No. 11-484

IN THE
Supreme Court of the United States

DAWN V. MARTIN, ESQUIRE,
Petitioner,

v.

HOWARD UNIVERSITY,
HOWARD UNIVERSITY LAW SCHOOL,
Respondent.

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

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF *CERTIORIARI*

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I. The Question of whether Undisputed Conduct Constitutes Legally "Protected Activity" Cannot *Sometimes* be Submitted to a Jury and *Sometimes* Decided by a Court

Howard offers no explanation for why it was appropriate for a jury in *Martin* to decide this question, though not in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009). Howard does not cite *even one case* holding that it is the province of the jury to decide whether the plaintiff's conduct constitutes "protected activity."[1] Howard acknowledged that:

> No jury in *Crawford* was ever asked to determine whether the plaintiff engaged in legally protected activity.

Opp., 13.

This Court held that Ms. Crawford's responses to her employer's questions about "inappropriate conduct" by her supervisor constituted "protected activity," *as a matter of law.* This was not a tentative, threshold question to allow the question to proceed to a jury, as Howard suggests. To the

[1] Howard argues that *Howard University v. Green,* 652 A.2d 41, 47 (D.C. 1994), holds "just the opposite" of what Ms. Martin represented it said (Opp., 17); however, *Green* certainly does not hold that the jury, rather than the judge should decide the issue. Howard states that the "state" cases are "not controlling here;" however, the D.C. cases are *absolutely controlling* regarding her DCHRA claims.

contrary, on remand, the *Crawford* trial court expressly acknowledged that the issue of protected activity had already been decided by this Court and would *not* be revisited by the trial court judge or submitted to the jury. *Crawford*, 2009 U.S. LEXIS 96282 at 4 (M.D. Tenn. 2009). *See* Pet. at 18-19. Howard ignored Ms. Martin's discussion of the remand, but it is enormously significant.

Howard argues that *Crawford* and its progeny do not apply to this case because the underlying acts of discrimination and/or harassment that the plaintiffs opposed in those cases were not the same as the stalking that Ms. Martin experienced in her workplace (Opp., 16); however, the issue is not whether Ms. Crawford and Prof. Martin endured the *exact same* acts of sexual harassment or that they reported them in the *exact same* way; it is whether the Court or the jury should assess the complaints about the objectionable conduct to determine whether it constitutes "protected activity." This assessment requires statutory construction and the application of case precedent by a court.

Howard states that the cases cited by the Petition:

> do not support the argument that, as a matter of law, always courts and never juries must decide whether a plaintiff has engaged in protected activity under Title VII and/or the DCHRA.

Opp., 17.

Even if Howard's characterization of these cases were accurate (which it is not), *Howard's own proclamation* highlights the need for clarification by this Court regarding whose province it is to decide whether conduct constitutes "protected activity." If not "*always courts and never juries*," *when* courts and *when* juries? The submission of the question of "protected activity" to a jury must not be arbitrary; there must be some conditions and guidelines for consistency, justice and due process. Howard offers no guidance on this issue. Only this high Court can provide it.

The contrast between the decisions in *Martin* and *Crawford* exemplifies the inconsistency and injustice afforded plaintiffs in Title VII cases if courts may arbitrarily decide whether an employee's complaint of harassment in the workplace constitutes "protected activity" is a question the court or the jury. This presents the opportunity to correct the injustice for the parties before it and to set precedent that will provide guidance for *all plaintiffs* alleging retaliation for opposing prohibited discrimination.

II. Howard Completely Misrepresents the Relief Requested by Ms. Martin and *Amicus Curiae* NOW Foundation[2]

On page 21 of its Brief, Howard states:

> .... Petitioner would have this Court apply a blanket rule that all criminal activity in the workplace or all common law premises tort liability that arises in the work place constitutes sexual harassment. Not only would Petitioner have this Court take away from juries the fact-finding responsibility that the many unique facts and circumstances arising in different cases presents, but she would effectively federalize under the anti-discrimination statutes large swaths of state criminal and common law.

Ms. Martin has never argued that juries should not decide the facts of a case. To the contrary, Ms. Martin has set forth the jury's factual findings in this case, explaining that, but for the improper submission of the "protected activity" legal question to them, their findings entitled her to a verdict in her favor on her sexual harassment/hostile work environment claim and consideration of additional facts to determine her retaliation claim. The jury

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[2] Howard referenced the *Amicus* Brief in one dismissive and condescending footnote. Opp. at 2, fn. 2. Howard's statement regarding this country's premier advocacy organization for women demonstrates its callousness toward issues of sexual harassment, stalking and other issues impacting primarily upon women.

found that: 1) Leonard Harrison harassed Prof. Martin in her workplace, Howard University Law School; 2) Harrison's harassment of Prof. Martin was severe and pervasive, creating a hostile work environment for her; 3) Howard knew or should have known of the harassment; 4) Howard failed to take reasonable steps to end the harassment. Pet. at 10.

Howard attempts to mislead this Court into thinking that the jury actually reached questions regarding whether Howard refused to renew Prof. Martin's contract in retaliation for her complaints about being stalked on campus (Opp., 18-19); however, the jury *did not* make any such determinations. Pet. at 11-12; A-58-60. Since the jury mistakenly concluded that Prof. Martin's complaints about stalking did not constitute "protected activity" within the meaning of Title VII, *it did not matter* what Howard did to her in retaliation for these complaints, because there was no statute that protected her from it. The jury *did not* answer the questions of whether Howard's stated reason(s) for Prof. Martin's non-renewal was pre-textual. *Id.* The jury had to answer "no," to the questions of whether Howard retaliated against her based on her "protected activity" because the jury had already determined that *there was no protected activity*. The determination that Prof. Martin's complaints of stalking did not constitute "protected activity" required the answer "no" to *every question* using the term.

III. The Facts of this Case Compel the Conclusion that Prof. Martin Engaged in "Protected Activity"

A. The Gender Specific Profiling and Language Compel the Conclusion that Harrison's Stalking of Prof. Martin was Based on Sex

The facts in *Martin* compel a finding that Prof. Martin engaged in protected activity, as a matter of law. Pet at 15-33; *Amicus* Brief at 14-15.

> If this is not harassment based on sex, or gender, it is difficult to imagine a scenario when stalking is based on sex.

Prof. Martin was stalked in her workplace, the Howard University Law School main building, by a delusional, stranger, Leonard Harrison, pursuing her to be his "*wife*." Pet. at 22-28. He selected Prof. Martin based on his perception that as an African-American *female* Law Professor teaching civil rights and race and the law classes, she fit the profile of a fictional *female* character in a book, Geneva Crenshaw, with which Harrison was obsessed. Pet. at 23. Harrison wrote to other *women*, also pursuing them, based on his perception that they fit the profile of his fictional "*wife*." Pet. at A-23. No man could have fit the profile of this *female* character. Harrison did not pursue any man to be his "wife," spouse, lover or intimate companion. If these facts do not establish stalking based on gender, then

stalking can virtually *never* constitute sexual harassment.

The manner in which Prof. Martin reported the stalking has never been disputed. Most of her complaints are well documented by Howard's Campus Security Records, the Stalking Complaint taken by the D.C. Metropolitan Police Department and the Dean's own records, including the memoranda that Prof. Martin provided her detailing the stalking (A-244, A-248, A-251; *see* Dean Bullock's response at A-250) These detailed memoranda were entitled "Security Problem on Campus" and described Harrison's conduct, the involvement of the D.C. Metropolitan Police Department (MPD) and the Howard Campus Police. These memos included, as exhibits, the actual letters that Harrison wrote to her, claiming that he believed that she was his "wife." Prof. Martin also transcribed Harrison's voice-mail messages, professing that she was the most important thing in the world to him and that he needed her. A-251, *see also* Harrison's letter to Valery Edwards at A-234. Since there is no dispute about what Prof. Martin said in her complaints about being stalked on campus, this is not a situation where the question of "protected activity" depends upon factual determinations by a jury; it depends *solely* upon a the application of statutory construction and Title VII case law.

Even thirteen years later and a change in administration, Howard takes no responsibility for its failure to take any reasonable steps to stop the delusional stalker who was terrorizing Prof. Martin

in her workplace -- *facts determined by a jury*. Pet. at 10. Instead, Howard continues to misrepresent her accomplishments[3] and even attempts to denigrate Ms. Martin's highly accomplished daughter -- who was *eleven years old*, suffering from allergies in Cleveland -- not a "teenage[r]" who was experiencing "problems" "at school and with her health." Opp. at 5. *See* Pet. at 32-33, fn. 24.

Howard still fails to take complaints of sexual harassment seriously unless and until the harasser commits an assault and is arrested. *See*, *e.g.*, *Bello, et. al. v. Howard University,* #: 1:11-cv-02106-CKK. *See*, *e.g.*, http://www.nbcwashington.com/news/local/Five-Students-Sue-Howard-University-in-Sexual-Harassment-Case-134865623.html. Howard, as an institution, has learned *nothing* in the last thirteen years regarding its obligation to maintain a workplace free of sexual harassment of women. Ms. Martin respectfully implores this Court to take this opportunity to teach Howard -- as well as employers and the other universities across the country

[3] Howard states that Prof. Martin did not make satisfactory progress in her scholarship (Opp., 5); but Dean Bullock testified that she did. Tr. 705:18-714:6. *See also*, *e.g.*, Tr. 873:20-24, 945:5-952:3, testimony of APT Committee members. Howard stated that Howard did not recruit Prof. Martin (*Id.*), but *see* Tr. 973:1-875:2, 1599:15-1609:16. Howard states that Prof. Martin was not replaced by a less experienced, lower ranked professor (*Id.*); however, *Associate* Professor Martin had 17 years of legal experience, teaching Equal Employment Opportunity (EEO) Law and other courses for 4 years, while the lower ranked *Assistant* Professor Cunningham had 6 years of legal experience, with 2 total years of teaching and none teaching EEO law. Contrast JEXs 50 (Cunningham) with 49 and 56 (Martin).

concealing known acts of sexual harassment, assault and stalking. It would be especially fitting to teach that less on January 13, 2012 -- the middle of *Stalking Awareness Month. See http://www.whitehouse.gov/the-press-office/2011/12/28/presidential-proclamation-national-stalking-awareness-month-2012; http://stalkingawarenessmonth.org/*.

B. Workplace Stalking is Prohibited under Title VII because it is "Based on Sex," Pursuant to the Disparate Impact Theory

In addition to the gender specific language and Harrison's own stated purpose of his pursuit of Prof. Martin to be his "wife," the disparate impact theory should be applied to this case to establish that the stalking constituted harassment based on sex. Pet. at 3, fn. 2, 23-27; *Amicus* Brief at 13-14. Howard asks this Court to ignore the national statistics on stalking published by the United States Department of Justice, establishing that 80% of stalking victims are women, but provides no justification for ignoring this compelling data or the disparate impact theory of discrimination, which relies on such national statistics.

Howard falsely claims that Ms. Martin did not make the disparate impact argument at any of the lower court levels. In fact, Ms. Martin has been making this argument since she filed this lawsuit in 1999. Judge Hogan acknowledged Ms. Martin's disparate impact argument in his 1999 decision denying Howard's *Motion to Dismiss and, in the*

Alternative, for Summary Judgment, *Martin v. Howard University*, 1999 U.S. Dist. LEXIS at 10 (D.D.C. 1999).

Howard next argues that Ms. Martin is precluded from making the disparate impact argument in this case because she did not make it *before the jury*, *at trial*. *Of course* she did not make this legal argument to the jury because attorneys parties are *not permitted* to make *legal arguments* to the jury. This is precisely the point. Ms. Martin had already prevailed on this issue in 1999. *Id*. Howard next argues that Ms. Martin is precluded by *res judicata*, from arguing the disparate impact theory because this Court did not grant certiorari in 2009; however, Howard cites no authority for the proposition that the denial of *certiorari*, at an earlier date, constitutes a decision on its merits, invoking *res judicata*. This Court necessarily denies *certiorari* in approximately 9,000 or more Petitions per year. It does not indicate that all of these cases lacked merit; moreover, a denial of certiorari certainly does not establish the lower court's opinion as *Supreme Court* precedent; it simply means that the Supreme Court did not consider it. In addition, the disparate impact theory was not raised as a threshold question in the 2008 Petition. It would only have been reached if this Court had granted certiorari based on the argument that the Court either should not have submitted the question of "based on sex" to the jury or should have provided the jury with the instruction that it requested regarding the definition of "sexual harassment."

C. Harrison was not an "Equal Opportunity Stalker" of both Men and Women

There is no evidence that Harrison pursued any man to be his "wife," spouse or lover, or otherwise pursued any type of intimate or sexual contact with him. The one time encounter between the late Professor Derrick Bell and Leonard Harrison does not meet the legal definition of "stalking" in any jurisdiction in this country.

Prof. Bell created the fictional character, Geneva Crenshaw, that Harrison believed was his "natural wife." Harrison demanded that Prof. Bell reveal the name of the "real Geneva Crenshaw" to him. *Howard moved to exclude the renowned Prof. Bell,* Profs. Lani Guinier at Harvard Law School and Profs. Adrienne Wing and James McPhereson, at the University of Iowa. Docket #349.[4] All of these professors had had contact with Harrison. Howard argued that allowing these "prestigious" witnesses for Ms. Martin would increase the credibility of her claims *and therefore should be excluded*. Judge Hogan excluded them and then held that Ms. Martin could testify about what Prof. Bell told her about his encounter with Harrison -- although it was *pure hearsay,* purportedly admitted only as proof of Ms. Martin's state of mind and emotional distress.

Although hearsay evidence may not be used to prove the truth of the matter asserted, Howard, Judge Hogan and the D.C. Circuit have repeatedly

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[4] Howard also moved to exclude its own most senior faculty member, Prof. Spencer Boyer (Docket # 445) -- and prevailed.

relied on this brief piece of hearsay testimony as *evidence* that Harrison "stalked" a male professor. Ironically, Howard argues that Prof. Bell's affidavit should *not* be considered by this Court because Judge Hogan excluded it as evidence at trial (Opp. at 2, fn. 3); however, *without Prof. Bell's statement, there is absolutely no evidence that indicates that Harrison ever confronted any man, for any purpose.* Howard wants to have it both ways: it seeks to use the hearsay trial testimony of Ms. Martin, stating that Prof. Bell told her that Harrison confronted him and threatened to "blow [his] head off" (Tr. 2050:10-2052:6), but does not want the affidavit admitted because it explains that Harrison was stalking African-American female professors and was angry because Prof. Bell told him that the Geneva Crenshaw character was fictional and he could not provide him with the name of a *woman* who would be his next stalking victim. Howard has now magnified its misrepresentations by claiming that there was evidence that "men" -- plural -- were "stalked" by Harrison. Opp., 20.

In any case, the courts are not limited to the evidence admitted at trial, but may consider all evidence of record. Prof. Bell's affidavit was an exhibit to numerous filings at the trial court level -- including the motions *in limine* filings determining whether the exhibit would be admitted at trial. Particularly since Ms. Martin is arguing that the Court, rather than the jury should have considered the question of protected activity, all evidence before the trial court may be considered by this Court.

IV. Howard Falsely States that the Issue of Rule 37 Sanctions was Decided by the Court

Ms. Martin quoted Magistrate Judge Facciola's May 31, 2011 decision holding her Motion for *mandatory* Rule 37 "in abeyance." Pet at 36. She listed the motions, over the years, that she filed asking the Court to decide this issue (Pet. at 37, fn. 27); yet Howard insists that Magistrate Facciola actually decided the issue and "determined that the monetary sanctions that Appellant was seeking were not necessary or appropriate." Opp., 22-23, fn. 7. Howard utterly fails to cite or quote any such decision by Magistrate Facciola -- because *it never happened*.

The D.C. Circuit never mentioned the Rule 37 issue. This collateral issue remained within the jurisdiction of the trial court. It was not dependent upon Ms. Martin's Rule 60(b) motion or her *Motion to Retax*, but she did remind the Court that it had never been decided. She also argued that, if costs were assessed against her, they should be deducted from the $364,000 that she should be awarded under Rule 37. Howard's decision, on appeal, to abandon its claim for costs against Ms. Martin did not "moot" out her long-pending Rule 37 motion.

CONCLUSION

Petitioner respectfully requests that *certiorari* be granted.

Respectfully submitted,

/s/

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