaliation; however, it has always been the contention of Ms. Martin and the *Amici* in the case that Title VII already applies to most stalking cases and that a proper application of the current law would protect Ms. Martin and most other women who are stalked in their workplaces.

The Supreme Court has never addressed the issue of workplace stalking, *per se*; however, Justice Ginsberg characterized Title VII as "a statute that's meant to govern the workplace with all its realities." Tr. Oral Argument in *Crawford*, at 39. Workplace stalking is a terrible reality for many women. The long-established disparate impact theory holds that sex discrimination is established where a practice disproportionately adversely affects members of one sex. *See Dothard v. Rawlinson,* 433 U.S. 321, 329 (1977) (height and weight requirements) and *Oncale v. Sundower Offshore Services*, 523 U.S. 75, 118 (1998) (offensive conduct affected "*primarily* one sex).[19] The D.C. Circuit never even acknowledged the disparate impact arguments made by both Ms. Martin and

[19] Supreme Court *Petition for Certiorari*. at 11-12, 23.

Amicus NAWL – even though this Court did acknowledge Ms. Martin's adverse impact argument in its 1999 decision. 1999 U.S. Dist. LEXIS 19516 at *10 (A-27).

Martin presents the classic example of "gender profiling." Harrison's gender specific desire to make each stalking victim his "wife" necessarily required that he stalk *only women*. Prof. Martin was stalked while doing nothing more than "working while female." Pursuant to *Oncale*, where only members of one sex are subjected to a particular type of harassment, it is based on gender.[20]

If stalking victims are not protected from retaliation, they will be less likely to report the stalking to their employers, thus hindering the employer's ability to protect the stalking victim or other employees. *Martin* now sets precedent holding that a woman can be stalked in her workplace and fired for reporting it. This Court has the opportunity to reverse that holding and set precedent that furthers the Title VII purpose of eliminating sexual harassment in the workplace -- whether the harasser is an employee or a non-employee workplace stalker. The interests of justice -- to Ms. Martin and other stalking victims -- compel consideration of the *Martin* under *Crawford.* This Court's reversal would serve the interests of justice, public safety and workplace equality.

IV. *Martin* Would Supplement *Crawford* by Addressing "Protected Activity" where the Harasser is a Non-Employee in the Workplace

This Court has an early opportunity to comment upon and supplement *Crawford* to clarify the definition of "protected activity," whether the harasser is an employee or a non-employee in the workplace. In 1999, this Court set precedent for the D.C. Circuit in *Martin*, adopting the Regulation of the U.S. Equal Employment Opportunity Commission (EEOC) Regulation, 29 C.F.R. § 1604.11(e). This Court held that an employer is liable

[20] Harrison's pursuit of Prof. Martin to be his "wife," was also necessary "sexual in nature" since marriage inherently includes sex.

for the sexual harassment of an employee by a non-employee if it knew or should have known of the harassment, but failed to take reasonable steps to end it. *Martin v. Howard University,* 1999 U.S. Dist. LEXIS 19516.

Complaints about harassment by non-employees are not reported or remedied in the same manner as harassment by employees. It would be futile and illogical to file a formal sexual harassment complaint against a *non-employee*, with the EEO office of an employer that has no means by which to discipline the *non-employee*. The first step in taking "reasonable measures" to end workplace harassment by a *non-employee* is to ban the *non-employee* from the workplace. Prof. Martin reasonably entitled her memos "Security Problem on Campus" because Harrison needed to be prevented from entering the law school buildings and particularly, her office.

V. **Defendant Howard University would not be Prejudiced by Applying Crawford to Martin and Vacating the Judgment**

The parties have been fully award, of the possibility of reversal over the past two and a half years since the trial verdict. "[T]he interest of finality has less force where the litigation has not terminated but is still pending on appeal." *Id.* at 931.

> During the pendency of an appeal, the parties recognize the possibility of reversal; thus, modification of a judgment being appealed impacts not at all on finality concerns.

Parks v. U.S. Life and Credit Corp., 677 F. 2d 838, 841 (11th Cir. 1982).

There would be no absolutely prejudice, then, to Howard University, by considering the current Rule 60(b) motion while the appeal is still pending before the Supreme Court and only 16 days after the Supreme Court decided *Crawford*. Howard would have no basis for a sense of finality or security on denial of rehearing less than a month old, when the same Court issued a contrary decision nine days later and, two days

ago, the opposing party filed a motion to supplement her motion for rehearing in light of *Crawford*. On the other hand, there would be tremendous injustice, inconsistency and fundamental unfairness if the same standard applied in *Crawford* were not applied in *Martin* simply because one was decided nine days after the other. Both women are entitled to the same justice and women who are stalked at work are entitled to precedent that protects their safety and employment.

CONCLUSION

Plaintiff respectfully requests that this Court grant Plaintiff judgment, as a matter of law, set the case for a new trial on damages, and direct the jury to determine compensatory and punitive damages. In the alternative, Plaintiff requests a new trial pursuant to Fed. R. Civ. P. 60(b).

Respectfully submitted,
/s/

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