

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DAWN V. MARTIN,

Plaintiff,

v.

HOWARD UNIVERSITY, et al.,

Defendant.

Civil Action No. 99-1175 (TFH/JMF)

REPORT AND RECOMMENDATION

For the reasons stated in this opinion, I recommend that the parties' cross motions for summary judgment be denied except that Howard University's motion be granted as to plaintiff's claims based on Howard's leaving certain faculty positions vacant and hiring a tax professor.

BACKGROUND

The plaintiff, Dawn V. Martin ("Martin"), was a visiting professor at Howard University Law School¹ from August 16, 1996 until her contract expired on May 15, 1998.

This lawsuit grows out of incidents involving a mentally deranged homeless man, Leonard Harrison ("Harrison"), whose strange behavior led plaintiff to seek protection from HU. Subsequently, however, plaintiff complains that HU created a hostile working environment because of its inadequate reaction to Harrison's behavior. She also complains that HU retaliated against her because of her complaints to the administration about its inadequate response.

¹ Hereafter "HU".

INTRODUCTION

I. The Parties' Failure to Comply with the Local Rules

The parties have cross-moved for summary judgment. This obliged each of them to comply with our local rules by filing a Statement of Material Facts as to Which There Is No Genuine Issue. LCvR 7.1(h). Once they received each other's Statement, they were obliged to file an opposition that "shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated." Id. The statement of genuine issues must refer to that portion of the record, created by discovery and otherwise, that supports the contention that a certain fact is disputed. Id. Neither party complied with the rule. Plaintiff filed Plaintiff's Statement of Material Undisputed Facts ("Plains. Statement"), but HU filed what it called Howard University's (Corrected) Statement of Material Facts that Preclude Summary Judgment for Plaintiff. HU said that it filed this document "to support its opposition to plaintiff's motion for summary judgment " and then in a footnote stated:

HU asserts that this statement precludes this Court from entering summary judgment for plaintiff. Indeed, to the extent these facts are undisputed by plaintiff, as set forth in HU's motion for summary judgment, this Court must grant summary judgment for HU. Moreover, the existence of these factual issues precludes the entry of summary judgment for plaintiff.

Id. at 1 n.1.

HU's assertion that material facts preclude summary judgment for plaintiff has to mean that plaintiff is not entitled to summary judgment because there are factual issues that have to be

resolved by a jury. But, if there are factual issues that have to be resolved by a jury, that means that HU is not entitled to summary judgment either since the existence of any factual issues precludes granting summary judgment for HU as much as it precludes it for plaintiff.

Unfortunately, plaintiff, apparently forgetting that she was both movant and opponent of a motion, also failed to comply with the rule and file a statement of facts as to which there is a genuine issue. The parties' failure to comply with the local rule puts me in the impossible predicament of attempting to resolve cross-motions for summary judgment without knowing exactly what facts are disputed. Confronted with two irreconcilable versions of the facts, I certainly cannot prefer one to the other.

I could, at this point, say a plague on both your houses and strike both motions for failure to comply with the local rule. But, given the tortured, acrimonious history of this case, I am, to put it mildly, reluctant to engender another round of briefing or an appellate issue on what might be characterized as a technical ruling. Moreover, I have presided over this case so long that I can divine what is and what is not in dispute for the limited purposes of my responsibility. As will become obvious, I am firmly convinced that there are genuine issues of material fact as to nearly every issue dividing the parties. Given that conclusion, striking the cross motions would only prolong the agony that this case has become for the parties and the court.

II. Issues Resolved by Chief Judge Hogan Will Not Be Revisited

Before turning to my analysis, I must note that in 1999, Chief Judge Hogan denied HU's motion for summary judgment and specifically held that there were factual issues that precluded an award of summary judgment. Martin v. Howard Univ., 1999 U.S. Dist. LEXIS 19516 (D.D.C.

Dec. 16, 1999). As hard as it is to believe, in its current motion, HU ignores that decision and once again advances the very arguments Judge Hogan rejected. It is, of course, legitimate for a party to renew a motion for summary judgment based on information newly garnered as a result of the discovery process. See Williamsburg Wax Museum, Inc. v. Historical Figures, Inc., 810 F.2d 243, 250 (D.C. Cir. 1987). But, what HU cannot do is ignore the Chief Judge's decision and expect me to ignore it as well. I cannot reconsider a decision I did not issue, nor do I have any power to overrule the Chief Judge. Thus, his determinations control.

More specifically, the Chief Judge concluded:

1. The alleged harassment by Harrison of the plaintiff was based on her sex;
2. Whether Harrison's conduct was sufficiently severe or pervasive to be actionable under the rubric of a hostile environment claim was a jury question;
3. Whether plaintiff's letter was sufficiently detailed to place HU's Dean Alice Gresham Bullock ("Bullock") on notice that plaintiff believed that she had been the victim of a hostile work environment was a question of fact for the jury;
4. Whether plaintiff engaged in protected activity when she informed Bullock of Harrison's activities and complained about what she felt was the inadequacy of campus security was a question of fact for the jury;
5. There was a sufficient causal connection between the adverse actions about which plaintiff complained and her complaints about Harrison and campus security to make the issue of whether the former were retaliation for the latter a triable issue of material fact; and
6. Whether one of plaintiff's complaints of retaliatory action, that, as a result of HU's retaliation, she was evicted from her officer prematurely, constituted an adverse employment action was a material issue of fact for the jury.

I will not permit HU, in its second motion for summary judgment, to re-litigate those issues that were resolved against it. Triable issues of fact in 1999 remain triable issues of fact in

2003.

III. The Issues Raised by HU's Second Motion That May Be Considered

Reading HU's second motion with some indulgence, there are only three issues that it did not press in its first motion: 1) whether plaintiff suffered an adverse personnel action, *i.e.*, a materially adverse consequence affecting the terms, conditions, or privileges of employment because of Harrison's activities; 2) whether HU's response to plaintiff's complaints about Harrison was adequate;² and 3) whether information disclosed during discovery compels the conclusion that Howard did not retaliate against plaintiff such that no reasonable juror could conclude to the contrary.

DISCUSSION

I. Plaintiff Need Not Show an Adverse Employment Action

As to the first issue, whether plaintiff must show that she suffered an adverse employment action, HU muddles two distinct bodies of law. When a person claims to be victimized by discrimination and invokes Title VII, she must establish that she was subjected to an adverse employment action, such as a demotion or a loss of pay. Brown v. Brody, 199 F.3d 446, 457 (D.C. Cir. 1999). On the other hand, when a person complains of being subjected to a hostile environment because of sexual harassment, she is not obliged to show an adverse

² HU specifically indicated in its first motion that "material facts regarding the appropriateness of the University's response are indeed in dispute." Defendant Howard University, Howard University School of Law, President H. Patrick Swygert, and Dean Alice Bullock's (in her Official Capacity) Reply Memorandum of Points and Authorities in Support of their Motion to Dismiss the Complaint or in the Alternative for Summary Judgment at 4. It, therefore, was not moving for summary judgment on the ground that HU's response to plaintiff's complaints about Harrison was appropriate. Hence, HU can make that argument now.

employment action so long as she establishes that the harassment is sufficiently severe or pervasive to alter the conditions of her employment, even though she remains employed at the same salary and in the same position. Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 64 (1986). Plaintiff was, therefore, not obliged to show that she was fired or demoted as a condition of establishing a hostile working environment. If she did, the protections afforded employees who have to work in hostile environments would evaporate as long as their employers, while tolerating the harassment, did not fire or demote them. What HU is really saying is that only two personal encounters with Harrison do not constitute a hostile environment. But, Chief Judge Hogan has already ruled that whether Harrison's actions did or did not constitute a hostile environment is a triable issue of fact. Martin, 1999 U.S. Dist. LEXIS 19516 *8.

II. The Adequacy of HU's Response

As to the second issue, the adequacy of HU's response to Harrison's activities, there is a self-evident jury issue presented. Juries exist, after all, to apply a standard, as defined by the court's instructions, to the evidence it hears. There is not much dispute as to what Harrison did, what complaints plaintiff made, and what HU did in response. It is also undisputed that, when Harrison returned to the campus, he was not apprehended. Hence, the adequacy of HU's actions raises a jury question in the same sense as a doctor's treatment of a patient may or may not be deemed negligent under the applicable standard of care. HU's assertion that its response was adequate does not make the issue any less a jury question. The demand by plaintiff for summary judgment on the grounds that HU's response was inadequate has to be denied for the same reason.

Moreover, if HU were to argue that no reasonable person could conclude that its response was inadequate, plaintiff could point, for example, to the fact that, despite her complaints, the administration failed to alert all of its officers about Harrison's bizarre contacts with the plaintiff. Indeed, when Officer Dowdy encountered Harrison on campus, he simply examined his identification and let him go. This occurred even though campus security and the Metropolitan Police Department had agreed that Harrison should be arrested if he ever came back on campus. Those facts alone create a genuine issue of material fact as to the adequacy of HU's response to plaintiff's complaints. On the other hand, that plaintiff admittedly secured the assistance of the HU security staff nullifies her right to claim that a reasonable person would have to find HU's response inadequate. On either side of the coin, the adequacy of HU's response to plaintiff's complaints is a pristine example of a triable issue of fact.

III. Understanding Plaintiff's Retaliation Claims

A. Chronology of Events

Plaintiff claims that three additional acts of retaliation occurred after HU decided not to renew her contract. To understand HU's argument as to these claims, one has to understand the sequence of events in this case.

Plaintiff's visiting professorship was scheduled to end with the 1997-1998 school year. Howard University's Motion for Summary Judgment ("Defs. Mot.") at 6. On October 1, 1997, Martin formally applied for a tenure-track position, or in the alternative, for a renewed visitorship. Plains. Statement at 20. Martin followed up with a memorandum to the HU's Appointments, Promotions and Tenure Committee ("APT"), dated October 2, 1997, requesting

consideration for appointment to a permanent, tenure-track position. Defs. Mot. at 13-14. In the meantime, Howard advertised three available faculty positions for the 1998-1999 academic year: 1) Labor/Equal Employment Opportunity ("Labor/EEO") Law, 2) Constitutional/Civil Rights Law ("Constitutional Law"), and 3) Commercial Law. Plains. Statement at 20.

On Oct. 31, 1997, Martin interviewed with Bullock. Defs. Mot. at 14. Bullock told Martin that her appointment as Visiting Associate Professor of Law would terminate on May 15, 1998 and that Martin was being rejected for reappointment. Id. On November 3, 1997, Bullock wrote Martin a letter memorializing the meeting. First Amended Complaint ("Plains. Amended Compl.") at Ex. L.

On November 5, 1997, Martin submitted a memorandum to the APT Chair, Isaiah Leggett ("Leggett") to "assist [the APT] in assessing [Martin's] application for a permanent faculty position, or in the alternative, an extension of [her] visitorship." Defs. Mot. at Ex. 13. On November 7, 1997, Martin interviewed with the APT Committee. Id. at 15. On December 18, 1997, the APT Committee met to discuss all open positions. Id. After reviewing Martin's application and her supporting materials, the APT decided against recommending Martin for reappointment. Id. That same day, Professor Andrew Taslitz ("Taslitz"), Vice-Chair of the APT, verbally informed Martin of the Committee's decision. Id.

Shortly thereafter, the APT extended offers to E. Christi Cunningham ("Cunningham"), Reginald Robinson ("Robinson"), and Lateef Mtima ("Mtima"), for the Labor/EEO position, the Constitutional Law position, and the Commercial Law position, respectively. Id. at 15-16. In February 1998, Robinson rescinded his original acceptance. Defs. Mot. at 16-17. When Martin

became aware of Robinson's recision, she immediately wrote to Bullock. In a letter dated March 6, 1998, Martin requested that HU reconsider the APT's initial December 18 decision to reject her as a candidate for a tenured professorship. In the same letter, Martin also asked that she be considered for the newly vacant Constitutional/Civil Rights position. Plains. Amended Compl. at Ex. Q.

At some point thereafter, tenured HU Tax Law Professor Loretta Argrett ("Argrett") decided to extend her sabbatical leave for another semester. Argrett told Howard she would not return until the Spring semester of 1999, at the earliest. Plains. Statement at 50.

In the Spring of 1998, Bullock determined that she was unable to teach her courses in Tax and Trusts & Estates because of her responsibilities as Dean. Defs. Mot. at Ex. 6. She also realized that Associate Dean Michael Newsom ("Newsom") would not be able to continue teaching Property Law and Trusts & Estates. Id. In addition, at some point in time, HU suspended one of its Property Law professors. Id.

On April 15, 1998, the APT recommended to Bullock that HU hire Angela Vallario ("Vallario") to teach a Tax course and a Wills, Trusts & Estates course. Defs. Mot. at 19.

On April 8, 1998, Bullock responded to Martin's March 6 letter. Plains. Amended Comp. at Ex. R. Focusing on Martin's request for reconsideration of the December 18 APT decision, Bullock told Martin that HU would not reconsider her application and that the only courses "for which the school has urgent teaching needs . . . do not include courses which you teach." Id. Additionally, Bullock described how the events that occurred in February 1998 had resulted in changes in HU's hiring needs. Id.

In response to Bullock's April 8, 1998 letter, Martin wrote back, asking that she be considered for *any* position at Howard. Plains. Amended Comp. at Ex. S. On April 10, 1998, Martin again wrote to Bullock, this time proposing a number of scenarios in which, she thought, HU could reshuffle the faculty assignments in order to accommodate her desire for a position. Id. at Ex. T.

Bullock replied to Martin's April 10, 1998 letter and, in rejecting Martin's proposed reassignments, stated that "[t]he School of Law executed contracts with new hires several months ago which confirm their teaching assignments. I have no basis to rescind those agreements." Plains. Amended Comp. at Ex. U. Bullock then forwarded Martin's letters to the APT for formal reconsideration. Id. Positive action was not taken by the APT, and Martin left HU as the school year ended. Defs. Mot. at 19.

B. HU's Denial of Martin's Initial Application for Tenure or Renewed Visitorship

The first act of retaliation alleged by plaintiff is the easiest to articulate and understand: HU's denial of her initial application for tenure or renewed visitorship. This claim is predicated on the December 18, 1997 decision by the ATP not to recommend her re-appointment. The result was that plaintiff lost her job and it was given to Cunningham.

According to Martin, following her complaints regarding Harrison, Bullock expressed "animosity" toward Martin personally and displayed a "sarcastic, callous and hostile response to the issue" generally. Plains. Mot. at 16. Martin also contends that Bullock grew more and more weary of having to deal with Martin's situation and that Bullock's discomfort was made known to the members of the APT. According to Taslitz, Bullock spoke to him about Martin prior to the

APT's December 18, 1997 decision on Martin's application. Deposition of Andrew Taslitz ("Taslitz Dep.") at 130:2-132:11. Taslitz recalled that Bullock raised concerns about Martin's judgment and questioned Martin's abilities as an academic. Id. Martin thus claims that the APT evaluation process was "poisoned" since Bullock "used" Taslitz to misrepresent Martin at the APT evaluation. Plains. Mot. at 17-18.³ Martin also claims that the APT was simply a "rubber stamp" for Bullock's recommendation. Id.

HU contends that Martin was not recommended for the EEO tenure position because she: 1) lacked scholarship, 2) exhibited poor judgment, and 3) was not "actively involved in the intellectual life of the Law School community." Id. at 38-39.

1. Martin's Lack of Scholarship

In support of its claim that Martin lacked scholarship, HU argues that Martin failed to complete and misrepresented her expected ability to complete an article that she was preparing for publication. According to HU, during her initial job interview with the APT in early 1996, Martin represented to the Committee that she had an article in "final form" and "immediately ready for publication." Def.'s Mot. at 6. HU also claims that Martin indicated that she expected

³ Taslitz admits that he spoke with Bullock about Martin prior to the APT Committee meeting to review Martin's application for tenure. Taslitz Dep. at 130:2-131:8. He also admits that she expressed her displeasure with Martin as a law professor and made specific mention of Martin's "poor judgment" to him. Id. at 131:9-22. When the APT Committee met to discuss Martin's application for tenure, Taslitz presented a number of "concerns" to the other Committee members regarding Martin. Id. at 136:11-140:15. Taslitz also recalled that two other Committee members may have expressed comments about Martin's "bad judgment" when the APT discussed her qualifications. Taslitz confirmed that the comments were tied in some way to Bullock. Id. at 168:14-169:12. Taslitz testified that "there were a number of people on the faculty who had been saying that they thought you had poor judgment and that the Dean had also expressed that view very early on in your time at Howard." Id.

to have the article, entitled *911: How Will Police and Fire Departments Respond to Public Safety Needs and Comply with the Americans with Disabilities Act?* ("911"),⁴ finished by the beginning of the 1996-97 school year.⁵ In her letter to the APT supporting her application for tenure, however, Martin outrightly expressed her self-dissatisfaction with the progress of *911*. HU claims that she even stated that she was "extremely embarrassed at how long [the article] has taken to be ready to send out."⁶ Defs. Mot. at Ex. 13, p. 4. HU further claims that, in the same letter, Martin promised that the *911* article would be finished the very next day and that her other research project (*Lights, Camera, Discrimination! Playing the Victim Under Title VII* ("*Lights*")) would be done by January 1998. Id.

2. Martin's Poor Judgment

In addition to lacking scholarship, Martin, according to HU, also exhibited poor judgment. According to Taslitz, Martin behaved inappropriately at a faculty meeting by refusing to let drop an issue that the faculty had debated and voted on. Despite the fact that the faculty

⁴ Taslitz testified that Martin explicitly represented that the "*911* piece at the time [Martin] had accepted the offer to Howard would be published or at a minimum accepted for publication by the time [Martin] started employment at Howard and, in fact, it was not accepted for publication" Taslitz Dep. at 137:19-138:1.

⁵ In her November 5, 1997 letter to the APT in support of her application for tenure, Martin wrote that she "would have liked to have had *911* published at least a year ago." Defs. Mot. at Ex. 13, p. 5.

⁶ Martin cited eleven reasons why the article was not finished. Among those reasons were a car accident in October of 1996, which caused Martin constant headaches and damage to her back and neck, pneumonia suffered over the winter school break of 1996-97, a diagnosis of a severe mold allergy and exposure to "visible" mold-infested classrooms, an IRS problem, difficulties with research assistants, ongoing litigation with her landlord due to "hidden defects," and computer problems that forced Martin to retype the entire article. Id.

ultimately voted in a way not favored by Martin, according to Taslitz, Martin remained "very insistent" as to the correctness of her viewpoint. Taslitz Dep. at 170:10-17. In addition, Taslitz stated that several faculty members came away with the impression that "anyone who disagreed with [Martin] was unreasonable" and that "some people were feeling insulted by that." Id. Taslitz also stated that other faculty members had told him they didn't believe Martin had good judgment. Taslitz Dep. at 243:12-21.

According to Professor Andrew Gavil ("Gavil"), also an APT member involved in Martin's evaluation, Martin once referred to one of her students with whom she was having a conflict as a "bitch." Deposition of Professor Andrew Gavil ("Gavil Dep.") at 88:7-21. Gavil further stated that the comment was "troublesome" to him since he "was not accustomed to hearing faculty talk about a student that way." Id. Gavil recounted the matter to Taslitz and expressed his feeling that Martin's actions showed "very bad judgment." Taslitz Dep. at 247:20-248:21.

3. Martin's Interaction with the Law School Community

Finally, HU claims that Martin was not "actively involved in the intellectual life of the Law School community." Id. at 38-39. Various faculty members complained to Taslitz that they "found [Martin] difficult to deal with on a personal basis." Taslitz Dep. at 240:2-5, 243:12-21. Newsom told Taslitz that Martin had created "headaches" for his office. Id. Taslitz also reported that faculty members "were disturbed [and] felt uncomfortable with [Martin]." Id. at 26:3-19. According to Taslitz, Gavil had indicated his "frustration" with the lack of progress in Martin's scholarship and had noted that there were a "significant number of people who [felt] they [were]

having difficulties relating to [Martin]." Taslitz Dep. at 247:20-248:21. Taslitz also stated that Gavil was concerned that Martin had not gone to luncheons to talk about articles and scholarship. Id.

Martin argues that HU's proffered reasons are pretextual. The first suggestion of pretext is rooted in the Committee's consideration of applicant publications. Taslitz testified that when the APT met on December 18, 1997 to discuss and consider several candidates for open tenured positions at the Law School, the University considered only articles that were in print by the date of the APT action. According to Taslitz, this was in accordance with the requirements for an Associate Professorship. Taslitz Dep. at 119:20-120:16. Taslitz admitted, however, that while a two-article minimum was the "standard," it was not the "rule." Id. Nevertheless, although the publication of two articles was cited as a "minimum standard" for an Associate Professorship, HU offered it as the primary reason for its refusal to offer Martin tenure. See, e.g., Defs. Mot. at 6. Leggett, for example, testified that Cunningham's scholarship production was a "crucial point of the decision" to choose her over Martin. Deposition of Isaiah Leggett ("Leggett Dep.") at 169:4-14.

In Howard's Answers to Interrogatories dated October 17, 2000, Howard stated that Martin was refused tenure in part because as of December 18, 1997 Martin had "no scholarship articles accepted for publication." Plains. Mot. at 25. In fact, HU was aware that Martin's *911* article had been accepted for publication on December 17, 1997, that she had substantially completed work on a second article (*Lights*), and that she was in the process of researching a third. Taslitz Dep. at 159:12-162:13. Significantly, four of the five APT Committee members

testified that they knew of the article's publication. Plains. Statement of Facts at 27. Taslitz even testified that he had informed the other members that Martin's article was recently accepted for publication. Taslitz Dep. at 141:7-16.

Leggett testified that not only was he made aware that the *911* article had been approved by the time of the December 18 meeting, but that he was even considering giving Martin credit for two different articles. Leggett Dep. at 117:15-121:8. Nevertheless, when asked why he chose Cunningham, Leggett testified that Cunningham had not only published during her time at Howard but had also presented "sufficient information" to suggest that she would publish again and was in the process of doing so. Id. at 160:6-19. Although Leggett testified that publication was a "crucial" factor in his decision, he admitted to not even having read Cunningham's article. Id. at 170:19-20.

The second suggestion of pretext is rooted in the reason offered by the Committee in support of its decision to hire Cunningham for the Labor/EEO position. According to Taslitz, Cunningham had extremely positive academic and professional experience. Taslitz Dep. at 133:21-136:10. However, Leggett testified that Martin had more professional experience in EEO law than Cunningham. Leggett Dep. at 153:2-4. Although Leggett deemed Cunningham's qualitative experience to be better than Martin's, the Committee did not identify qualitative legal experience as a factor for consideration. Id. at 200:19-202:3. Finally, Professor J. Clay Smith, another Committee member, testified that Martin's and Cunningham's qualifications were "very close." Plains. Mot. at 32.

The third suggestion of pretext is rooted in the Committee's assessment of Martin's

judgment. Leggett testified, contrary to Taslitz' assertion, that he found Cunningham and Martin "basically both qualified . . . judgment-wise." Leggett Dep. at 194:22-195:3. Leggett also testified inconsistently with Taslitz on the issue of faculty comments about Martin. Leggett received comments from faculty members about Martin that were not negative. In fact, according to Leggett, faculty members generally had "good things [to say] about [Martin's] . . . work," Leggett Dep. at 249:7-12, and there was "no faculty concern brought to [Leggett's] attention regarding Martin's appointment." Id. at 251:13-15. Leggett himself admitted that he found Martin "to be collegial" based on his personal contact with her. Id. at 258:20-259:7. Although Taslitz considered the impressions of other faculty members important in assessing Martin's "contribution to the life of the Law School community," Taslitz Dep. at 240:2-5, Leggett testified that he personally "did not give a great deal of weight" to positive faculty comments about Martin and that there "was not a serious discussion among the faculty members" from which to base dispositive judgment on either Martin or Cunningham. Leggett Dep. at 265:11-19.

Reading the record in a light most favorable to plaintiff, the articulated reasons for firing Martin are contradicted by the potential testimony of members of the ATP committee who have voiced positive views of Martin. First, contrary to HU's contention that Martin lacked scholarship, there is evidence that members of the APT Committee were in fact aware that one of Martin's articles had been accepted for publication and that she was working on two others. In addition, while Cunningham's scholarship production was cited as pivotal in her selection, one Committee member admitted to not even having read the article. Second, contrary to HU's

contention that Martin displayed poor judgment, there is evidence that certain faculty members had positive impressions of Martin and that both she and Cunningham were viewed as equally qualified in terms of their exercise of judgment. Finally, that Martin's professional experience in EEO law was greater than Cunningham's undercuts the argument that Cunningham was substantially more qualified than Martin. In fact, it appears that the decision was a close call.

Allowing for the reality that the selection process is not a scientific one and for the deference that must be paid to the right of an employer, particularly a university, to hire whomever it sees fit, these inconsistencies compel me to conclude that a reasonable finder of fact could find them untrue and a pretext for retaliation.

C. HU's Hiring of a Tax, Trusts and Estates Professor

The second act of retaliation alleged by Martin is that Bullock inappropriately converted a vacant Constitutional Law/Civil Rights position into a Visiting Tax, Trust and Estates position and offered it to Vallario in retaliation against plaintiff for her complaining about Harrison. *Id.* ¶ 312. Plaintiff insists that Bullock only did this to ensure that plaintiff did not return to HU because she was not qualified to teach a tax course, even though she was qualified to teach a constitutional law course.

HU claims that the Law School's faculty needs for the 1998-1999 academic year simply "changed" around the Spring of 1998. First, HU cites Argrett's decision to extend her sabbatical leave for another semester. Second, HU cites Bullock's and Newsom's decisions to give up their teaching responsibilities. According to HU, these changes created the following vacancies: Tax (3 sections), Trusts and Estates (2 sections), and Property (4 sections). Bullock went to the APT

to begin the hiring process anew, and as a result, the APT hired Vallario.

Martin counters that HU simply reshuffled the deck. Martin argues that when she re-applied for the Constitutional Law position, Bullock simply did not want to deal with her anymore. Therefore, instead of vetting Martin through the APT again for a different position, Bullock decided to rearrange her and her colleague's schedule and to create a position for which there was previously no need.

D. HU's Decision to Leave Certain Positions Vacant

The third act of retaliation identified by Martin is that HU, in retaliation for her complaints about Harrison, left certain positions open rather than consider her for any of them. Id. ¶¶ 326, 327, 330, 340, 345. According to Martin, HU failed to fill several vacancies that were created at various times during the first few months of 1998. Specifically, Martin claims that HU failed to fill the following positions: 1) the Constitutional Law vacancy created by Robinson's rescission of her acceptance, 2) the vacancy created by Argrett's decision to extend her sabbatical, 3) the vacancy created by the decision of a professor named Ramsey to leave the faculty, and 4) the Property Law vacancy created by the suspension of a Property Law professor. Plains. Mot. at 42.

In Martin's view, three positions were vacant as of October 1997. Accordingly, Bullock recommended that three professors be hired and three offers were made. When only two professors accept the APT's offer, a vacancy was created. According to Martin, additional vacancies were then created by the decisions of Argrett and Ramsey. Finally, another vacancy was created by the school's suspension of one of its Property Law professors.

HU, on the other hand, argues that the decisions it made were perfectly appropriate given the school's changing staffing needs. First, while HU admits that the Constitutional Law position remained vacant until after February of 1998, HU argues that it ultimately decided not to fill the position because of the staffing changes that occurred in the Spring of that year.

According to Bullock, in October of 1997, she had the budgetary resources to fill three positions for the 1998-99 academic year. She claims that the APT was charged to fill these positions and that offers were in fact made. She further claims that even at the time Robinson rescinded, Bullock's staffing needs had changed. At that point in time, instead of offering the Constitutional Law position to another professor, Bullock claims that she needed a professor to teach Tax, Property, and Trusts & Estates. With only enough funds remaining in the budget to cover one position, Bullock decided not to hire a Constitutional Law professor as originally planned, but instead decided to hire a professor to cover the Tax, Property, and Trusts & Estates courses. This decision led to the hiring of Vallario. As stated by Bullock:

[a]ctually it was fortuitous that Reggie Robinson didn't accept the offer. Although establishing a presence in civil rights and constitutional law was important, the priority had to be courses already in the curriculum and in need of coverage by full-time faculty. And that is what tax and property and trusts and estates were.

Bullock Dep. at 184:7-14.

Martin counters that she offered several "suggestions" for reorganizing the faculty in order to accommodate her, but that these alternatives were never considered. For example, Martin wanted HU to ask Professor Cunningham to, in essence, relinquish her promotion and agree not to teach Labor and EEO Law so that Martin could teach those courses. Plains.

Statement at 52 ¶ 246. Martin also suggested that HU reassign newly promoted Mtima's responsibilities as well. Instead of teaching Torts I and II, courses for which he had been promoted to teach, Martin suggested that HU ask him to teach Property courses instead. Id. at 247.

E. Only HU's Decisions Not to Reappoint Martin or Offer Her Another Position Are Cognizable

It is settled in this circuit that an act, claimed to be retaliatory, must constitute an adverse employment action. An adverse action is one that has materially adverse consequences affecting the terms, conditions, or privileges of her employment such that a reasonable finder of fact could conclude that the plaintiff has suffered objectively tangible harm. Brown v. Brody, 199 F.3d 446, 457 (D.C. Cir. 1999). Two of Martin's retaliation claims easily meet this criterion: 1) the decision, formalized in Bullock's letter of November 3, 1997, not to reappoint her as Visiting Associate Professor, and 2) the decision, formalized in Bullock's letter of April 8, 1998, rejecting Martin's application for any position on the HU faculty. Combined, they led to Martin's dismissal and the loss of her job.

It is equally clear that the other acts of which she complains, the conversion of the Constitutional Law/Civil Rights position into a Visiting Tax, Trust position and the decision to leave certain faculty positions vacant, do not qualify as adverse actions. They lack a direct and immediate impact upon Martin that would permit them to be characterized as causing objectively tangible harm. While these acts ultimately led, in Martin's view, to her departure from HU despite her desire to stay in any faculty position, they did not in themselves cause her any harm cognizable as retaliatory.

In this context, the decision in Page v. Bolger, 645 F.2d 227 (4th Cir. 1981) is particularly instructive. In that case, Page, an African American, challenged his not being promoted by an all-white review committee. In addition to his claim as to the promotion itself, plaintiff tried to create an additional claim as to the selection of the review committee that made the decision. The Fourth Circuit, however, rejected that theory and concluded that Title VII applies only to ultimate employment decisions such as hiring or discharging:

Among the myriad of decisions constantly being taken at all levels and with all degrees of significance in the general employment contexts covered by Title VII there are certainly others than those we have so far specifically identified that may be so considered [,] for example, entry into training programs, Wright, 609 F.2d at 712 n.10. By the same token, it is obvious to us that there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of § 717 and comparable provisions of Title VII. We hold here merely that among the latter are mediate decisions such as those concerning composition of the review committees in the instant case that are simply steps in a process for making such obvious end-decisions as those to hire, to promote, etc.

Id. at 233.

An even closer case, because it arises in a university context, is Foley v. University of Houston System, 324 F.3d 310, 316 (5th Cir. 2003), in which the court, reasoning as the Fourth Circuit did in Page, stated:

Dr. Hutto's retaliation claim does not fare as well. The record below fails to establish the second essential element of her claim, i.e., that an adverse employment action occurred. Under our jurisprudence, an adverse employment action means an ultimate employment decision, such as hiring, granting leave, discharging, promoting, and compensating. Dollis v. Rubin, 77 F.3d 777, 781-82 (5th Cir. 1995). The employment actions alleged by Hutto

do not meet that standard. Viewing the record in the light most favorable to her, Hutto is complaining of the following employment actions on the part of the Appellants: (1) they schemed to remove her as Chair of the Education Division in August 1996, and to replace her with Cheryl Hines; (2) they tried to undermine an important program within the Division known as the Center for Professional Development and Technology (CPDT), which reflected upon Hutto's leadership; (3) Haynes and Hines reprimanded her for circulating unauthorized flyers regarding the Administration and Education Program (AED) and generally attempted to undermine that program; and (4) they refused to attend the Phi Kappa Phi initiation ceremony the year that Hutto was the president of the organization. None of these adverse actions qualify as ultimate employment decisions. Her loss of the title of Chair of the Division in August 1996 did not result in any loss of compensation or benefits and she remained on the faculty as a tenured professor. Furthermore, that particular claim is clearly barred by the statute of limitations. The other listed allegations fall far short of ultimate employment decisions.

Id. at 317. Accord: Saleh v. Virginia State U., 1999 U.S. Dist. Lexis 21842 *50 (E.D. Va. 1999)("Siddiqi's final claim is that he has applied repeatedly for graduate faculty status, to no avail until just recently. Because this claim involves only the process by which Siddiqi has secured a change in job title, it is not cognizable under the doctrine of Page v. Bolger, 45 F.2d 227 (4th Cir. 1981)").

Similarly here, the mediate decisions of Bullock to convert one faculty position from Constitutional Law to Tax, Trust and Estates and to leave other faculty positions open do not form the bases for independent claims of relief because they are not adverse actions. They, therefore, may not be submitted to the jury as independent claims of relief in addition to the claims predicated on Bullock's letters that (1) advised Martin that she was being rejected for reappointment and (2) advised Martin that her application for another position on the HU faculty

was rejected.

IV. Plaintiff's Breach of Contract Claim

In her final claim, Martin attempts to re-establish that an oral contract was made by Howard to extend Martin a tenure-track position after her visitorship ended. Chief Judge Hogan has already rejected her breach of contract claim, Martin, 1999 U.S. Dist. LEXIS 19516 at *20-22, and I cannot and will not accept plaintiff's demand that I reach a contrary conclusion.

V. Plaintiff's Renewal of Her August 3, 2001 Motion for a Default Judgment Based on Howard University's Production of Late, Incomplete, and Falsified/Tainted Evidence

In her August 3, 2001 motion, plaintiff sought to waive the 15-page limit previously established by this court. That motion was denied by the Chief Judge on September 4, 2001. With total disregard for the limits established by the Chief Judge, plaintiff now seeks to renew her previous motion. However, it has not escaped the court that although her current motion, contained within her motion for summary judgment, is only three pages long, plaintiff seeks to include, by incorporation, those arguments made in her original 43-page motion, excluding exhibits: "Plaintiff renews her August 3, 2001 *Motion for a Default Judgment, Due to Howard University's Production of Late, Incomplete and Falsified/Tainted Discovery* and incorporates, by reference all arguments made therein" Plains. Mot. at 48. A document that is 43 pages long does not become 15 pages long because it is attached to a document that is 15 pages long. A judicial order cannot be that easily evaded. Plaintiff's renewed motion should be denied.

CONCLUSION

For the reasons articulated above, I, therefore, recommend that Plaintiff's Motion for Summary Judgment [#289] be denied. I further recommend that Howard University's Motion

for Summary Judgment [#288] be granted as to plaintiff's claim of retaliation based on HU's decision to leave certain positions vacant,⁷ but denied as to all other portions.

Failure to file timely objections to the findings and recommendations set forth in this report may waive your right of appeal from an order of the District Court adopting such findings and recommendations. See Thomas v. Arn, 474 U.S. 140 (1985).

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated:

⁷ In the amended complaint, plaintiff characterizes HU's decision to leave certain positions vacant as the second and fourth acts of retaliation committed against her. Plains. Amended Compl. at 49, 64.