

that this case is “analogous to” Thomas v. George Washington University, 286 F. Supp. 2d 38 (D.D.C. 2003), which it describes as a “case involving federal anti-discrimination in employment law claims;” yet, Howard *once again* requires Plaintiff and the Court to waste time rebutting yet another of Howard’s false, ridiculous and *inconsistent* assertions. Howard has made similar false assertions in these proceedings -- perhaps *hundreds* of times – which, combined with Howard’s thwarting and withholding of discovery, changing its positions and factual assertions and the Dean of its Law School’s false statements to even Howard’s own attorneys, has caused this litigation to be protracted.²

II. Howard Ignores the Controlling Precedent Requiring Special Considerations Before Taxing Defendant’s Litigation Costs against Civil Rights Plaintiffs

Howard completely ignores the controlling precedent cited in Plaintiff’s *Motion Memo*, at 6-13, under the discussion entitled “*The Court should Exercise Discretion when Considering Taxing Costs to Title VII Plaintiffs.*” The case law cited therein includes citations to Supreme Court law as well as longstanding federal court precedent, including the D.C. Circuit, i.e., *Jaspers v. Alexander*, 1077 WL 15396 (D.D.C.), *Dual v. Cleland*, 79 F.R.D. 696, 697 (D.D.C. 1978) and *Allen v. D.C.*, 812 F. Supp 1239 (D.D.C. 1993). These cases hold that, before taxing Defendant’s costs against the unsuccessful civil rights Plaintiff, the court should consider whether: 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; and 7) imposing costs on the plaintiff would have a “chilling effect” on the filing of similar civil rights cases.

Howard cites *Thomas v. George Washington University*, 286 F. Supp. 2d at 40, for the holding

² There were additional delays that were not due to Howard’s conduct. For example, the parties’ cross-motions for summary judgment were pending before the Court for three years. Plaintiff’s *Motion for an Order to Show Cause Why Defendant should not be Held in Contempt of Court for its Violations of Three Orders to Produce Discovery*, was pending before the Court for more than a year before the Court did hold Howard in Contempt in 2002. Several other motions were pending before this Court for long months or even years. As discussed in Plaintiff’s *Motion Memo*, at 5-6, the Court still holds in abeyance Plaintiff’s 2001 Motion for mandatory Rule 37 sanctions against Howard for discovery violations (# 106 at 22 and 23) and Plaintiff’s February 11, 2009 *Unopposed Rule 60 Motion for a New Trial*.

that civil rights plaintiffs are not “immune” from the imposition of costs and that the imposition of costs is appropriate where it “chills” litigation by plaintiffs who lack meritorious claims. In fact, as Howard notes, Plaintiff cited *Thomas*, in her Motion Memo at 10, fn. 4, *contrasting* the present case with it. In *Thomas*, the Court found that Plaintiff’s claim so lacked merit that it actually *harmed* the interests of civil rights; accordingly, assessing costs against plaintiffs with frivolous cases properly deters such frivolous claims from ever being filed. As discussed in Plaintiff’s Motion Memo at 14-21, neither Howard nor any judge or magistrate involved in this case has never even alleged that the case was frivolously filed or filed in bad faith. To the contrary, the judges and magistrates in this case denied Howard’s repeated motions to dismiss, for summary judgment and for judgment after trial, before the verdict. See Dkt. #s 5, 123, 170, 268/288, 442, 443 and 445.

At trial, the jury found factually in Prof. Martin’s favor on the questions of whether she was harassed by a stalker, Leonard Harrison, in her workplace, to the point that it created a hostile work environment for her. Jury Verdict (Dkt. #459) Question # 1(a). The jury also determined that Howard knew about the harassment and failed to take failed to take reasonable steps to end it. Jury Verdict (Dkt. #459) Question # 1(d) and (e). Ironically, Prof. Martin’s workplace was a *law school building*, where the administrators were lawyers – who should know better. Faculty and administrative offices, as well as all law school classrooms were located in that building; accordingly, students, other professors and staff were all placed in danger by Howard’s refusal to take action to keep the stalker out of the building.

Because it could not defend the Title VII, sexual harassment/hostile work environment or retaliation claims on the facts and evidence of record, instead, Howard told the jury that “stalking” and “sexual harassment” are different. Howard argued that stalking does not constitute sexual harassment – even as here, when the delusional homeless stranger roaming through her was stalking her to make her his “wife.” Judge Kessler, substituting for Judge Hogan during the jury’s deliberations, denied the jury’s request for clarifying instruction on this issue; accordingly, a confused jury concluded that Leonard Harrison’s stalking of Prof. Martin – though severe and pervasive -- did not constitute “sexual” harassment or harassment based on sex/gender. Jury Verdict (Dkt. #459) Question # 1(a). The sole

reason that Plaintiff lost her Title VII claim was due to the jury's determination of an issue that this Court addressed, as a matter of law, in its 1999 decision. See Plaintiff's Motion Memo at 4-5, 14-19. Plaintiff had solid ground upon which to file this lawsuit, both as a matter of fact and law. See Plaintiff's Motion Memo at 14-21. She should not be punished for filing it or for bringing the important issue of workplace stalking of women to the forefront, where, hopefully, they can still be resolved in a manner that will protect women in the future. See Plaintiff's Motion Memo at 21-33.

III. Howard Falsely Claims that Plaintiff did not Cite Instances that Howard's Litigation Conduct was Vexatious

Howard falsely claims that Plaintiff did not cite instances that Howard's litigation conduct was vexatious. Plaintiff clearly cited the record and provided exhibits to demonstrate some of Howard's most egregious misconduct in this litigation, at 36-44, under the heading "*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,*" and at 35-44, "*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,*" at 35-36 "*Howard Violated Rules 11 and 8 by Failing to Answer the Complaint, in Good Faith,*" and at 39-40, discussing Appointment Committee member Prof. Nolan's spoliation of material evidence – *by her own admission.*

Plaintiff has raised these issues repeatedly, both at the trial level and on appeal. Howard has never attempted to explain or justify this misconduct; it simply continues to escape any punishment for it. Plaintiff's Motion Memo, at 12-13, discussed *Remington Products, Inc. v. North American Philips, Corp.*, 763 F. Supp. 683, 687-688 (D. Conn. 1991), in which 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." Howard's misconduct alone merits the denial of costs.

IV. The Docket Reflects that Howard, not Plaintiff, Created Unnecessary Litigation

Contrary to Howard's claim that the docket in this case demonstrates that "Howard's actions

throughout this matter have been necessitated by Plaintiff and her aggressive approach to this litigation, the docket, in fact, reflects that Howard thwarted discovery for three years and did not produce documents that it was ordered to produce – no less than three times – until after it was held in Contempt of Court. The docket also reflects that Howard failed to file a proper Answer to the Complaint, bombarded Plaintiff with numerous motions to dismiss and for summary judgment and other filings filled with misrepresentations of fact, in violation of Fed. R. 11, clearly hoping to “paper” Plaintiff into abandoning this case, with her limited resources. The docket also reflects that Howard further “over-litigated” this case by hiring four outside law firms and currently having no less than ten (10) counsel of record – 8 attorneys from the outside law firm of Venable, P.C., one in house counsel, LeRoy Jenkins, and a separate law firm, with Frederick Cooke as counsel of record, for Alice Gresham Bullock (paid by Howard). The University is *wasting alumni* contributions, federal funding and any other funding intended to be used for the good of students to enrich wealthy law firms that are *renowned* for defending other wealthy businesses from civil rights challenges, particularly employment discrimination cases.

Plaintiff is litigating this case *alone*. **Why does Howard need 10 attorneys of record to oppose her-- alone?** The fact that it has spent “staggering litigation costs” is a testament to Howard’s own financial mismanagement and vindictive pattern of handling its personnel matters. It is no wonder, then, that the former President of Howard University, Patrick Swygert, was removed from office by the Board for financial and academic mismanagement of the University. Plaintiff had hoped that, once the current President of Howard, Sidney A. Ribeau, who took office in 2008, that common sense and decency might take hold and that Howard would settle this case, which was then on appeal. At minimum, she hoped that University funds would no longer be approved for the battalion of outside attorneys retained for the sole purpose of taking food from her table and the roof over her head.

V. Howard Falsely Claims that Plaintiff Made “Unsubstantiated Assertions of Financial Hardship

In her Motion Memo, at 34-35, Plaintiff stated that Howard University has all of Ms. Martin’s tax returns through 2005, pursuant to discovery in this case. These documents were produced in discovery and were provided as trial exhibits, although they were not presented at trial because the trial was

bifurcated into liability and damages stages. Howard has not denied that it has these tax returns – nor has it disputed Plaintiff’s assertions that these tax returns reflect that her taxable income has been as low as \$25,000 in a year or that she has been struggling to pay for basic living expenses and to maintain her solo civil rights practice. Plaintiff also referred to trial testimony regarding the financial hardship that she has suffered since 1998, as a result of the destruction of her teaching career and the stigma attached to it. The Court was also provided with these exhibits prior to trial. See Trial Exhibit List, Dkt. #426, items #s 12-17. These tax returns reflect that Plaintiff’s adjusted gross income, from 1999 through 2005, was as follows: 1) \$42,545.00 in 1999; 2) \$27,500.00 in 2000; 3) \$937.00 in 2001; 4) \$12,318.00 in 2002; 5) \$3,968.00 in 2003; 6) \$30,823.00 in 2004; 7) \$15,977.00 in 2005 (**Ex. A**); 8) \$19,902.00 in 2006 (**Ex. B**); 9) \$65,317.00 in 2007 (**Ex. C**); and 10) \$21,819.00 in 2008 (**Ex. D**). Since costs should be assessed based on the current financial state of the losing party at the time costs are taxed, Plaintiff’s financial status as of April of 2006 should be controlling, since that is when the verdict was issued (at which time Plaintiff provided tax returns through 2005); however, Plaintiff has updates this information by providing tax transcripts from 2005 through 2008 (Plaintiff has not yet filed a return for 2009, which is not due until April 15, 2010).³

In addition, the stress of the financial hardship, the uncertainty of income coming from her small, civil rights practice, which is her sole source of support, has caused Plaintiff health problems. In her January 26, 2010 *Motion for and Enlargement of Time* to file this Reply, Plaintiff explained that she was under the care of a cardiologist to address some of these problems. On February 2, 2010, Plaintiff was unexpectedly hospitalized by her cardiologist,⁴ after a scheduled appointment, due to dangerously high blood pressure, chest pains, dizziness and other incapacitating symptoms, which were not responding to medication. Over a period of two days, Plaintiff received both oral and intravenous medication to reduce

³ Although the Rules of this Court permit a party to file a Reply that is up to 25 pages long, with no limit on exhibits, Judge Hogan, *sua sponte* and without explanation, imposed a limit of 16 pages on Plaintiff, *including exhibits* (Dkt. #564); accordingly, Plaintiff had to limit the number of pages in her exhibits to include only the page of the first page of her tax returns, which states her ultimate “adjusted gross income,” for each of these three years. Howard was not similarly subject to a page limit.

⁴ See **Ex. E**, hospital release form.

her blood pressure and heart rate. She also underwent tests to determine the state of her heart and to determine appropriate medication. Plaintiff continues under the care of the cardiologist and new medication, but the additional cost of medical care, recent medical tests taken, potential additional tests, medication and the unpredictability of Plaintiff's ability to work the hours she has been working for the past 11 years, are adding to the stress levels.

Plaintiff does not have \$10,000 to give to Howard. Because she has no steady income or salary and no assets, she cannot predict what she will make or when it will come to her; accordingly, when she does prevail in a case, she must pay creditors of her law firm as well as personal creditors and use the money for living expenses until she wins another case. The health problems, which have been building for these 11 years, as a result of the stressful situation Howard has created for her, requires additional money for medical expenses, as well as time to recuperate, during which she cannot work. Howard has been aware, from various filings in this case and from evidence presented at trial, its continued attacks on Plaintiff are damaging her health; yet, it continues to pursue every possible avenue to destroy her and her family. The interests of justice compel the reversal of the clerk's imposition of costs on Plaintiff.

VI. Howard's Reply to Plaintiff's Opposition to Defendant's Motion to Lift the Stay on Taxing Costs should be Stricken from the Record and not Considered as Part of its Opposition to this Motion since it was Procedurally Improper

On page 3 of its *Opposition*, Howard refers this Court to, and incorporates by reference, its *Reply to Plaintiff's Opposition to Defendant's Motion to Lift the Stay on Taxing Costs* (Dkt. # 561); accordingly, Plaintiff incorporates, by reference, her February 18, 2010 *Motion to Strike Howard's Reply to Plaintiff's Opposition to Defendant's Motion to Lift the Stay on Taxing Costs*. As discussed Plaintiff's *Reply to Plaintiff's Opposition to Defendant's Motion to Lift the Stay on Taxing Costs*, Howard's *Reply* should be stricken, or at least not considered by this Court. It was improperly filed as a *Reply* to one motion, when it was, in effect, an untimely *Opposition* to two long-pending motions. Howard's *Reply* raised new issues not raised in its own *Motion to Lift the Stay* or in Plaintiff's *Opposition* to it.

Howard's procedurally improper *Reply* deprived Plaintiff of an opportunity to file a *Reply*, as she would have been permitted to do had Howard timely and properly filed its opposition as an *Opposition* to

her February 11, 2009 *Rule 60(B) 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). Instead, Howard used a procedurally improper *Reply* as a means to respond to motions that had been pending for one year and seven years, respectively.

VII. Howard Falsely Claims that MJ Facciola Decided Plaintiff's Motion for Rule 37 Sanctions

In its improper *Reply to Plaintiff's Opposition to Defendant's Motion to Lift the Stay on Taxing Costs* at 3 – incorporated, by reference, into its *Opposition to Plaintiff's Motion to Retax Costs*, Howard *falsely* states that MJ Facciola decided not to impose sanctions on Howard for these discovery violations – another Rule 11 violation.⁵ Howard cites no decision of this Court – by any judge or magistrate – that states that the Court will not impose Rule 37 sanctions on Howard for its discovery violations or otherwise decided this motion expressly placed in abeyance. As discussed in Plaintiff's Motion, at 5-6, 41-44, Plaintiff's Motion for Rule 37 sanctions against Howard was ripe as of May 30, 2001 on May 30, 2001. MJ Facciola clearly *did not* make a determination that Rule 37 sanctions were not appropriate, but rather, simply decided *not to decide it* (Dkt. #106, page 22 and 23):

Plaintiffs renewed request for sanctions is held in abeyance pending further order by this court at the conclusion of discovery.

Similarly, on page 24, the Opinion reads:

ORDERED that plaintiffs renewed request for sanctions is held in abeyance.

In her Motion Memo, at 5-6, fn. 1, Plaintiff cites each of her motions – filed over a period of nine years -- in which she asks the Court to take this issue out of abeyance and decide it. Rather than award the undisputed amount of \$364,120.00 spent in attorney hours working to obtain discovery improperly withheld, falsified or destroyed by Howard, the Court continues to hold the motion in abeyance. MJ Facciola never explained why he did not decide this motion. A court may not close a case while leaving a

⁵ Plaintiff is well aware that the “safe harbor” provision of Rule 11 requires notice to the offending party and a 21 day period during which the offending party can withdraw the offending statements; accordingly, this motion is not motion seeking Rule 11 sanctions. In any case, since the Defendant's misconduct in these proceedings is a factor in whether it is entitled to costs, it is important to point out Defendant's continued, flagrant misrepresentations of the record and its blatant violations of the Court's Rules. The Court may, however, *sua sponte*, assess Rule 11 sanctions against Defendant.

motion for sanctions pending. *Gary v. The Braddock Cemetery*, 517 F.3d 195, 202 (3rd Cir. 2008); *Aardvark Child Care and Learning Center, Inc. v. Township of Concord*, 288 Fed. Appx. 16 (3rd Cir. 2008); yet, this Court *did* close this case, with Plaintiff’s Rule 37 motion for sanctions still pending -- and imposed costs upon Plaintiff without awarding her the *undisputed* compensation for attorney time due, mandated by Rule 37. There is certainly no justice in this scenario.

“This Court has previously observed that ‘the language of the Rule itself is mandatory, dictating that the Court must award expenses upon granting a motion to compel disclosure unless one of the specified bases for refusing to make such an award is found to exist.’ ” *DL v. District of Columbia*, 251 F.R.D. 38, 49 (D.D.C.2008), *citing* cases. In its improper *Reply* at 3, Howard attempts to mislead the Court by implying that it is wholly within the discretion of the judge as to whether the moving party is compensated for the legal work that the offending party forced him/her to perform to obtain the withheld discovery. Rule 37 does not grant such unlimited discretion. Rule 37(a)(5)(A) actually reads:

(5) *Payment of Expenses; Protective Orders.*

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted — or if the disclosure or requested discovery is provided after the motion was filed — the court **must**, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees. But the court **must not** order this payment if: (*Emphasis added*)

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party’s nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

The use of the word “*must*” makes it clear that the court is being mandated to order the offending party to compensate the movant unless one of the enumerated circumstances is present – in which case the court “*must not*” award it. The court’s discretion, then, is not as broad as Howard claims, with respect to the issue of fees.⁶ Howard has never cited any conduct by Plaintiff -- or any other reason -- that would

⁶ A Court does have broad discretion to impose more *severe* penalties on the party violating discovery rules, such as a default judgment, strike pleadings, exclude evidence, make factual determinations against

make it “unjust” to pay her for the legal work that it forced her to perform due to its totally unjustified withholding of discovery, in the face of three orders to produce it. If this Court finally takes this motion out of abeyance and orders Howard to pay to Plaintiff the mandatory \$364,120.00 she is due, clearly, she will not owe Howard \$10,000 for is costs. If the Court determines that Plaintiff should pay Howard’s costs, it should be deducted from the \$364,120.00 that Howard owes her.

VIII. Plaintiff’s Pending February 2, 2009 Rule 60(B) Motion for a New Trial is Unopposed

Plaintiff again refers the Court to, and incorporates, by reference, her February 18, 2010 *Motion to Strike Defendant’s Procedurally Improper Reply to Plaintiff’s Opposition to Defendant’s Motion to Lift Stay on Taxation of Costs*. Howard had every opportunity to timely respond to Plaintiff’s February 11, 2009 *Rule 60(B) 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), but failed to do so. The motion is therefore, officially unopposed. Howard should not be permitted to ignore a motion duly docketed and filed in this Court. If any of Howard’s *ten (10)*⁷ *current attorneys of record* believed that Plaintiff’s motion was improperly filed or docketed, it had every opportunity to move to strike it from the record. Howard does not, however, have a right to ignore it for a year and then “sneaking” an egregiously untimely “*Opposition*” into “*Reply*,” or final filing in a different motion.

IX. Equity and Justice Compel that Plaintiff not be Ordered to Pay Howard’s Costs

Howard – purporting to represent the vanguard of the civil rights movement -- set *anti-civil rights precedent* in this jurisdiction holding that a woman can be stalked in her workplace with no legal basis to request protection and that she can even be fired if she requests such protection. The chilling effect of this holding is particularly frightening since it will deter women who need their jobs from reporting

the offending party, adverse inferences and presumptions – in addition to the mandatory payment of attorneys’ fees. *See Bolger v. D.C.*, 608 F. Supp. 2d 10 (D.D.C. 2009); *Moore v. Chertoff*, 255 FRD 10, 32-33 (D.D.C. 2008).

⁷ Howard had nine (9) attorneys of record as of February 11, 2009, but added a new associate to the “team” on this case, in recent months. These 10 attorneys include: 1) 8 attorneys, including several partners, at Venable, LP; 2) 1 in-house counsel from Howard’s Office of General Counsel, LeRoy Jenkins; and 3) Frederick Cooke, who represents Alice Gresham Bullock, in her individual capacity, though he is paid by Howard.

stalkers. The result places the stalking victim in danger, as well as her co-workers. Stories of stalkers shooting their victims in the workplace are commonplace.⁸ The holding in this case makes it clear that a woman must choose between her job and her safety if she is stalked in her workplace -- because *the courts will not protect her either*. It was not enough that Howard set this *anti-woman, anti-civil rights precedent*. It was not enough for Howard to destroy the previously glowing legal career of a dedicated civil rights lawyer and excellent professor, loved by her students.⁹ It was not enough that Howard destroyed the livelihood of a single mother and deprived her and her child of the peace, stability, and financial resources that this mother had previously dedicated to the support of her daughter. It is not enough that Howard left Prof. Martin struggling, for the last 11 years, to meet living expenses and to maintain her own civil rights practice. It is not enough that she had to work in fear at Howard because its administrators refused to take any action to keep a known, criminal stalker out of the law school building; instead, *Howard removed the stalked professor from the law school*. Now, *Howard has now come back, like a shark, on a "feeding frenzy," circling to devour whatever is left of Plaintiff's career, health and ability to support herself*. Plaintiff implores this Court to administer some small semblance of justice in this case and vacate the clerk's order taxing Howard's costs against her.

CONCLUSION

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

Respectfully submitted,

/s/

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⁸ See, i.e., <http://www.aolnews.com/crime/article/alissa-blanton-killed-by-stalker-after-judge-denied-protection-order/19356645?ncid=webmaild11>.

⁹ See student letters (Dkt. # 474, Ex. W) or http://www.dvmartinlaw.com/files/Howard_2002_10-9_MSJ_Ex._VV_Collective_student_letters_protesting_Martin_s_non-renewal.pdf.