No. ____

In The Supreme Court Of The United States

DAWN V. MARTIN, ESQUIRE,
Petitioner,

v.

HOWARD UNIVERSITY, AND
HOWARD UNIVERSITY LAW SCHOOL,
Respondents.

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

PETITION FOR WRIT OF *CERTIORIARI*

Dawn V. Martin, Esquire
Law Offices of Dawn V. Martin
1725 I Street, N.W., Suite 300
Washington, D.C. 20006
(202) 408-7040/(703)440-1417
dvmartinlaw@yahoo.com
www.dvmartinlaw.com
Counsel for Petitioner

QUESTIONS PRESENTED

1) Is it the duty of the Court or the jury to decide whether *undisputed* conduct constitutes "protected activity" for reporting "sexual harassment," within the meaning of Title VII of the Civil Rights Act of 1964, particularly in light of *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009)?

2) Does Title VII protect stalking victims -- who are primarily women -- when they report stalking in the workplace?

3) Does a trial court violate a plaintiff's Fourteenth and/or Fifth Amendment rights to due process by refusing to apply Rule 60(b) to reverse a judgment that is inconsistent with a Supreme Court Decision issued while the case is still in the Appellate Process?

4) Does a trial court violate a plaintiff's Fourteenth and/or Fifth Amendment rights to due process and thwart civil rights litigation by placing a decision on her motion for mandatory Rule 37 sanctions – in excess of $364,000 -- in indefinite abeyance and close the case without deciding it?

TABLE OF CONTENTS

APPENDIX

Court Decisions

Memoranda, Letters and Affidavits

TABLE OF AUTHORITIES

CASES

STATUTES

FEDERAL RULES OF CIVIL PROCEDURE

FEDERAL REGULATIONS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Dawn V. Martin, Esquire, respectfully petitions this Court for *Certiorari* to reverse the May 9, 2011 unpublished, *per curiam*, *sua sponte* decision, summarily affirming the trial Court's October 8, 2010 decision denying her February 10, 2009 *Renewed Motion for Relief from Judgment, Pursuant to Rule 60(B), Based on New, Controlling Supreme Court Law Set Forth in Crawford v. Nashville, During Pendency of Appeal*. Ms. Martin seeks a ruling of law that affords Title VII protection to stalking victims -- primarily women -- from employment discrimination and retaliation by their employers. Her Petition is supported by *Amici*, *The National Organization for Women* (NOW) and other women's advocacy groups. This case had been widely covered by internet, radio and television media.[1]

OPINIONS BELOW

Martin has been litigated for the past twelve years. The Table of Contents lists, and the Appendix includes, the most significant Orders in the case. They are summarized under *Statement of the Case*, *Procedural History*; however, the opinions below that are directly at issue in this *Petition* are:

1) the May 9, 2011 decision Order the D.C. Circuit, *sua sponte*, *per curiam*, which granted

[1] See, e.g.; http://www.legalshowtime.com/video/34/Justice-for-Women-Stalked-in-the-Workplace-and-Retaliation-b; truncated at http://www.youtube.com/watch?v=MxyzwRGYIgA; www.dvmartinlaw.com/MartinvHowardU.

Summary Affirmance to Howard University and denied Martin's unopposed *Cross-Motion for Summary Reversal* (A-1); and

2) the October 8, 2010 decision of the U.S. District Court for the D.C. denying Ms. Martin's February 10, 2009 *Renewed Motion for Relief from Judgment, Pursuant to Rule 60(B), Based on New, Controlling Supreme Court Law Set Forth in Crawford v. Nashville, During Pendency of Appeal* and her renewed request to decide her motion for mandatory Rule 37 Sanctions against Howard for its discovery violations held in abeyance since May 30, 2002. (A-5)

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) and Supreme Court Rules 10(a) and (c), with pendant jurisdiction over state claims, including the D.C. Human Rights Act, pursuant to 28 U.S.C. § 1332. The decision of the Court was issued on May 9, 2011. Petitioner timely filed a Petition for Rehearing *En Banc*, which was denied on July 20, 2011.

The D.C. Circuit's decision compels review for three reasons: 1) it conflicts with this Court's January 26, 2009 decision in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009); 2) the D.C. Circuit's decision creates a split in the circuits; and 3) the proceeding involves questions of exceptional importance to the public -- the rights of women to be

free of employment discrimination and/or retaliation for being stalking victims.[2]

STATUTES AND REGULATIONS

See Addendum.

STATEMENT OF THE CASE

The Undisputed Facts[3]

Dawn V. Martin, Esquire, was a law professor at Howard University from July 1996 through June 1998. During her two years at Howard, Prof. Martin received excellent student evaluations. Howard's Law School Dean, Alice Gresham Bullock, consistently awarded Prof. Martin summer grants based on her satisfactory progress in scholarship. Prof. Martin taught Equal Employment Opportunity (EEO) law and other courses for four years. Howard recruited her from a tenure-track position at

---

[2] 80% of stalking victims are women. www.ojp.usdoj.gov/bjs/pub/pdf/vw99,pdf; *Workplace Stalking*, *U.S. Department of Justice*, 2002, www.doc.sc.gov/VictimServices/**WorkplaceStalking**.doc; *Legal Momentum*, *The Women's Legal Defense and Education Fund,* advises stalking victims to invoke the disparate impact doctrine when retaliated against by employers. *Employment Discrimination against Abused Women***,** http://www.sikhcoalition.org/documents/EmploymentDiscriminationAgainstAbusedWomen.pdf; *Employment Rights for Victims of Domestic or Sexual Violence*, http://action.legalmomentum.org/site/DocServer/Employment_Rights.May.08.pdf?docID=2721.

[3] *See also Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516 (D.C.D.C. 1999). (A-157-159, 163-166, 168, 172-173).

Cleveland-Marshall College of Law. Prior to teaching, Prof. Martin served as a trial attorney with the U.S. Department of Justice, Civil Rights Division (Honors Program), the New York State Office of the Attorney General, Civil Rights Bureau, and as a Special Assistant to Commissioner Tucker at the Equal Employment Opportunity Commission (EEOC). Prof. Martin helped develop national policy and published in the area of EEO law. She graduated from Columbia University (1978) and New York University School of Law (1981).

Beginning on November 20, 1997, Prof. Martin was harassed on campus by a delusional, homeless, serial stalker with a criminal record, Leonard Harrison. Harrison roamed freely through Howard Law School buildings, leaving Prof. Martin letters under her office door, messages on her voicemail and visiting her office. (A-244-259) He stated that he was pursuing Prof. Martin as his "wife." (A-251-253) He described this "*natural wife*" as the physical embodiment of a *fictitious female character*, Geneva Crenshaw, in a book, written by NYU professor, Derrick Bell, *And We are Not Saved*. (A-237) Harrison's letters discussed other women that he had pursued. (A-251) He targeted women of color teaching civil rights and "race" courses. (A-251-252)

Prof. Martin immediately reported Harrison's conduct to the Dean's office. (A-254) The Associate Dean, Michael Newsom, refused to assist her, but left it up to her to call the D.C. Metropolitan Police Department on her own. (*Id.*) Prof. Martin enlisted a campus police officer who attended the meeting with police and took a campus police report.

(*Id*.) The D.C. Metropolitan Police Department (MPD) characterized Harrison's harassment as "stalking," pursuant to D.C. Code § 22-404 (b) and processed her criminal complaint. (A-256-257) MPD advised Howard to ban Harrison from campus and hold him for arrest if he returned.

On November 25, 1997, Harrison was escorted off campus, but was not barred or held for arrest. (A-258-259) Prof. Martin therefore wrote her first memo to Dean Bullock detailing Harrison's conduct, again asking the administration to bar Harrison from the law school. (A-251-259) Dean Bullock responded in writing, stating that she was discussing the matter with the Director of Campus Security, Lawrence Dawson (A-250); however, Mr. Dawson and Dean Bullock's 2002 depositions revealed that Dean Bullock *never* discussed the stalking with Mr. Dawson or any other member of Howard's Campus Security Force. (Bullock deposition at 49, 54; Dawson deposition at 15, 24)[4] Harrison continued to enter the law school and confronted Prof. Martin in her office on December 1, 1997. (A-248-249) Harrison was chased off campus, but still *not* barred from campus. (*Id*.)

Non-tenured professors – whether they are tenure-track or visitors – must have their contracts renewed each year. On December 18, 1997, less than a month after the stalking began and while Prof. Martin was

[4] Prior to the 2002 depositions, Howard falsely represented to the EEOC and the Court that Dean Bullock had conferred with Mr. Dawson and that Mr. Dawson was working with her to address Harrison's stalking of Prof. Martin. (A-213-214, 224-225)

still requesting that Howard ban Harrison from the Law School building, Howard rejected Prof. Martin for the advertised tenure-track position teaching (EEO) law -- a course she had been teaching at Howard for two years. (A-244-247) She was replaced by a less experienced, lower ranked, Visiting *Assistant* Professor who had never taught EEO law and who was then publishing her *first* article.

At least eighty (80) law students sent letters and/or signed petitions praising Prof. Martin as a professor and protesting her non-renewal. Dean Bullock ignored their protests. She left positions vacant while students protested the shortage of courses and professors. In her *Answer to the Complaint* ¶¶313, 326, Dean Bullock admitted that, as of May, 1998, there were *at least three vacant faculty positions for which Prof. Martin was "well qualified*;" yet, Dean Bullock falsely told Prof. Martin that she could not even be renewed for one more year because there were no "Visitorships" available. Dean Bullock also falsely told APT Committee member, Prof. Nolan, that there were no vacant positions for which Prof. Martin could be considered. (Nolan deposition at 329-330)

Dean Bullock even withheld from the APT Committee information that the advertised Civil Rights/Constitutional Law position was still unfilled. When Prof. Martin learned of this vacancy from an outside source, she reapplied for it. (A-229-232) Prof. Martin was the only candidate for the position during the spring of 1998. Dean Bullock immediately responded by converting the Civil Rights position to a tax position.

Had Prof. Martin remained at Howard, she would have been eligible for tenure the following year and would have met Howard's written requirements. Because Howard rejected her application after the "hiring season" had ended, Prof. Martin was unable to secure another teaching position for the following year. Her teaching career therefore ended in June of 1998.

On May 15, 1998, Ms. Martin filed a charge of sexual harassment and retaliation, pursuant to Title VII of the Civil Rights Act of 1964 and the D.C. Human Rights Act, alleging sexual harassment/hostile work environment and retaliation for reporting sexual harassment in the form of workplace stalking. In a July 1, 1998 internal University memorandum written in response to Ms. Martin's EEOC charge, Dean Bullock expressly acknowledged that both she and Associate Dean Newsom perceived Harrison as a threat to Prof. Martin and "*other women*" whom he might "*stalk or otherwise harass*" on campus. (A-218-219)

In her interview with the EEOC investigator, Dean Bullock expressed resentment toward Prof. Martin because she was stalked. Dean Bullock even *mocked* Prof. Martin's requests for protection by saying:

> Martin did not seem satisfied with my response. I was left with the impression that she wanted me to wrestle the stalker down.[5]

---

[5] Tr. 1092:7-1093:2.

After requesting and receiving a right to sue letter from the EEOC, Ms. Martin filed a lawsuit in the U.S. District Court for the District of Columbia, on May 14, 1999, pursuant to Title VII and the D.C. Human Rights Act. She also filed pendent common law claims of breach of contract and intentional infliction of emotional distress.

The circumstances of Prof. Martin's departure from Howard have thwarted her efforts to gain comparable employment. As a 41 year old single mother in 1998, Ms. Martin was forced to begin her career anew. She established a solo practice, representing plaintiffs in civil rights and personal injury cases. Over the past 13 years, Ms. Martin's income has been sporadic, dependent upon winning cases and collecting judgments that she has won for her clients.

Procedural History

The Precedent-Setting 1999 Decision

The first significant decision below was the December 13, 1999 precedent-setting decision of District Judge Hogan denying Howard's *Motion to Dismiss, or in the Alternative, for Summary Judgment*. *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516, 1999 WL 1295339; 81 Fair Empl. Prac. Cas. (BNA) 964; 15 I.E.R. Cas. (BNA) 1587 (D.D.C. 1999) (A-154). This decision held that, pursuant to Title VII of the Civil Rights Act of 1964, employers are liable for the sexual harassment of employees by non-employees if they knew or should have known of the harassment and failed to take

reasonable steps to end it. (A-159-160). *Martin* was the first case in the District of Columbia that addressed the issue of third-party harassment in the workplace. [6]

In 1999, Judge Hogan made certain findings of fact and law, based on the undisputed facts as set forth by the parties in their respective Rule 56 *Statements of Facts*. The Court expressly rejected Howard's argument that this was not a sex discrimination case and that Title VII did not apply. The court held "it is clear that Prof. Martin was only the object of Harrison's attention because she was a female." 1999 U.S. Dist. LEXIS 19516 at 9-10 (A-162). With respect to Ms. Martin's sexual harassment claim, the court identified the factual questions that would proceed to the jury in this case as: (1) whether the harassment was severe and pervasive, creating a hostile work environment for Prof. Martin (A-164-165), and (2) whether Howard took reasonable steps to end it (A-165). The court also upheld Ms. Martin's retaliation claims[7] (A-166-168) and breach of contract claim (A-170-173). *Martin* finally proceeded to trial in April of 2006.

---

[6] *See Simms v. Center for Correctional Health and Policy Studies,* 272 F.R.D. 36, 38, 2011 U.S. Dist. LEXIS 71511 (D.D.C. 2011) and *Coles v. Kelly Services, Inc*., 287 F. Supp. 2d 25, 31 (D.D.C. 2003), relying on *Martin*. In 1999, Judge Hogan relied on cases from other jurisdictions, including *Powell v. Las Vegas Hilton Corp*., 841 F. Supp. 1024, 1025 (D. Nev. 1992), which adopted EEOC (U.S. Equal Employment Opportunity Commission) Regulation, 29 CFR § 1604.11(e), http://cfr.vlex.com/vid/1604-11-sexual-harassment-19685660l.

[7] In fact, *Martin* preceded *Crawford* in holding that the "opposition clause" protected all objections to conduct that the employer should recognize as sexual harassment.

The 2006 Jury Verdict

On April 18, 2006, the jury answered a series of questions for each of Prof. Martin's claims:

> 1. Did the Plaintiff prove by a preponderance of the evidence that:
>
> a) Mr. Harrison subjected her to conduct that was sufficiently severe and pervasive to alter the terms and conditions of her employment?
>
> __X___ YES _____ NO
>
> b) Mr. Harrison's conduct was unwelcome?
>
> __X___ YES _____ NO
>
> c) Mr. Harrison's conduct was sexual in nature or because of Plaintiff's gender?
>
> _____ YES __X__ NO
>
> d) Howard University knew or should have known of the alleged conduct?
>
> __X___ YES _____ NO
>
> e) Howard University failed to take proper remedial action that was reasonably calculated to end the harassment?
>
> __X___ YES _____ NO

(A-54-55)

In closing argument, Howard's counsel told the jury that, since Prof. Martin's memoranda detailing

this conduct were entitled "*A Security Problem on Campus*," rather than "*Sexual Harassment on Campus*," she did not complain of "sexual harassment" and had no remedy under Title VII for being stalked on campus or retaliation for reporting it.

Contrary to the questions he stated would be submitted to the jury, Judge Hogan submitted the threshold Title VII coverage question to the jury: was Harrison's stalking of Prof. Martin based on her sex/gender? Because this question was submitted to the jury, *Ms. Martin was precluded from making the very legal arguments that she prevailed upon in 1999* to establish Title VII coverage against Howard's *Motion to Dismiss, or in the Alternative, for Summary Judgment*. This was particularly true because the question was submitted to the jury *after* all evidence had been presented.

This verdict for Howard was entirely due to the improper submission of the legal question of Title VII coverage to the jury. Because the jury found that Harrison's harassment was not based on sex/gender, Prof. Martin's complaints did not meet the legal definition of "legally protected activity" under Title VII. There is no federal statute that explicitly protects an employee from being fired for being stalked. The jury therefore never reached the questions of whether Howard had a legitimate, non-retaliatory reason for her non-renewal (Verdict Questions #6 and 7, left blank, A-58-60) The jury left the questions about Howard's motives *blank*; without Title VII coverage, it made no difference

why Prof. Martin's contract was not renewed; she had no remedy.

Post-Trial Motions

Both parties' filed post trial motions seeking judgment, as a matter of law. On October 4, 2006, Judge Hogan denied both of parties' motions, holding that the instructions to the jury were adequate. *Martin v. Howard University,* 2006 WL 2850656 2006 U.S. Dist. LEXIS 72303 (D.D.C. 2006). He offered various hypotheses regarding what the jury *might* have been thinking in order to arrive at its verdict. Notably, Judge Hogan ruled that the fact that Prof. Martin was not "groped" or otherwise physically assaulted, could serve as a valid basis for determining that Harrison's harassment on her was not based on her sex (A-37-38). He also characterized Harrison's one confrontation with Prof. Derrick Bell as meaning that Harrison stalked men as well as women, so his stalking did not constitute harassment on the basis of sex. (A-40) Ms. Martin had noted that Harrison did not target Prof. Bell for stalking, but only as a resource for information about *women*. Harrison only confronted Prof. Bell, nine years earlier, for the purpose of identifying his next *female* stalking victim, whom he could harass to become his "wife."

Prior Appeals

Ms. Martin appealed to the D.C. Circuit. *Martin v. Howard University,* 2008 WL 1885434 (D.C. Cir. 2006) (*Martin I*). The *National Association of Women Lawyers* (NAWL) and numerous other

women's advocacy groups filed an *Amicus* Brief in support of Ms. Martin; nevertheless, the D.C. Circuit affirmed the trial court's October 4, 2006 decision on March 31, 2008, in a short, unpublished, *per curiam* decision which ignored most of their arguments. (A-31)

Ms. Martin petitioned this Court for review. NOW, NAWL (*The National Association of Women Lawyers*) and other women's advocacy groups filed an *Amicus* Brief on her behalf; however, it was late filed and not considered by the Court. Ms. Martin's *Petition for Rehearing of the denial of her Petition for Certiorari* was denied on January 12, 2009 (A-176) *Crawford* was decided two weeks later, on January 26, 2009. On February 9, 2009, Ms. Martin filed a *Motion to Supplement her Petition for Rehearing*, *or Leave to File a Second Petition for Rehearing*, *in Light of Crawford*. The next day, on February 10, 2009, she also filed a *Renewed Motion for Relief from Judgment, Pursuant to Rule 60(B), Based on New, Controlling Supreme Court Law Set Forth in Crawford v. Nashville, During Pendency of Appeal*. Her *Rule 60(B) Motion* asked the district court to vacate the jury's finding on the issue of "protected activity" and the underlying issue of "based on sex," in light of *Crawford*.

The District Court did not decide Ms. Martin's Rule 60(b) Motion until nearly two years later, on October 8, 2010. It held:

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

(A-9)

Ms. Martin appealed (*Martin II*). Howard filed a *Motion to Dismiss* the appeal. Ms. Martin filed an *Opposition and Cross-Motion for Summary Reversal*. Howard did not file an *Opposition* to Ms. Martin's *Motion for Summary Reversal*. The D.C. Circuit denied both Howard's *Motion to Dismiss* and Ms. Martin's *unopposed Motion for Summary Reversal*. The Appellate Court then, *sua sponte*, granted Howard *Summary Affirmance*. Ms. Martin sought

Rehearing, En Banc, which the D.C. Circuit denied, since no judge called the motion for a vote.

Ms. Martin, supported by the *National Organization for Women* (NOW) and additional women's advocacy groups, seeks review of the lower courts' decisions to reverse the precedent set by the D.C. Circuit in *Martin*, not only in the interests of justice to Ms. Martin, but for the benefit of all women who face stalking and/or retaliation for reporting stalking in their workplaces.

REASONS FOR GRANTING THE WRIT

I. *Crawford* Requires that a Court, not a Jury, Determine whether Ms. Martin's Reporting of Stalking in her Workplace was Protected by Title VII

Courts must decide questions of law. *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007). *Id.* Only questions of fact should be submitted to the jury. *Id.* The lower courts in this case have never cited *any authority* to hold that the question of whether the plaintiff has engaged in "protected activity" is one for the jury -- nor has Howard. The question of whether undisputed conduct constitutes "protected activity" or "conduct based on sex" under Title VII cannot arbitrarily, or *sometimes,* be a question for the Court and *sometimes* submitted to a jury. This is not just legal theory; in *Martin*, it meant the difference between winning or losing this case.

In *Martin I*, even the D.C. Circuit recognized that the interpretation of "protected activity" under Title VII is a "legal" determination:

> [T]he jury found: … (2) that Ms. Martin had not proven that she was engaged in **legally protected conduct** when she informed the law school about Harrison's behavior …. (*Emphasis added*)

(A-16)

Because *Martin I* was pre-*Crawford*, there was no controlling federal law directly on point -- although Ms. Martin did cite cases from other jurisdictions, including cases decided under the Human Rights Act of the District of Columbia, for the proposition that the jury should not have been charged with this question in the first place. The Court did not address that argument, but held only that the instructions provided to the jury were sufficient.

In the first appeal of the case ("*Martin I*"), the D.C. Circuit answered a different question than it did in its May 9, 2011 decision ("*Martin II*"). *Martin I* held that the jury had sufficient evidence to find that Prof. Martin's complaints about Harrison's stalking her in her workplace did not constitute "protected activity" because Harrison's harassment of her to be his "wife" was not "based on her gender;" however, this conclusion was based on the presumption that it was within the province of the jury to make these assessments in the first place. This presumption cannot stand under *Crawford*. *Crawford* constitutes controlling law demonstrating

that the jury should never have been charged with this question of law. That is the primary issue currently before this Court.

Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn., 555 U.S. 271, constitutes controlling law in *Martin*, with respect to: 1) whether a Court or a jury should decide whether undisputed facts in a particular case constitute "protected activity," within the meaning of Title VII; 2) how sexual harassment must be reported in order to constitute "protected activity." The D.C. Circuit's *sua sponte* summary affirmance of the District Court's interpretation of *Crawford* deprived Ms. Martin of procedural due process -- which, in turn, deprived her of her substantive right to present judicially recognized legal arguments that she engaged in "protected activity" when she reported stalking in her workplace. The D.C. Circuit never cited *Crawford* by name; rather, it disposed of Ms. Martin's arguments in one sentence:

> the new precedent appellant brought to the district court's attention in her Rule 60(b)(6) motion does not demonstrate that the judgment in her case was in error.

The "new precedent" that Ms. Martin expressly relied on was *Crawford*. *Crawford* was a retaliation case, brought under Title VII of the Civil Rights Act of 1964. The plaintiff, Vicky Crawford alleged that she was fired for her opposition to sexual harassment when she answered questions about a supervisor during her employer's internal investigation. In response to questions about

whether the supervisor engaged in "inappropriate behavior," Ms. Crawford detailed specific acts that she witnessed and related her reactions to them, making it clear that she found them objectionable. Shortly after the investigation, the Defendant fired her. The District Court granted the Defendant's motion for summary judgment, holding that Ms. Crawford's answers in the internal investigation did not constitute "protected activity." Since Ms. Crawford did not initiate a formal sexual harassment complaint, the trial court dismissed her case, holding that she had not "opposed" sexual harassment, within the meaning of Title VII's retaliation provisions. The Sixth Circuit affirmed. This Court reversed, unanimously holding that Ms. Crawford's conduct is covered by the "opposition clause" of Title VII, thus she *did* engage in "protected activity."

There is no indication that Ms. Crawford used the words "sexual harassment." The fact that this Court never even asked this question demonstrates that these words are unnecessary to establish "protected activity" under Title VII. Based on the conduct described and Ms. Crawford's protests of it, this high Court held that the supervisor's conduct constituted "sexual harassment;" therefore, Ms. Crawford's protests of it constituted "protected activity."

This Court's act of definitively determining that Ms. Crawford's conduct constituted "protected activity" demonstrates that it was the *duty* of the Court to do so. If this determination had been the province of the jury, this Court would have usurped the jury's duties by deciding it. This Court did *not*

remand *Crawford* for a determination by *a jury* regarding whether Ms. Crawford engaged in "protected activity;" the case was remanded only for the purpose of determining whether Ms. Crawford's employer had a legitimate, non-retaliatory reason for her termination.

On remand, the District Court expressly acknowledged that the issue of protected activity had been decided by the court and would not be tried by a jury. *Crawford*, 2009 U.S. LEXIS 96282 at 4 (M.D. Tenn. 2009), particularly at 2, fn. 2. The case proceeded to trial on the question of whether Ms. Crawford's employer fired her because of her complaints of sexual harassment. The same should be done in *Martin*. Both women are entitled to the same justice.

As *Crawford* demonstrates, the question of "protected activity" often hinges on whether the underlying conduct complained of constitutes illegal discrimination within the meaning of Title VII, that is, conduct that is based on race, based on gender, based on national origin, etc. A jury of non-attorneys is not equipped with the legal background to understand all of the legal theories that constitute discrimination "based on gender" (or based on race, national origin, etc.)

Like *Martin*, in *Crawford*, the Circuit Court affirmed the trial court's decision in an unpublished, *per curiam* decision. It took the U.S. Supreme Court to reverse both lower federal courts before Ms.

Crawford received Title VII protection.[8] If a Federal District Judge and a panel of three Appellate Court judges on the Sixth Circuit could "get it wrong" – or at least disagree with *all nine judges on the U.S. Supreme Court* -- how can a jury of non-attorneys be expected to properly determine what conduct falls within the legal definition of "protected activity," within the meaning of Title VII? These are not distinctions that are apparent to layperson jurors. They require distinctions of law, involving statutory construction and case precedent.

The D.C. Circuit's *sua sponte* summary affirmance squarely sets precedent that conflicts with *Crawford*, the case law in other circuits and case law under the D.C. Human Rights Act. (*See* Section II). The facts of *Martin* are particularly compelling: Prof. Martin was stalked in her workplace -- a nationally renowned law school -- by a delusional, homeless stranger who was allowed to wander through Howard's law school building. The stalker only became aware of Prof. Martin's existence because of her position as a law professor at Howard.[9] There is a particular irony where the job is the reason for the stalking -- and, in turn, the stalking is the reason for losing the job -- and even a profession.

---

[8] After seven years of litigation, a jury awarded her $1,556,258.86, plus attorneys' fees and costs. The Defendant appealed and the parties settled.

[9] This case is therefore similar to the "celebrity stalking cases," such as journalist, Erin Andrews, the actress, Jodie Foster, singer, Paula Abdul and model/talk show host, Tyra Banks. Erin Andrews' case has been the subject of Congressional hearings on possible stalking legislation.

Justice Ginsberg characterized Title VII as "a statute that's meant to govern the workplace with all its realities (*Crawford* Supreme Court Argument at 39). Stalking is a terrible workplace reality for many women. It is the duty of the judiciary -- not juries -- to determine whether stalking is a workplace reality covered by Title VII. *Martin I* and the District Court's October 8, 2010 and October 4, 2006 decisions, together, set precedent holding that a woman can be stalked in her workplace and legally retaliated against for reporting it. If they can be fired for reporting it, they will keep quiet -- thus hindering the employer's ability to protect the stalking victims or others in the workplace. This precedent therefore creates a dilemma for any woman who is stalked: should she risk being fired if she informs her employer about the stalking or should she keep quiet and hope that the stalker never becomes violent in her workplace? Ms. Martin and *Amici* implore this high Court to issue a decision that protects stalking victims from being forced to choose between their jobs and their safety when they are doing nothing more than "working while female."

II. The D.C. Circuit's Interpretation of a Jury's Title VII Responsibility Creates a Split in the Circuits and Further Conflicts with D.C. Human Rights Law

Citing *Crawford*, additional federal district courts have held that certain undisputed conduct "**is**" "protected activity," as a matter of law – not a question a jury. *Koger v. Woody*, 2010 U.S. Dist. LEXIS 5974 * 41 (E.D. VA 2010); *Glover v. Kenwood Healthcare Center, Inc.*, 2010 U.S. Dist. LEXIS

104559 * 29-30 (N.D.Ill. 2010); *Russell v. Nassau Co.*, 659 F. Supp.2d 213, 237-238 (E.D.N.Y. 2010); *Julceus v. City of North Miami*, 2009 U.S. Dist. LEXIS 106018 * 25-26 (M.D. Fl. 2009); *Rhinehart v. Gastonia*, 2009 WL 2957973 at 5 (W.D.N.C. 2009); *Smith v. St. Luke's Roosevelt Hospital,* 2009 U.S. LEXIS 69995 at 74 (S.D.N.Y. 2009).

The D.C. Court of Appeals held that, under both the D.C. Human Rights Act (DCHRA) and Title VII, "[w]hether actions by an employee constitute 'protected activity' is a question of law," thus determined by the Court, not a jury. *McFarland v. George Washington University*, 935 A.2d 337, 356 (D.C. 2007). *Carter-Obayuna v. Howard University,* 764 A.2d 779, 790 (D.C. 2001); *Howard University v. Green*, 652 A.2d 41, 45-47 (D.C. 1994). Although D.C. Courts' interpretation of federal law is not controlling, these cases are controlling with respect to the DCRA.[10] The conflicting precedent under federal and D.C. law creates an anomaly for judges in D.C.: should the court decide whether the plaintiff engaged in "protected activity" for the DCHRA claim but send the same question to the jury? This process would be illogical, impractical and unjust.

[10] Conversely, the federal courts' ruling with respect to D.C. law is not controlling over DCRA claims; accordingly, the federal courts violated D.C. law by submitting the question of "protected activity" to a jury.

III. Prof. Martin's Undisputed Reports of Stalking in her Workplace Constituted "Protected Activity," as a Matter of Law

Although it is now well ingrained in our society that sexual harassment is prohibited, this was "judge-made" law, interpreting Title VII of the Civil Rights Act of 1964. Sexual harassment was not expressly prohibited in the 1964 statute. It was not until 1986 that this Court determined that sexual harassment constituted discrimination "*based on sex"* and was therefore covered by Title VII. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

Meritor set the precedent for all of the Title VII sexual harassment claims filed in this country. *Meritor* did not require that every women in the company be harassed to establish a Title VII claim. Sexual harassers do not normally harass *all* women; they have personal preferences. *Meritor* established that harassment is "based on sex" where the victim is selected based on "sex plus" other factor(s).[11] In the present case, Harrison harassed Prof. Martin based on "sex plus" profession (and race), to fit the "Geneva Crenshaw" profile.

This Court also established the disparate impact theory of establishing discrimination "based on sex."

---

[11] *Accord Abraham v. Graphic Arts International Union*, 660 F.2d 811 (D.C. Cir. 1981); *Judge v. Marsh*, 649 F. Supp. 770 (D.D.C. 1980); *Back v. Hastings on the Hudson*, 365 F.3d 107 (2d Cir. 2004); *Jefferies v. Harris County Community Action Association*, 615 F.2d 1025, 1033-34 (5th Cir. 1980); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971) *cert. denied*, 404 U.S. 991 (1971).

Dothard v. Rawlinson, 433 U.S. 321 (1977). *See also Griggs v. Duke Power Co.,* 401 U.S. 424, 431-432 (1971) (disparate impact based on race). Even when a neutral criterion affects both men and women, the criterion may constitute discrimination "on the basis of sex" if it disproportionately affects women. *Dothard v. Rawlinson,* 433 U.S. 321, 329 (1977) (height and weight requirements); *Lynch v. Freeman***,** 817 F.2d 380 (6th Cir. 1987) (unsanitary portable toilets). *Kopp v. Samaritan Health Sys., Inc.,* 13 F.3d 264, 269 (8th Cir. 1993) (harassment affected "primarily women").

Although this Court has not yet directly considered the question of whether stalking constitutes sexual harassment, federal Circuits and trial courts have expressly found, as a matter of law, that stalking constitutes sexual harassment, or harassment based on sex, within the meaning of Title VII. As *NOW*'s *Amicus Brief* supporting Ms. Martin's pre-*Crawford* Petition for Supreme Court review, at 5-6, stated:

> 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 F3d 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. 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. Williamette 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. 931, 937 (N. Dist. Ind. 1998) ("stalking" was one of the most "disturbing" acts of sexual harassment).

Judge Hogan's 1999 decision properly addressed the question of whether Harrison's undisputed stalking was "based on sex," as a matter of law, and denied Howard's *Motion to Dismiss or in the Alternative, for Summary Judgment.* Judge Hogan applied Ms. Martin's legal arguments to the undisputed facts and concluded that **"**it is clear that Plaintiff was only the object of Mr. Harrison's

attention because she was a female" and that Harrison "targeted women other than Plaintiff." 1999 U.S. Dist. LEXIS 19516 at *11 (A-164).

In 1999, Judge Hogan also considered the disparate impact analysis because "stalking is primarily a crime against women, with sexual connotations." *Id.* at 10. (A-162)[12] He noted Ms. Martin's argument that she had established a claim of sexual harassment because "she was being stalked by Mr. Harrison and that stalking is primarily a crime against women, with sexual connotations." *Id.* The effect of firing or otherwise punishing stalking victims has a disparate impact on women. The burden should now shift to the employer to produce evidence of a legitimate business justification for its actions. *Griggs*, 401 U.S. at 431-432. In order to defeat the *prima facie* case, Howard would have to produce evidence of a legitimate, non-discriminatory business justification for failing to follow *its own Campus Security procedures and policies* established to protect the University community from stalkers. *Id.* Since attorneys are not permitted to argue case law to a jury, and the jury had no reason to be familiar with *Dothard, Griggs* or their progeny, Ms. Martin was deprived of the benefit of the disparate impact doctrine when Judge Hogan submitted

[12]Fed. R. Civ. P. 56(d)(1) required that both legal and factual conclusions remain "*established through the action*" -- not re-litigated before a jury. In 2003, Magistrate Judge Facciola held that Judge Hogan's 1999 conclusion that Harrison's stalking of Prof. Martin *was* "based on sex" was *not* a triable issue of fact for the jury and would "not be revisited" (2003 U.S. Dist. LEXIS 18501 at *6-7 (D.C.D.C. 2003) (A-81-82); yet, this issue *was* "revisited" and submitted to the jury in 2006.

related questions of "based on sex" and "protected activity" to the jury.

The 1999 decision expressly held that an employee need not use the words "sexual harassment" to establish a sexual harassment or retaliation case. *Id*. at 17-18. "There are no 'magic words' which must be chanted in order to invoke Title VII protection" (*Id*. at 18). Judge Hogan quoted *Howard U. v. Green*, 652 A.2d 41, 46 (D.C. App., 1994), *citing Zellerbach*, 720 F.2d at 1012-1013 and *Powell v. Las Vegas Hilton Corp*., 841 F. Supp. 1024, 1025 (D. Nev. 1992). *Zellerbach* held that the plaintiff had engaged in "protected activity" when she told her employer simply, "I don't have to take this" when her employer observed customer behavior that he should have recognized as sexual harassment. *Powell* held that a simple request to the employer to "do something" was enough to invoke Title VII.[13]

The stalker, Leonard Harrison, pursued Prof. Martin to be his "*wife*." At least *some* jurors *did* understand that the term "wife" necessarily means a "*woman*" who is married, but apparently, there was juror dissention on this issue such that the jury sent a note saying:

> Wives are typically female. Is the answer to 1(c) an automatic yes simply because the plaintiff is female?

(A-64)

---

[13]In Oral Argument in *Crawford*, Supreme Court Justice Stevens indicated that "get the hell out of my office" would constitute "opposition" to sexual harassment under Title VII."

Judge Hogan left the trial for a conference for the few crucial hours just before the jury issued its verdict. Judge Kessler, who had never been involved in this case in any way, replaced him. It was Judge Kessler who responded to the jury's question with a resounding:

> No. You should base your decision on the evidence before you.

Some jurors openly gasped at the answer; yet, this was *the determining instruction* for the jurors. It resulted in a verdict holding that Harrison's pursuit of Prof. Martin to be his "wife" was not harassment based on sex and *not* covered by Title VII and therefore *not* covered by Title VII.

Legal analysis is relevant to the question of whether Harrison's pursuit of Prof. Martin, to be his "wife" constituted harassment on the basis of sex. A "wife" is "a married *woman*." Courts may grant divorces, as constructive abandonment, if a spouse withholds sex. *Tedford v. Tedford*, 856 So.2d 753 (Miss. App. 2003). Marriage is therefore presumed to be "*sexual in nature*," as a matter of law. At least if this had been a determination by a judge, Ms. Martin would have had the opportunity to make this legal argument and to appeal any errors of law made by the trial court on this point.

Courts have also held, as a matter of law, that Title VII protects an employee from retaliation for opposing perceived discrimination, if s/he had a reasonable and good faith belief that the opposed

practices were unlawful, even if the underlying case is unsuccessful. *Little v. United Technologies*, 103 F.3d 956, 960 (11th Cir. 1997). Again, unfamiliar with the legal analysis in *Little*, the jury was not even aware of this doctrine and could not ascribe it to Prof. Martin's conduct.

IV. Title VII Protection should not be Denied Simply because Harassment by a Non-Employee is Reported Differently than Co-Worker Harassment

In 1999, Judge Hogan set precedent for the District of Columbia, holding that an employer is liable for the sexual harassment of an employee by a non-employee if it knew or should have known of the harassment.[14] That decision specifically explained that, in non-employee harassment cases, an employee can invoke Title VII by simply telling her employer to "Do something;"[15] yet, in 2006 and thereafter, the lower courts refused to acknowledge that harassment by a *non-employee* is addressed differently than harassment by an employee.

The first step in taking "reasonable measures" to end workplace harassment by a non-employee is to ban the *non-employee* from the workplace. Prof. Martin entitled her memos "*Security Problem on*

---

[14] 1999 U.S. Dist. LEXIS 19516. *See Simms v. Center for Correctional Health and Policy Studies,* 272 F.R.D. 36 and *Coles v. Kelly Services, Inc.*; 287 F. Supp. 2d 25, relying on *Martin*.

[15] 1999 U.S. Dist. LEXIS 19516 at 16-17 (A-169-170)

Campus"[16] to focus on the remedy for the stalking -- utilizing the Campus Police to bar the stalker from campus. The term "sexual harassment" may not receive immediate attention,[17] but conduct that had been characterized by the police as "stalking" conveys its severity and urgency.

Howard's counsel told jurors that Ms. Martin was *not credible* when she testified that she complained of "harassment," because her memoranda referred to Harrison's conduct as "stalking;"[18] but the D.C. stalking statute, D.C. Criminal Code Ann. §22-404(b) defines "stalking" as:

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

"Stalking" is repeated "harassment." Because the jurors could not analyze the stalking statute[19] against the Title VII definition of "sexual harassment," they were misled and confused by Howard's counsel regarding the legal significance of the title of Prof. Martin's memoranda. The jurors did not realize that Prof. Martin's "stalking"

---

[16]Prof. Martin actually *did* refer to Harrison's conduct as "sexual harassment" before MPD characterized it as "stalking." Bruner deposition at 137:4-13.

[17] Sexual harassment complaints at Howard received little, if any, response from Howard administrators. *See*, e.g., Sexual "jokes" circulated by e-mail by Prof. Reggie Robinson, despite complaints by faculty members that it may constitute "sexual harassment." Pl's Trial Ex. 23.

[18]Tr. 2477:21-2478:5.

[19] Judge Hogan refused to provide the statute to the jury.

complaint was *necessarily* a *harassment* complaint, *by legal definition*.

Howard also told jurors that Prof. Martin was not entitled to Title VII protection because she did not file a sexual harassment complaint with Howard's Human Resources Department; however, complaints about harassment by non-employees are not reported or remedied in the same manner as harassment by employees. Howard's Human Resources Department could not "fire" Harrison -- a non-employee. The Campus Police Department needed to be utilized to keep Harrison off campus to stop the harassment. Again, as this Court recognized in *Crawford*, there is not just one way to report sexual harassment to invoke Title VII. The circumstances often determine which type of reporting will take place. This is particularly true when the harasser is a non-employee.

Prof. Martin first reported Harrison's harassment to the administration, campus security, colleagues, and police verbally, on November 20th and 21st. *Id.* She discussed it with administrators,[20] colleagues,[21] staff members[22] and law enforcement officers[23] who *all* readily recognized that Harrison's stalking was based on her status as a woman.

---

[20] Pl's Tr. Exhibit 8B; Tr. #490 at 50:5-51:4.

[21] Tr. 1666:2-15. 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.

[22] Bruner depo at 137:4-13.

[23] Sirleaf depo at 36:22-37:3, 137:5-140:19, 21:22-22:5, 99:22-102:3.

Howard has never argued that Prof. Martin *chose* Harrison or that the stalking was somehow her "fault;" nevertheless, at Oral Argument, Howard's counsel played on the prejudices against victims of stalking and domestic violence:

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

(A-105-106)

Neither Ms. Martin nor *Amici* have ever suggested that employers enter women's homes and stop domestic violence; they seek only to hold employers liable for their *own* actions in the workplace. Title VII obligates the employer to take *reasonable* steps to end sexual harassment in the workplace when it know *or should know* about it. Women stalked at work should not be fired or *castigated*[24] for reporting it.

---

[24] Howard's counsel also told the jury that Ms. Martin "*played the sexual harassment card*." Tr. 2459:17. He pointed to her accusingly and asked jurors, "Would you want Ms. Martin to teach *your children*?" Tr. 2463:4-5 Law students are adults with college degrees; moreover, Prof. Martin's students had taken up several petitions and written letters to the Dean protesting her non-renewal; yet, Howard's counsel implied that she would somehow harm *the jurors' "children*." Ms. Martin has always been a devoted mother and mentor. Her daughter, Danielle Evans, is now a Professor at American University and a nationally acclaimed writer. See e.g., http://www.washingtonpost.com/wp-dyn/content/article/2010/10/06/AR2010100606851.html; http://www.nationalbook.org/5under35.html; http://www.pgcmls.info/MeetAuthor1;

If employers are permitted to ignore threats from third parties, the harassed employee may be compelled to leave the workplace. In *Maupin v. Howard County*, No. 13C05062062 (verdict July 2, 2007) (Howard County, Maryland Circuit Court), a call from a purported Ku Klux Klan member to an African-American high school teacher was one factor creating a hostile work environment for her. *Id*. Such tactics are reminiscent of the school desegregation cases wherein African-American students were attacked by White supremacists and intimidated into leaving the schools they had integrated. It would be a sad irony if *Howard University* removed Title VII protection from employees threatened with racial hate crimes in their workplaces. Similarly, an employer must not be permitted to rid itself of *women* by failing to protect them when they are threatened – as women -- in their workplaces.

V. The D.C. Circuit Violated Ms. Martin's Right to Due Process by Denying her Relief under Rule 60(b) because *Crawford* was decided after the District Court's Judgment in *Martin*

The D.C. Circuit erroneously held that *Crawford* should not be applied to *Martin* because it was

---

http://www.american.edu/cas/faculty/evans.cfm. In an Appellate Opposition Brief, Howard even made false and irrelevant comments about Danielle, when she was eleven years old. Ms. Martin sought sanctions for Howard's attacks on her daughter; however, even before Howard filed any response, the D.C. Circuit, *sua sponte*, denied her motion and ordered the Clerk not to accept any further motions for sanctions from her. (A-178)

decided after the District Court's judgment in *Martin* -- yet, Rule 60(b) is entitled "*Grounds for Relief from a Final Judgment, Order, or Proceeding*." The *entire point* of Rule 60(b) is that judgments can be vacated due to facts learned, or cases decided, *after the judgment* -- as other federal circuits have expressly recognized. See fns. 25 and 26.

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. Fed. R. Civ. P. 60(b) permits a court to correct a "mistake" of fact or law where "the controlling case law of the circuit changed between the time of the court's judgment and the Rule 60 motion." *Bestor v. FBI,* 539 F. Supp.2d 324, 328 (D.D.C. 2008), relying on *Ctr. for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n*, 781 F.2d 935, 939 (D.C. Cir. 1986). A party acts reasonably by filing a Rule 60(B)(6) motion 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).

Rule 60(b)(6) provides for relief from a judgment for "*any other reason that justifies relief."* 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."[25]

---

[25]*Accord*, *Morris v. Adams-Millis Corp.,* 758 F.2d 1352, 1359 (10th Cir.1985); *see also D.C. Federation of Civil Associations v. Volpe*, 520 F.2d 451, 453 (D.C. Cir. 1975); *Barrier v. Beaver,* 712 F.2d 231, 235 (6th Cir. 1983).

Rule 60(b)(6) motions may be based on post judgment changes in the controlling law, *as long as a timely appeal has been filed*.[26] "[T]he interest of finality has less force where the litigation has not terminated but is still pending on appeal." *Id*. at 931; *Parks v. U.S. Life and Credit Corp.,* 677 F. 2d 838, 841 (11th Cir. 1982). *Martin* filed her Rule 60(b) motion on February 11, 2009 -- only *two weeks* after *Crawford* was decided. There would be tremendous injustice and inconsistency if the same standard is not applied in *Crawford* and *Martin*. Both women are entitled to the same justice.

The D.C. Circuit misapplied Rule 60(b) in a manner that deprived Ms. Martin of her right to due process, pursuant to the Fourteenth and Fifth Amendments of the U.S. Constitution. The decision also creates an additional split in the Circuits. It further violated Ms. Martin's right to due process by applying an abuse of discretion standard of review to the District Court's October 8, 2010 decision. Where a Rule 60 motion is "rooted in an error of law," the review is *de novo*. *Horowitz v. Peace Corps*, 428 F.3d 271 (D.C. Cir. 2005). The lower courts' decision is

---

[26]*Ctr. for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Commissions*, 781 F.2d at 935, 939 (D.C. Cir. 1986); *Volpe*, 520 F.2d at 453; *Parks v. U.S. Life and Credit Corp.,* 677 F. 2d 838, 841 (11th Cir. 1982); *Lairsey v. Advance Abrasive Co.,* 542 F.2d 928, 930-931 (5th Cir. 1976); *Bestor v. FBI,* 539 F. Supp.2d 324, 328 (D.D.C. 2008). The Circuit court cited *Kramer v. Gate,* 481 F.3d 788, 792 (D.C. Cir. 2007), as holding that "an intervening change in case law" is not a sufficient basis for granting a Rule 60(b)(6) motion; however, *Kramer* limits the statement to parties who misuse Rule 60(b) instead of filing an appeal.

rooted in errors of law in interpreting *Crawford*; the standard for review is therefore *de novo.*

VI. The D.C. Circuit Violated Ms. Martin's Rights to Due Process, by Leaving her Rule 37 Motion in Perpetual "Abeyance"

Under Federal Rule of Civil Procedure 37(a)(5)(A):

> if the moving party's motion to compel discovery 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. (*Emphasis added*)

On May 31, 2001, Ms. Martin prevailed on several motions to compel Howard to produce Answers to Interrogatories and to produce documents, which Howard had been withholding for months. Responding to Ms. Martin's request for **mandatory** Rule 37(a)(4)(A) sanctions, Magistrate Judge Facciola held: "**Plaintiff's renewed request for sanctions is held in abeyance pending further order of this court at the conclusion of discovery**" (A-158).

Howard committed egregious and repeated discovery violations, delaying this litigation by years. (*See e.g.*, A-127-132; 132-159) Ms. Martin submitted an itemization of the sanctions due to her as totaling

$364,120. Howard never contested her hourly rate or hours expended. On June 27, 2002, Howard was even held in Contempt of Court for violating the Orders compelling discovery (A-125-126); however, the Court did not address the Rule 37 sanctions in abeyance, which were based on the attorney time spent pursuing the withheld discovery.

Despite Ms. Martin's *numerous* pleas to the trial court to take the issue of Rule 37 sanctions out of "abeyance,"[27] the case was closed with the issue of the sanctions never having been addressed. The court's refusal to decide a motion squarely before it violates Ms. Martin's right to due process. Left in this state of perpetual limbo, it was both justice delayed and justice denied -- permanently.

The D.C. Circuit further violated Ms. Martin's rights to due process by holding that her Rule 37 motion for mandatory sanctions against Howard could not be considered on appeal because she did not raise it in her Rule 60(b)(6) motion. In fact, Ms. Martin properly and timely appealed the District Court's October 8, 2010 decision which ruled, not only on her February 11, 2009 Rule 60(b) motion, but

[27] 1) Pl's July 8, 2002 *Modification of June 25, 2002 Order to Increase $1,000.00 Contempt Sanction on Defendant Howard University and Other Relief*; 2) Pl's July 28, 2002 *Assessment of Discovery Produced by Howard;* 3) Plaintiff's August 3, 2001 *Motion for a Default Judgment Based on Defendant's Production of Late, Incomplete and Falsified Discovery*; 4) Pl's December 21, 2005 *Motion to Compel Depositions of Dean Denise Purdie-Spriggs, Prof. Steven Jamar*, at 15; 5) Plaintiff's December 18, 2005 *Opposition to Defendant's Motion in Limine to Preclude Plaintiff from Offering Argument of Evidence Regarding Alleged Damages*, at 9; and 6) Pl's December 21, 2009 *Motion to Retax Costs*, at 41-44.

also on her December 21, 2009 *Motion to Retax Costs*, which also asked the Court, once again, to take the issue of Rule 37 sanctions out of abeyance and to order Howard to pay her the sanctions, even if it also subtracted the costs assessed against her from the money due her. Ms. Martin's *unopposed* renewed request to take this issue out of abeyance and finally award the mandatory sanctions, was a collateral issue, separate and apart from the Rule 60(B) motion. *See Cooter v. Hartmarx Corp*., 496 U.S. 384, 965-396 (1990). Such supplemental proceedings can even be addressed years after a final judgment has been entered. *Id*.

Plaintiffs suing their employers/former employers typically face tremendous procedural, substantive and financial obstacles against wealthy corporations and powerful law firms with virtually unlimited resources. Rule 37 is the only "slingshot" plaintiffs have against abuses by these giants. Title VII plaintiffs are primarily wage earning people -- many of whom have lost even those wages as a result of the circumstances forming the bases of their lawsuits. Without Rule 37, plaintiffs are left to be *devoured* by defendants who thrive on thwarting discovery and otherwise sabotaging their struggle to eradicate discrimination, including sexual harassment. Rule 37 is germane to the enforcement of Title VII; it therefore merits enforcement by this Court.

CONCLUSION

Petitioner respectfully requests that *certiorari* be granted.

Respectfully submitted,
/s/

Dawn V. Martin, Esquire
Law Offices of Dawn V. Martin
1725 I Street, N.W., Suite 300
Washington, D.C. 20006
(202) 408-7040/(703)440-1417
dvmartinlaw@yahoo.com
www.dvmartinlaw.com
Counsel for Petitioner