No. 11-484

IN THE
SUPREME COURT OF THE UNITED STATES

DAWN V. MARTIN, ESQUIRE,
Petitioner,

v.

HOWARD UNIVERSITY LAW SCHOOL,
HOWARD UNIVERSITY,
Respondents.

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

AMICUS CURIAE BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN FOUNDATION (NOW FOUNDATION), IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The National Organization for Women Foundation ("NOW Foundation") files this motion for leave to file A*micus Curiae* Brief in support of Dawn V. Martin's Petition for Certiorari. NOW Foundation has an interest in protecting the rights of stalking victims, who are predominately women,[1] and in ensuring that the employers of these victims fulfill their obligations to provide a safe, productive work environment that is free from threats of stalking and retaliation against stalking victims.

Legal Momentum, *the Women's Legal Defense and Education Fund*, has published at least two periodicals addressing Title VII's application to employment discrimination based on stalking, such as the one in *Martin*. Legal Momentum expressly advises that a woman should invoke Title VII if she is discriminated against, or retaliated against, for being a victim of stalking. See *Employment Discrimination against Abused Women*[2] and *Employment Rights for Victims of Domestic or Sexual Violence*.[3] It is difficult to imagine a more compelling case than *Martin* to apply Title VII as *Legal Momentum* advises.

In *Martin*, the stalker was a homeless stranger who was permitted to roam through the Law School

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[1] See *Workplace Stalking*, *U.S. Department of Justice*, 2002, www.ojp.usdoj.gov/bjs/pub/pdf/vw99,pdf. www.doc.sc.gov/VictimServices/WorkplaceStalking.doc.

[2]http://www.sikhcoalition.org/documents/EmploymentDiscriminationAgainstAbusedWomen.pdf.

[3]http://action.legalmomentum.org/site/DocServer/Employment_Rights.May.08.pdf?docID=2721.

building at Howard University. The stalker only became aware of Prof. Martin because of her status as a Law Professor at Howard. She was stalked and lost her job for doing nothing more than "working while female." If Prof. Martin, a professor teaching equal employment law, with expertise in Title VII, could be targeted for stalking and lose her job as a law professor for reporting it, then no woman is safe in her workplace -- from stalking or for retaliation for reporting it.

NOW Foundation has an interest in ensuring that sexual harassment and/or retaliation lawsuits under Title VII are analyzed using the same due process and analysis used by this Court in *Crawford* v. *Metropolitan Government of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009). Since the material facts regarding the stalking and Prof. Martin's reporting of it are undisputed, the jury's verdict in *Martin* must be vacated. This Court's 2009 decision in *Crawford* demonstrates that it is up to the courts, not a jury, to determine whether specific behavior is protected by Title VII. The question of whether Ms. Martin's conduct constituted "protected activity" must be decided, as a matter of law, as it was in *Crawford*. *Crawford* also clarifies that sexual harassment may be reported in several different ways, depending on the circumstances, and constitute “protected activity” under Title VII.

The A*micus* Brief illustrates an employer’s legal responsibility to maintain a workplace free from stalkers and to refrain from punishing the victims of stalkers with termination or other adverse employment actions. Absent Court rulings and/or

legislation clarifying these responsibilities, stalking victims will have little to no recourse but to endure stalking and blatant retaliation for doing nothing more than "working while female."

As the trial court actually held, in 1999, the stalking of Prof. Martin in her workplace constituted sexual harassment, or harassment on the basis of sex. Prof. Martin's requests that Howard's Campus Security follow its own procedures to ban the stalker from the Law School building therefore constituted opposition to this illegal conduct; however, without explanation, in 2006, at the end of the trial, the same court submitted the question of whether Prof. Martin's activity was "protected" to a jury. If this question is left to a jury, as it was in *Martin*, the plaintiff will be deprived of the legal doctrines developed by this Court to establish illegal discrimination, such as the disparate impact theory, the "sex plus" theory, the absence of a requirement that the plaintiff use the "magic words" "sexual harassment" to invoke Title VII and holdings that a plaintiff need not allege physical "touching" to establish a sexual harassment case. These plaintiffs will also be deprived of their due process rights to make these legal arguments, as well as their rights to a legal analysis by a judge on these legal issues.

NOW Foundation welcomes this opportunity to clarify why courts, not juries, must decide whether women who complain about stalking in their workplaces are protected against employer retaliation for complaining about stalking. This is not an issue that should be *sometimes* decided by a Court and *sometimes* decided by a jury. Due process requires that each plaintiff be provided an

opportunity to make all applicable legal arguments established the Courts. Where the process is not consistently applied, with equal opportunities for each plaintiff to make these arguments, plaintiffs are being deprived of due process which affects their substantive rights.

NOW Foundation has an interest in promoting safety of women in the workplace and in eliminating gender-based discrimination. Although NOW Foundation supports Ms. Martin's *Petition* on behalf of women, and in the interests of women, this case affects all employment discrimination retaliation cases, including Title VII, the Age Discrimination in Employment (ADEA) and the Americans with Disabilities Act (ADA). The case law regarding retaliation is often interchangeable among these statutes. The precedent set by this case therefore affects retaliation cases based on complaints about discrimination based on race, color, national origin, religion, age and disability.

Respectfully submitted,

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THE *AMICUS CURIAE*

The National Organization for Women Foundation ("NOW Foundation")[1] is a 501(c) (3) organization devoted to furthering women's rights through education and litigation. The NOW Foundation is affiliated with the *National Organization for Women,* the largest women's rights grassroots organization in the United States, with hundreds of thousands of members and supporters and hundreds of chapters in all states and the District of Columbia.

INTRODUCTION

The following facts of record are undisputed.

1) Prof. Dawn Martin was stalked in her workplace, *Howard University Law School*, by Leonard Harrison, a delusional serial campus stalker, with a history of violence.

2) Harrison pursued Prof. Martin to be his "wife," based on his assertion that she bore professional and physical similarities to a *fictional* character in a book written by renowned Prof. Derrick Bell.

3) Prof. Martin reported Harrison's conduct to the law school administration, campus security and the D.C. Metropolitan Police Department, both orally and in writing, asking for protection from Harrison in the Law School.

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[1] As required by Rule 37.6 of this Court, counsel for now submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than NOW Foundation, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief. Petitioner Dawn V. Martin consents to the filing of this Brief. Howard University opposes NOW Foundation's participation.

4) Law School Dean Bullock assured Prof. Martin in writing that she was discussing the matter with the Director of Campus Security, Lawrence Dawson; however, Mr. Dawson testified, and Dean Bullock admitted, at trial, that she never actually discussed the stalking or anything about Prof. Martin with him.

5) Howard University failed to follow its own procedures for addressing stalking on campus, so that the stalker freely reached Prof. Martin's office.

6) Less than a month after Prof. Martin reported the harassment, Howard's administration decided not to renew her teaching contract.

7) Howard continued to reject Prof. Martin from any position, permanent or visiting, for the remaining six months of her tenure at Howard, although there were three vacant positions for which Prof. Martin was well qualified.

8) Dean Bullock concealed vacancies from the Appointments Committee, even when a member of that committee specifically asked whether there was any vacancy for which Prof. Martin could be considered.

9) On April 18, 2006, the jury found, as Prof. Martin alleged, that Harrison's actions *did* create a "hostile work environment" for her. The jury further concluded that Howard failed to take reasonable steps to end it. Despite these findings, Prof. Martin was denied recovery because the jury concluded that Harrison's harassment was not *"sexual"* in nature nor based on Prof. Martin's gender, so her complaints were not "protected activity" within the meaning of Title VII of the Civil Rights Act of 1964, *et seq*. So even if Howard retaliated against her for

reporting the stalking, Prof. Martin was deprived of her cause of action.

10) Ms. Martin filed post-trial motions seeking to vacate the judgment. The trial court issued a judgment in favor of Howard on August 21, 2006, without an accompanying opinion.

11) On September 11, 2006, Ms. Martin appealed the August 21, 2006 judgment to the U.S. Court of Appeals for the D.C. Circuit.

12) On October 4, 2006, the trial court denied both of parties' post trial motions, with a published decision. Ms. Martin amended her Notice of Appeal to include the October 4, 2006 decision.

13) The *National Association of Women Lawyers* (*NAWL*) and additional *Amici* filed an *Amicus* Brief in support of Ms. Martin's appeal; however, on March 31, 2008, the D.C. Circuit affirmed, in an unpublished decision, *per curiam*, failing to address most of the arguments made by Ms. Martin or the *Amici*.

14) On August 14, 2008, Ms. Martin petitioned this Court for *Certiorari*, NOW Foundation, NAWL and additional *Amici* filed a *Motion to Late File* an Amicus Brief in support of Ms. Martin's Petition, with the Brief attached; however, the Court denied NOW Foundation's motion and did not consider the *Amicus* Brief. This Court denied Ms. Martin's Petition on November 17, 2008. On December 12, 2008, Ms. Martin filed a *Petition for Rehearing*, asking that this Court reconsider her Petition after it decided *Crawford* v. *Metropolitan Government of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009), which was then pending. Ms. Martin explained that the cases addressed similar legal

issues and that the decision in *Crawford* would be controlling in *Martin*. Her Petition was denied on January 12, 2009.

15) On January 26, 2009 -- only 14 days after it denied Ms. Martin's *Petition*, this Court decided *Crawford*.

16) On February 10, 2009, Ms. Martin filed a Motion to Enlarge the Time to Supplement her *Petition for Rehearing or to File a Second Petition for Rehearing in Light of Crawford*.

17) On February 11, 2009, Ms. Martin also filed a Rule 60(b) *Motion for Relief from Judgment* in the trial court, prior to a final ruling from this Court and while several other collateral issues were still pending at the trial court level.[2]

18) In its October 8, 2010 opinion (at 4-5), the trial court denied Ms. Martin's Rule 60(b) *Motion for Relief from Judgment*, expressly holding:

> Plaintiff miscasts *Crawford*. The issue in *Crawford* was whether protection afforded by

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[2] The trial court had ordered Ms. Martin to pay Howard University's costs, totaling nearly $10,000. Ms. Martin had filed a *Motion to Retax, or to Vacate the Order Assessing Howard's Litigation Costs against her*, which the trial court deferred deciding until after the completion of the appellate process. In addition, the trial court continued to hold in abeyance Ms. Martin's Motion for Mandatory Rule 37 Sanctions, which the trial court had been holding in abeyance since 2003, after issuing several orders compelling Howard to produce withheld discovery and holding Howard in Contempt of Court for violating those orders and delaying the litigation. The Court refused to vacate the order, but when Ms. Martin filed her appeal, including this issue, Howard withdrew its Petition for fees; this issue is therefore moot and was withdrawn on appeal.

> Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq. (2000 ed. and Supp. V), which forbids retaliation by employers against employees who report workplace race or gender discrimination, "extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation." Id. at 849. While the Supreme Court held that it did, such activity is not at issue here. Furthermore, at no time in Crawford does the Supreme Court suggest that the question of whether an activity constitutes a "protected activity" under Title VII "is the province of the court and not a jury." In *Crawford* the Supreme Court reversed the Sixth Circuit's decision upholding a grant of summary judgment by the district court. As such, a jury did not hear the matter, and the court's treatment of alleged activities as matters of fact or law was not an issue on certiorari. Thus, *Crawford* does not control this case. (Footnote omitted.)

17) On November 1, 2010, Ms. Martin appealed the October 8, 2010 decision to the U.S. Court of Appeals for the D.C. Circuit, arguing that the trial court had misinterpreted *Crawford*.

18) Howard University filed a Motion to Dismiss the Appeal. Ms. Martin filed an *Opposition to Howard's Motion to Dismiss and a Cross Motion for Summary Reversal*. Howard did not oppose Ms. Martin's Motion for Summary Reversal. On May 9, 2011, the D.C. Circuit denied Howard's *Motion to*

Dismiss the Appeal, but, *sua sponte*, summarily affirmed the trial court's October 8, 2010 decision. At the same time, it denied Ms. Martin's *unopposed Motion for Summary Reversal*.

19) On June 7, 2011, Ms. Martin filed a *Petition for Rehearing En Banc*. On July 20, 2011, the D.C. Circuit denied Ms. Martin's *Petition*, *per curiam*, since no member of the Court voted on it.

20) Ms. Martin timely filed her *Petition for Certiorari*, asking this Court to review the lower court's interpretation of *Crawford* in order to afford women in the D.C. Circuit the same procedural due process and substantive analysis that was applied in *Crawford*.

The current precedent in the D.C. Circuit, set by *Martin*, leaves women with no remedy for being stalked in the workplace or for being terminated in retaliation for complaining about it.[3] For this reason, this Brief concurs with and supports Prof. Martin's argument that she is entitled to judgment, on her sexual harassment and retaliation claims, as a matter of law, based on the undisputed facts.

The arguments below detail the impact of a decision adverse to Prof. Martin on the broader issues of sexual harassment and retaliation confronting women in their workplaces and campuses.

[3] Although Prof. Martin was stalked by a stranger, this case also affects victims of domestic violence. Domestic violence does not necessarily stop at the front door, but often overflows into the workplace.

SUMMARY OF ARGUMENT

Courts are responsible for deciding questions of law. *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007). *Id.* Juries are responsible for deciding questions of fact. *Id.* In *Crawford* v. *Metropolitan Government of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009), this Court properly held, as a matter of law, that Ms. Crawford had engaged in "protected activity," within the meaning of Title VII, when she reported "inappropriate behavior" by her supervisor during an internal investigation by her employer. This Court further held that the manner in which Ms. Crawford complained about the sexual harassment was protected by Title VII. In *Martin*, however, the trial judge improperly submitted both of these legal questions to a jury, in violation of her right to due process. This violation was the sole reason that Ms. Martin lost her sexual harassment case at trial. All women are entitled to the same, consistent judicial procedures and burdens when filing sexual harassment and retaliation claims.

The legal doctrines and precedent that should be applied in *Martin* by a Court compel the conclusion that she engaged in "protected activity" because she reported stalking that constituted "sexual harassment," or "harassment on the basis of sex," in violation of Title VII.

Leonard Harrison's stalking of Prof. Martin constituted harassment based on sex/gender, thereby invoking Title VII. Title VII prohibits harassment based on sex or gender. *Oncale v. Sundowner Offshore Services,* 523 U.S. 75 (1998).

Stalking has been recognized as one of the most egregious forms of sexual harassment. *Turnbull v. Topeka State Hospital,* 255 F.3d 1238 (10th Cir. 2001). At least eighty percent of stalking victims are female.[4] Even when conduct might affect both men and women, the conduct may constitute harassment on the basis of sex if it disproportionately affects women. *Turnbull*, 255 F.3d at 1244; *see also Crist v. Focus Homes*, 122 F.3d 1107, 1111 (8th Cir. 1997). The disparate impact analysis should therefore be applied in Title VII cases to conclude that, stalking, as a matter of law, is based on sex.

Employers are obligated to understand their duties under Title VII. If a supervisor can simply claim that he or she did not realize that the conduct complained of constituted sexual harassment, it will be in the employers' interests *not* to educate its managers regarding conduct that constitutes sexual harassment so they can all claim "ignorance" when a woman files a sexual harassment charge.

A harasser's use of gender-specific criteria to select the target of his stalking establishes that the harassment is "based on sex." By analogy to "sex-plus discrimination" cases, this kind of gender profiling violates Title VII. *Abraham v. Graphic Arts International Union,* 212 U.S. App. D.C. 412, 660 F. 2d 811 (D.C. Cir 1981). The use of a gender- specific character to locate a victim is based on sex.

Sexual assault or express solicitation of sexual acts need not be shown to establish hostile environment sexual harassment. *Ellison v. Brady,* 924 F.2d 872, 880 (9th Cir. 1991).

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[4] *Id.*

Harrison's one-time confrontation with Prof. Bell cannot be considered "stalking," pursuant to the operative D.C. anti-Stalking statute, which requires "repeated" harassment; moreover, since Harrison only confronted Prof. Bell to learn the name of another woman whom he intended to stalk, this confrontation constitutes additional evidence of Harrison's gender based stalking of Prof. Martin.

ARGUMENT

I. Under *Crawford*, a Court, not a Jury, Must Decide whether Prof. Martin's Complaints of Stalking in her in her Workplace Constituted "Protected Activity" as a Matter of Law

In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009), this Court held, as a matter of law, that Ms. Crawford had engaged in "protected activity," within the meaning of Title VII, when she reported "inappropriate behavior" by her supervisor during an internal investigation by her employer. Although there is no indication that Ms. Crawford ever used the words "sexual harassment," this Court found that the supervisor's conduct constituted "sexual harassment," within the meaning of Title VII. This Court further held that the manner in which Ms. Crawford complained about the sexual harassment was protected by Title VII.

In *Crawford*, this Court applied the principle that Courts are responsible for deciding questions of law. *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007). *Id.* Juries are responsible for deciding

questions of fact. *Id*. In *Martin*, as in *Crawford*, the manner in which the women reported the offending conduct is undisputed and well-documented. In *Crawford*, this Court decided that the supervisor's conduct, as reported, constituted "sexual harassment" and whether the manner in which it was reported met the Title VII's definition of "protected activity." In *Martin*, however, the trial judge improperly submitted both of these questions to a jury that was ill-equipped to apply the case law and legal analyses long-established by this Court. Both the trial court and the D.C. Circuit failed to cite any authority justifying the submitting these questions to the jury. Similarly, Howard has not cited any such authority.

The trial court's submission of these determinative legal questions to the jury violated Ms. Martin's Fifth and Fourteenth Amendment rights to due process and equal protection; moreover, it was not "harmless error." The trial court's refusal to decide these questions and instead, to submit them to jurors who were not familiar with legal theories in employment discrimination cases,[5] meant the difference between winning and losing for Ms. Martin.

As discussed below, the legal doctrines and precedent that should be applied in *Martin* by a Court compel the conclusion that she engaged in "protected activity" because she reported stalking that constituted "sexual harassment," or

[5] The jury's notes demonstrate confusion and its lack of understanding of the legal definition of "sexual harassment" under Title VII. The jury asked for additional guidance, but the trial court provided none.

"harassment on the basis of sex," in violation of Title VII.

All women are entitled to the same, consistent judicial procedures and burdens when filing sexual harassment and retaliation claims. The difficulties of litigating and winning a sexual harassment and retaliation case, particularly where the plaintiff has lost her job and her income, and is, additionally, a victim of stalking or domestic violence, are great enough even where the judicial process proceeds according to the rules; however, where a plaintiff is blindsided, at the end of trial, by the court's submission of a legal issue that requires knowledge of legal precedent and legal analysis, to a jury of laypersons, with no legal argument or case law before them, justice, fairness and the public interest compel review and reversal.

II. Harrison's Stalking of Prof. Martin Constituted Harassment Based on Sex/Gender, Thereby Invoking Title VII

A. Stalking Has Been Recognized as a Severe Form of Sexual Harassment against Women

Courts have long recognized that stalking is one of the most egregious forms of sexual harassment. *Crowley v. L.L. Bean,* 303 F.3d 387, 396, 401-403 (D. Me. 2002) (plaintiff identified the harasser's conduct as "stalking" and had therefore met her burden of demonstrating that she perceived the harasser to have created a "hostile or abusive environment"); *Frazier v. Delco Electronics Corporation,* 263 F.3d

663, 668 (7th Cir. 2001) (stalking recognized as creating a hostile work environment); *Whitmore v. O'Connor Management, Inc.*, 156 F.3d 796, 798 (8th Cir. 1998) (sexual harassment was so severe that co-worker would "almost call it stalking"); *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1108 (8th Cir. 1998) (plaintiff felt that her co-worker "was harassing her, actually, stalking her"); *Angeles-Sanchez v. Alvarado*, 1993 U.S. App. LEXIS 10509 (1st Cir. 1993) (sexual harassment/hostile work environment included "stalking"); *Spina v. Forest Preserve District of Cook County*, 207 F. Supp. 2d 764, 772 (D. Ill. 2002) ("stalking" listed as one of the more severe allegations of sexual harassment); *Ramirez v. New York Presbyterian Hospital*, 129 F. Supp. 2d 676, 678 (S.D.N.Y. 2001) (plaintiff used "stalking" to describe acts of sexual harassment/hostile work environment); *Dolman v. Willamette University*, 2001 U.S. Dist. LEXIS 7772 (D. Or. 2001) (professor stalked by a former student was sexually harassed); *Chontos v. Rhea and Indiana University*, 29 F. Supp. 2d 931, 937 (N. Dist. Ind. 1998)[6] ("stalking" was one of the most "disturbing" acts of sexual harassment).

Women's advocacy organizations have long recognized that Title VII is appropriately invoked where a victim of stalking, domestic violence or sexual assault is discriminated against by her employer because of her status as a victim. *Legal Momentum*, *the Women's Legal Defense and Education Fund*, has published at least two periodicals addressing Title VII's application to

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[6] This lawsuit was filed against University under Title IX, rather than Title VII of the Civil Rights Act of 1964.

employment discrimination based on stalking, such as the one in *Martin*. *Legal Momentum* expressly advises that a woman should invoke Title VII if she is discriminated against, or retaliated against, for being a victim of stalking. See *Employment Discrimination against Abused Women*[7] and *Employment Rights for Victims of Domestic or Sexual Violence*.[8] It is difficult to imagine a more compelling case than *Martin* to apply Title VII; yet, in its closing argument, Howard's counsel told the jury that, by invoking Title VII to retaliation for reporting stalking, Ms. Martin had "played the sexual harassment card." Howard's "mocking" of the consequences of stalking is an affront to all women in general and to stalking victims in particular.

B. Pursuant to the Disparate Impact Theory, Stalking Constitutes Harassment on the Basis of Sex

At least eighty percent of stalking victims are female.[9] Ninety-four percent of the female stalking victims identified their stalkers as being male.[10] Employers must not be permitted to ignore the stalking of women as a gender-based activity by simply disregarding the fundamental nature of stalking as a tool to control women. While stalking

[7]http://www.sikhcoalition.org/documents/EmploymentDiscriminationAgainstAbusedWomen.pdf

[8]http://action.legalmomentum.org/site/DocServer/Employment_Rights.May.08.pdf?docID=2721

[9] *Id*; United States Department of Justice, *Workplace Stalking*, 2002, www.ojp.usdoj.gov/bjs/pub/pdf/vw99,pdf; www.doc.sc.gov/VictimServices/WorkplaceStalking.doc.

[10] *Id.*

can affect men, the vast majority of stalking victims are female.[11]

Even when conduct might affect both men and women, the conduct may constitute harassment on the basis of sex if it disproportionately affects women. *Turnbull*, 255 F.3d at 1244; *see also Crist v. Focus Homes*, 122 F.3d 1107, 1111 (8th Cir. 1997). The disparate impact analysis should therefore be applied in Title VII cases to conclude that, stalking, as a matter of law, is based on sex.

C. Serial Stalker's Lone Confrontation with a Man Does Not Affect the Sex-Based Element of His Stalking of Women

Judge Hogan's October 4, 2006 decision justified the jury's finding that the stalking was not gender-based by referring to Harrison's single confrontation seven years earlier with a renowned African-American male professor, the late Prof. Derrick Bell, at Harvard University Law School. (*See* 2006 WL 2850656 at *4. As a matter of law, Harrison's one-time confrontation with Prof. Bell cannot be considered "stalking."

> Any person who on more than one occasion engages in conduct with the intent to cause emotional distress to another person or places another person in reasonable fear of death or bodily injury by willfully, maliciously, and repeatedly following or harassing that person,

[11] P. Tjaden and N. Thoennes, *Research in Brief*, National Institute of Justice Centers for Disease Control and Prevention, (April 1998).

> or who, without a legal purpose, willfully, maliciously, and repeatedly follows or harasses another person, is guilty of the crime of stalking.

DC ST § 22-404 (b).

Since Harrison did not engage in repeated confrontations or harassment of Prof. Bell, his conduct toward Prof. Bell, a male, is not at all comparable to his stalking of Prof. Martin, a female. Harrison was not an ongoing threat to Prof. Bell. He only confronted Prof. Bell as a means of locating his next *female* stalking victim.

Neither Howard's administrators nor Prof. Martin even knew that Harrison ever confronted Derrick Bell until 1999 – a year after Prof. Martin left Howard. In 1997-1998, when Prof. Martin was complaining of Harrison's stalking, neither Howard nor Prof. Martin had any reason to believe that Harrison had harassed any man, at any time. In fact, Harrison's letters expressly identified additional women that he had targeted, over a period of years, to be his "wife." It is not possible, then, that Howard could have perceived Harrison as an "equal opportunity harasser" at the time Prof. Martin requested protection from him. Prof. Martin complained that he was stalking her and had pursued other *women,* trying to achieve his goal of making one of them the "*wife*" that he imagined was his "natural" mate, based on the fictional *female* character, *Geneva Crenshaw*, created by Prof. Bell. If this is not harassment based on sex, or gender, it

is difficult to imagine a scenario when stalking is based on sex.

Harrison's confrontation with Prof. Bell was not a gender-based act against Bell although his *purpose* was gender-based: to locate a *woman* to be his "wife," based upon Prof. Bell's fictional character of Geneva Crenshaw. To argue that one who commits ongoing acts of female gender based harassment would never commit an aggressive act against a man is as ludicrous as it is irrelevant.

Under the rationale set forth by the district court, an employer can invalidate a woman's Title VII protections by producing evidence that the sexual harasser demonstrated violent or threatening behavior toward any male, at any time in his life. The broad implications of this new legal edict could seriously thwart future sexual harassment claims. For example, one could argue that, since John Hinckley shot President Ronald Reagan – a male -- on March 31, 1981, his stalking of actress Jodie Foster while she was an undergraduate student at Yale University was not based on sex, although he professed his "love" for her in letters and phone calls – as did Harrison in letters and phone calls to Prof. Martin.

A sexual harasser may have exhibited violent or other threatening behavior at some point in his life. This prior act neither diminishes nor negates sex-based harassment, such as stalking.

D. Title VII Protection Should Not Depend Upon the Employer's Subjective Belief of What Conduct Constitutes Sexual Harassment

Whether or not a woman is protected by Title VII from termination must not depend upon the purported level of knowledge of any particular supervisor.

In 1999, Judge Hogan concluded:

> In this case, it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female. Therefore, the alleged stalking activities do appear to have been "because of sex" even if they were not inherently sexual in nature.

Martin, 1999 U.S. Dist. LEXIS 19516 at *11.

Pursuant to Fed. R. Civ. P. 56(d)(1), this ruling -- that Harrison's harassment of Prof. Martin was based on sex -- should have remained a finding, whether as a finding of fact and/or law -- throughout the remainder of the litigation; yet, on October 4, 2006, Judge Hogan stated that he had *not* concluded, in 1999, that Harrison's harassment was "sexual in nature" or "based on sex."

> [T]his Court never found that Mr. Harrison's conduct was sexual in nature or because of Plaintiff's gender, but left this as a question for the jury. The jury verdict did not, therefore, contradict the Court's 1999 decision.

Martin, 2006 WL 2850656 at *3 (D.D.C. 2006)

The only evidence before the jury indicating that Harrison's conduct was *not* sexual in nature was Dean Bullock's 2006 trial testimony stating that she did not perceive Harrison's conduct to be based on sex or sexual in nature. Dean Bullock's testimony directly conflicted with her July 1, 1999 Memo to Howard's General Counsel, which Howard's General Counsel incorporated into its response to Prof. Martin's EEOC Charge (Petitioner's Appendix at 218). In that memo, Dean Bullock admitted that she was aware, by no later than December 1, 1997, that Harrison posed a threat of stalking and harassment to Prof. Martin and "other women" on campus.

> Associate Dean Newsom advised me that he thought that MPD should be called in to provide more manpower in tracking down the individual not only to benefit Professor Martin, but also to prevent harm to other women whom this person might stalk or otherwise harass.

This admission by Dean Bullock, adopted by Howard's General Counsel, compelled the conclusion that she understood Harrison's harassment of Prof. Martin to be based on sex, or gender. Title VII should therefore apply to this case, as a matter of law.

Even if there were not an admission by the defendant that its agents did understand that Harrison's stalking was based on sex, employers should not be permitted to escape liability for Title VII retaliation by claiming "ignorance of the law." Ignorance of the law is not even an excuse in

criminal proceedings, where life and liberty are at stake; certainly, it should not be an excuse for a major University's failure to comply with employment discrimination laws. It is particularly ironic for such an excuse to be propounded by a law school -- and one reputed to be a civil rights icon. Employers are obligated to understand their duties under Title VII. If a supervisor can simply claim that he or she did not realize that the conduct complained of constituted sexual harassment, it will be in the employers' interest *not* to educate its managers regarding conduct that constitutes sexual harassment so they can all claim "ignorance" when a woman files a sexual harassment charge.

E. Where Gender Specific Language is Used to Identify and Target the Harassment Victim(s), the Harassment is "Based on Sex"

Where a harasser targets a woman because he fantasizes that she is related to him in sex-specific terms, such as "wife," "mother," "sister," "aunt," "grandmother," the target can only be a woman. The very words used by Harrison clearly identified his victims in terms that required them to be female. At least some jurors understood this fact, but some were apparently confused by the verdict form question 1c, which asked the jurors whether Harrison's conduct was sexual in nature or because of plaintiff's gender. The jury sent a note asking the court the questing:

> Wives are typically female. Is 1c an automatic 'yes' just because plaintiff is female?

The court's reply was:

> No, it is not an automatic 'yes.' You must base your decision on the evidence presented to you.

The jury was led to believe that Harrison's pursuit of Prof. Martin as his "wife" was insufficient standing alone to establish the gender-based nature of the stalking, and that they needed additional proof of that element. This was the only finding that the jurors made that was *not* in favor of Prof. Martin -- and it was a question that should never have been before them.

Harrison's harassment was clearly based on sex. The contrary jury finding disregards critical evidence, deprived the plaintiff of a remedy, and thwarts the goal of safety for women in the workplace.

F. "**Gender Profiling" as a "Sex-Plus" Factor in Sex Discrimination**

NOW Foundation urges the adoption of a "gender profiling" analysis as part of employment law. "Gender profiling" is closely related to the long recognized doctrine of "sex plus" employment discrimination.

Prior to *Martin*, Judge Hogan had recognized that "sex-plus" basis discrimination violates Title VII:

> Disparate treatment of subclasses of women, based on an immutable characteristic or the exercise of a fundamental right, has been held unlawful under Title VII; e.g. *Abraham v. Graphic Arts International Union*, 212 U.S.

App. D.C. 412, 660 F.2d 811 (D.C. Cir. 1981) (leave policy did not accommodate pregnancy and hence was unlawful gender discrimination under Title VII). *Judge v. Marsh*, 649 F. Supp. 770, 779-780 (D.D.C. 1980).

In a "sex-plus" case, an employer does not discriminate against a protected class as a whole; rather it treats a subclass within a protected class disparately. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (employer treated women with children of preschool age differently than men in similar circumstances); *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971) *cert.* denied, 404 U.S. 991 (sex plus marriage violated Title VII, where airline hired married male flight attendants but not married female flight attendants).

Most sexual harassers have personal preferences and do not harass every woman they meet. In this case, Leonard Harrison targeted women based on their profession – particularly female academics addressing civil rights issues. Harrison did not similarly pursue male civil rights professors to be his "wife."

G. Where a Gender Specific Character is Used to Identify the Harassment Victim, the Harassment Constitutes "Gender Profiling"

Only a woman could be "Geneva Crenshaw." Where the harasser selects the victim based on his obsession with a female character, real or imagined, the harasser has selected the victim on the basis of

her gender. 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, one constant requirement for the role is that she be female. The harassment is, therefore, necessarily based on sex and invokes Title VII.

H. A Sexual Harassment Claim Does Not Require that the Harasser Sexually Assault the Victim or Expressly Solicit Sexual Acts

Judge Hogan offered a rationale for the jury's failure to conclude Harrison's harassment was based on gender:

> 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.

Martin v. Howard University, 2006 WL 2850656 at *4 (Pet. A-146)

This holding ignores the gains made by working women during the past several decades. A plaintiff is not required to prove that she was "touched," "groped," or sexually assaulted to establish a sexual harassment claim. Even intended compliments can constitute sexual harassment—a fact that Judge Hogan explicitly acknowledged in his 1999 decision. *See Martin*, 1999 LEXIS 19516 at *12-13. (Pet. A-29) *Accord*, *Ellison v. Brady*, 924 F. 2d 872, 880 (9th Cir. 1991), wherein a male subordinate wrote love letters strikingly similar to those Harrison wrote to

Prof. Martin and the Court held that the fear of receiving a “bizarre note from...a person she barely knew….” and “not knowing what this mentally unstable person would do next,” was enough to create a hostile work environment for the plaintiff.

See also Fuller v. City of Oakland, 47 F.3d 1523 (9th Cir. 1995), wherein a female police officer trainee was harassed by her ex-boyfriend, a more senior police officer. The sexual harasser did not touch plaintiff or threaten her, nor did he say anything to her that was overtly sexual; however, the context of the conduct and the history of the relationship indicated that the harasser wanted the plaintiff to be his girlfriend again. The court therefore defined the conduct as "sexual harassment."

If harassment is “sexual in nature” where the harasser wants the victim to be his “girlfriend,” then it must certainly be sexual in nature where the harasser takes it a step further, targeting the victim to be his “wife,” as the stalker did in *Martin.*

CONCLUSION

NOW Foundation, *as Amicus Curiae,* respectfully joins Ms. Martin's *Petition for Certiorari*.

Respectfully Submitted,

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