# RECENT CASE

## A QUICK CASE FOR INCLUDING SAME-SEX HARASSMENT UNDER TITLE VII: *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372 (8th Cir. 1996).

Same-sex sexual harassment has grown in the mid-1990s into an issue of intense judicial and academic debate. Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[1] In 1986, the Supreme Court held, in *Meritor Savings Bank v. Vinson*, that a claim of "hostile environment" sexual harassment is a form of sex discrimination actionable under Title VII.[2] *Meritor* involved harassment between members of the opposite sex, and courts are currently divided as to whether Title VII's causal requirement that discrimination occur "because of" a victim's sex can be fulfilled in same-sex cases. The Fourth and Fifth Circuits have held that harassment by a heterosexual male against another male is not actionable under Title VII.[3] This year, in *Quick v. Donaldson Co., Inc.*,[4] the Eighth Circuit came to a different conclusion, holding that a heterosexual male may maintain a sexual harassment claim against another male.[5] In

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1. 42 U.S.C. § 2000e-2(a)(1). Supreme Court decisions show that, in the context of Title VII, "sex" connotes "gender." *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 239-41 (1989) (using the terms interchangeably). However, it is more precise to use the word "sex" when discussing Title VII. *See* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1436 n.1 (1994) (Scalia, J., dissenting) (explaining distinction between "sex" and "gender").

2. *See* 477 U.S. 57, 66 (1986).

3. *See* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 72 (1996); Garcia v. Elf Atochem N. Am., 28 F.3d 446 (5th Cir. 1994). The Fifth Circuit reluctantly affirmed *Garcia* in Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118 (5th Cir. 1996). On December 16, 1996, the Supreme Court requested briefs from the U.S. Department of Justice to assist in deciding whether to grant certiorari in that case. *See Justices May Decide if Same-Sex Harassment is Illegal*, BOSTON GLOBE, Dec. 17, 1996, at A27.

4. 90 F.3d 1372 (8th Cir. 1996). The Eighth Circuit reaffirmed *Quick* in Kinman v. Omaha Pub. Sch. Dist., No. 95-2809, 1996 WL 478853 (8th Cir. Aug. 26, 1996).

5. *Quick* considered whether a heterosexual male could maintain a claim against another heterosexual male. The court was not specifically addressing the situation where the perpetrator is homosexual, although its reasoning would suggest that Title VII offers

*Meritor*, the Court employed a common method of statutory interpretation to discern congressional intent regarding Title VII's language prohibiting sex discrimination. The Court considered three elements: the language of the statute, the legislative history, and the view of the federal agency charged with enforcing the statute.[6] Using this method of statutory interpretation, *Quick* correctly concluded that, in addition to opposite-sex harassment, Title VII protects against same-sex harassment.

Phil Quick was hired by Donaldson Company, Inc. ("Donaldson"), in January of 1991 as a welder and press operator in a muffler production plant in Grinnell, Iowa.[7] Quick contends that male co-workers subjected him to a continuous pattern of physical and verbal abuse and harassment, both on and off the job.[8] Quick complained of being "bagged"[9] approximately one hundred times by at least twelve different male co-employees between January 1991 and January 1992.[10] During this period, Quick also saw at least one other male employee being bagged every day.[11] There was no evidence that any females were bagged.[12]

Donaldson admitted that bagging was not an uncommon event, that Quick was bagged repeatedly, that the management was aware of bagging incidents as early as 1981, and that it failed to take action.[13] In August 1993, Quick filed a state tort action against Donaldson. He later amended his complaint to include a Title VII claim of sex discrimination arising from the hostile working environment of which Donaldson was aware, but failed to remedy properly.[14] The defendant removed the case to federal district court, and the court granted summary judgment to the defendant.[15] The court held that a male employee is

protection in that situation.

6. *See Meritor*, 477 U.S. at 63-67.

7. *See Quick*, 90 F.3d at 1374.

8. *See* Quick v. Donaldson Co., Inc., 895 F.Supp. 1288, 1291 (S.D. Iowa 1995).

9. The practice of "bagging" at the plant is "either the 'intentional grabbing and squeezing of another employee's testicles,' or 'when an employee uses his or her hands to intentionally come into contact with another employee's groin area.'" *Id.* at 1292.

10. *See id.*

11. *See Quick*, 90 F.3d at 1375.

12. *See id.* at 1374.

13. *See id.* at 1374, 1376.

14. *See id.* at 1374-75.

15. *See id.* The court granted summary judgment with respect to one state law claim,

protected from discriminatory sexual harassment under Title VII "only where he can show an anti-male or predominately female environment making males a disadvantaged or vulnerable group in the workplace."[16] Additionally, the sexual harassment must be of a sexual nature to be actionable under Title VII. The court found no evidence that these conditions were met.[17]

Judge Murphy,[18] writing for a divided Court of Appeals, reversed and remanded for further consideration. Reviewing the record de novo, the appeals court outlined the five-element test that a plaintiff must meet to show a hostile working environment.[19] First, the plaintiff must show membership in a protected group, which is "is satisfied by showing that the plaintiff employee is a man or a woman."[20] Second, the plaintiff must prove that he was subject to "unwelcome sexual harassment," which does not have to be explicitly sexual in nature.[21] The court concluded that whether the conduct in this case was sexual harassment prohibited by Title VII remained a genuine issue of material fact for trial, to be viewed in the totality of the circumstances.[22] Third, the harassment must be "based on sex,"[23] meaning that "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[24] In a

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and dismissed the remaining ones without prejudice. *See Quick*, 895 F.Supp. at 1297.

16. *Quick*, 90 F.3d at 1375-76.

17. *See id.* at 1376.

18. Judge Beam joined the opinion of Judge Murphy.

19. Each circuit has established its own test to state a sexual harassment claim based on a hostile environment. The Eighth Circuit's five-part test was used previously in *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993).

20. *Quick*, 90 F.3d at 1377 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986)). Both men and women are protected groups under Title VII because "Congress did not limit Title VII protection to only women or members of a minority group." *Id.* (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279-80 (1976)).

21. *Quick*, 90 F.3d at 1377; Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1326 (8th Cir. 1994).

22. *See Quick*, 90 F.3d at 1379.

23. This prong of the test correlates to testing causation "because of" sex. The court used the phrase "based on" sex to describe the causal requirement, because *Meritor* used the phrases equivalently, *see Meritor*, 477 U.S. at 64 ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."), and used the phrase "based on" sex in its holding, *see id.* at 66.

24. *Quick*, 90 F.3d at 1379 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). The inquiry to determine whether discrimination occurred "based on" sex should focus on the nature of the harassment and not the identity of the

summary judgment context, showing that the harassment was targeted only at members of one gender is sufficient to show harassment based on sex.[25] Fourth, the harassment must constitute "discriminatory intimidation, ridicule and insult... sufficiently severe" to alter the conditions of employment to create a hostile work environment.[26] Finally, the plaintiff must prove that "the employer knew or should have known of the harassment and failed to take proper remedial action."[27] Using this five-part test, the court concluded that the district court had failed to recognize several genuine issues of material fact for trial. On this basis, the court reversed the grant of summary judgment.[28]

Judge Nangle dissented,[29] asserting that the majority approach improperly expanded Title VII to cover "any form of harassment experienced in the workplace."[30] Judge Nangle reasoned that when a man directs sexual behavior at a woman, it raises the presumption that the harassment is based on sex. However, unlike the traditional male-to-female harassment cases, there is no implication that the harassment is "because of sex" in heterosexual male-to-male harassment claims, because "similar sexually suggestive words and acts can take on a whole other meaning."[31]

The majority properly interpreted Title VII to include a cause

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harasser. *See infra* note 66. This is the case in the Eighth Circuit, where disparate treatment of men and women is sufficient to prove causation, regardless of the identity of the perpetrator. One criticism of considering disparate treatment of males and females is that this approach insulates a bisexual perpetrator from liability. *See, e.g.*, Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1551 n.6 (M.D. Ala. 1995). Yet, the Eighth Circuit's approach may avoid such a result, since disparate treatment is a sufficient, but not necessary condition to liability. *See* Miller v. Vesta, No. 94-C-1270, 1996 WL 683725, at *7 (E.D. Wis. 1996) ("Title VII protects individuals, not classes.... [T]he focus is on whether there is an allegation or evidence that the plaintiff, not those of her class, suffered sexual harassment based on her sex. Disparate treatment of the genders is evidence of such harassment, but it is not a requirement. Thus, an employer that sexually harasses both genders equally is not insulated from Title VII liability.").

25. *See Quick*, 90 F.3d at 1378.

26. *Id.* (citing *Harris*, 510 U.S. at 21). The proper test considers the totality of the circumstances. *See Harris*, 510 U.S. at 23.

27. *Quick*, 90 F.3d at 1373 (citation omitted).

28. *See id.* at 1379.

29. Judge Nangle, District Judge for the Eastern District of Missouri, was sitting by designation.

30. *Quick*, 90 F.3d at 1380 (Nangle, J., dissenting).

31. *Id.* at 1380-81 (referring to McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 72 (1996)).

of action for heterosexual male-to-male harassment cases. Statutory interpretation, in the context of Title VII, should involve consideration of three elements.[32] First, a court should examine the language of the statute. Next, a court should look to the legislative history, which prevails if the legislative history is in clear conflict with the language of the statute. Finally, a court may defer to the interpretation of the federal enforcement agency, the Equal Employment Opportunity Commission (EEOC). A consideration of these three factors supports *Quick's* conclusion that same-sex harassment may be actionable under Title VII.

To determine congressional intent, the Court has shown that, in the context of Title VII, the first step should be to examine the statutory language.[33] The reasoning of *Quick* did not explicitly appeal to the text of Title VII.[34] Yet, the result of *Quick* is harmonious with an interpretation that does explicitly consider Title VII's language. It is commonly accepted that broad language in a remedial statute should be construed liberally to realize congressional goals.[35] Because Title VII is a broad remedial statute using nonrestrictive language to achieve its ends,[36] any restriction on its protection would be an

32. This is the method of statutory interpretation exemplified in *Meritor. See supra* note 6 and accompanying text.

33. *See* Flora v. United States, 357 U.S. 63, 65 (1958) ("In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in doing so our first reference is of course to the literal meaning of the words employed."); Perrin v. United States, 444 U.S. 37, 42 (1979); Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117, 128 (1991); Rake v. Wade, 508 U.S. 464, 471 (1993).

34. The *Quick* court instead analyzed the issue by considering whether a claim existed under the five-element test to prove hostile environment discrimination. *See supra* text accompanying notes 19-27. However, the court incorporated much of the Court's reasoning regarding Title VII into its five-element test. *See Quick*, 90 F.3d at 1377-78.

35. It is an established maxim that courts should construe remedial statutes broadly; if an evil exists that Congress has chosen to address, a court should strike the balance on the side of the victim. *See, e.g.*, Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (It is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes."); Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 428-29 (1st Cir. 1985) ("Although we have no way of definitively determining the congressional intent... there remains at least one secure guidepost: when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals. This principle has been understood and endorsed repeatedly by the federal judiciary and Congress and it is therefore an especially reliable and legitimate canon of construction.") (citations omitted).

36. *See* EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995) ("[E]mployment discrimination statutes have broad remedial purposes and should be interpreted liberally....").

inappropriate judicial invention.[37] Recognizing this, the Court in *Meritor* refused to limit the scope of Title VII to "economic" discrimination, given that the language contained no such limit and that there was a lack of evidence "to suggest that Congress contemplated [any] limitation."[38] According to similar reasoning, Title VII offers protection against same-sex discrimination because there are no limits in the requirement that sexual discrimination be "because of" an individual's sex. First, the language of Title VII is bereft of any requirement that the victim be of the "opposite sex" from the perpetrator.[39] Second, Title VII is a gender-neutral prohibition of "employer" discrimination against "individual" employees.[40] Congress could have included language explicitly limiting Title VII causes of action to opposite-sex harassment had that been its intent.[41]

The *Quick* court was correct not to follow the reasoning of the dissent, and some other courts,[42] that ignored the lack of limiting language in Title VII.[43] Those courts frustrate the remedial intent of Congress. The Fourth Circuit, for example,[44]

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37. *See* Miller v. Vesta, No. 94-C-1270, 1996 WL 683725, at *3 (E.D. Wis. Nov. 22, 1996) ("It is not the courts' role to limit the protections Congress conferred by selecting broad and general language.").

38. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986). In that case, the Court spoke in a gender-neutral fashion when it articulated that any harassment based on gender is prohibited by Title VII. *See id.* ("[W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex."); Roe v. K-Mart Corp., No. CIV.A.2:93-2372-18AJ, 1995 WL 316783, at *1 (D.S.C. Mar. 28, 1995) ("The Supreme Court did not restrict its holding to sexual advances from a member of the opposite sex.").

39. *See* Prescott v. Independent Life & Accident Ins. Co., 878 F. Supp. 1545, 1550 (M.D. Ala. 1995) ("Congress chose to use the unmodified word 'sex' when referring to the discrimination that is forbidden.").

40. *See* Wrightson v. Pizza Hut, 99 F.3d 138, 142 (4th Cir. 1996).

41. Congress retains the power to later restrict the language through new legislation. *See* Ryczek v. Guest Serv., Inc., 877 F. Supp. 754, 762 n.9 (D.D.C. 1995) ("[T]he simplest and best solution would be for Congress to amend the language of Title VII to reflect its specific intentions....").

42. *See, e.g.*, Torres v. National Precision Blanking, 943 F. Supp. 952 (N.D. Ill. 1996) (rejecting actionability of same-sex harassment claim under Title VII); Larry v. North Miss. Medical Ctr., 940 F. Supp. 960 (N.D. Miss. 1996) (same); Ashworth v. Roundup Co., 897 F. Supp. 489 (W.D. Wash. 1995) (same); Benekritis v. Johnson, 882 F. Supp. 521 (D.S.C. 1995) (same); Myers v. City of El Paso, 874 F. Supp. 1546 (W.D. Tex. 1995) (same); Hopkins v. Baltimore Gas & Elec. Co., 871 F. Supp. 822 (D. Md. 1994) (same).

43. The dissent relied upon the Fourth Circuit's reasoning in McWilliams v. Fairfax County Bd. of Supervisors. *See supra* note 31.

44. The first court to take this approach was Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307 (N.D. Ill. 1981). *See also* Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983) (holding that unwelcomed homosexual harassment is a violation of Title VII), *aff'd mem.*, 749 F.2d 732 (11th Cir. 1984); Parrish v. Washington Nat'l Ins. Co., No. 89.C.4515, 1990 WL 165611, at *7 n.2 (N.D. Ill. Oct. 16, 1990) (stating that

inaccurately requires that, in order for a victim to be protected from same-sex harassment, the perpetrator must be homosexual. *McWilliams v. Fairfax County Board of Supervisors* held that when both the victim and perpetrator are heterosexuals of the same sex, there can be no hostile work environment sexual harassment claim.[45] The court reasoned that Title VII's causation language, "because of [the claimant's] sex," could not be fulfilled, because common understanding would not view the kind of heterosexual-on-heterosexual conduct in the case then before the court as occurring "because of" the victim's sex.[46] The *McWilliams* court expressly reserved judgment on the question of whether a cause of action would lie if the perpetrator were homosexual. The Fourth Circuit recently addressed this reserved question in *Wrightson v. Pizza Hut,* holding that an action may lie for a same-sex hostile work environment where the perpetrator is homosexual.[47] A male perpetrator who discriminates only against male employees and not against female employees is discriminating "because of" sex no less than the perpetrator who only discriminates against members of the opposite sex.[48] The logic of *Wrightson* supports allowing all same-sex harassment claims, but the result, constrained as it was by *McWilliams,* is that the Fourth Circuit requires proof of the perpetrator's sexual orientation. Neither the Fourth Circuit nor other courts requesting such proof have explained how injecting this requirement into Title VII is

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homosexual advances are based on the victim's gender, and thus actionable, because the perpetrator would not treat similarly an employee of the nonpreferred gender).

45. *See* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1195 (4th Cir. 1996), *cert. denied,* 117 S. Ct. 72 (1996).

46. *See id.* A different result, the court reasoned, would expand Title VII to include "unmanageably broad protection of the sensibilities of workers simply 'in matters of sex.'" *Id.* at 1196.

47. *See* Wrightson v. Pizza Hut, 99 F.3d 138, 143 (4th Cir. 1996). While this approach avoids some inconsistencies, *see infra* note 65, it has been criticized for creating another disparity. A homosexual individual could be sued under Title VII, but would not be protected from harassment based on his or her status as a homosexual. This criticism is not compelling because the homosexual perpetrator is liable for discrimination on the basis of sex, whereas the homosexual who is harassed because of his status as a homosexual never enjoyed Title VII protection on the basis of sexual orientation originally. Federal courts have held uniformly that the protection from discrimination based on sex or gender does not include protection against discrimination on the basis of sexual orientation. *See, e.g.,* De Santis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327 (9th Cir. 1979); Pritchett v. Sizeler Real Estate Management Co., Inc., Civ. A. No. 93-2351, 1995 WL 241855, at *1 (E.D. La. Apr. 25, 1995).

48. *See Wrightson,* 99 F.3d at 142.

consistent with the broad language of the statute.[49] The Eighth Circuit in *Quick* reached a result more faithful to Title VII, extending the nonrestrictive language of Title VII to recognize a cause of action for same-sex harassment.

Following the Court's method of interpretation in *Meritor*, a court should supplement its analysis of Title VII's language by considering the legislative history. If the legislative history is in clear conflict with a court's interpretation of the plain language, then the court should use an interpretation consistent with both the language and the legislative history.[50] However, the meager legislative history of Title VII does not suggest that Congress contemplated denying protection in cases of same-sex discrimination.[51] The Supreme Court confirmed this in *Meritor*, wherein it concluded that there is little legislative history of any type with respect to the sex discrimination prohibition.[52] This conclusion was echoed in *Quick*.[53]

Some courts have concluded, unlike the Supreme Court, that the limited legislative history supports restricting the scope of Title VII.[54] In 1988, a district court asserted, in *Goluszek v. H. P.*

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49. This requirement may be based on the assumption that sexual harassment is motivated by sexual attraction. *See* Shermer v. Illinois Dep't of Transp., 937 F.Supp. 781, 783-84 (C.D. Ill. 1996). Yet, as one court explained, "Title VII does not require that sexual harassment be motivated by attraction, only that it be 'because of sex'; indeed, harassment, like other forms of victimization, is often motivated by issues of power and control on the part of the harasser, issues not necessarily related to sexual preference." Tanner v. Prima Donna Resorts, Inc., 919 F. Supp. 351, 354 (D. Nev. 1996) (referring to CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 220-21 (1979)). *Quick* adopts the latter view. *See supra* text accompanying note 21.

50. *See* United States v. Apfelbaum, 445 U.S. 115, 121 (1980) ("It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language."); United States v. Zacks, 375 U.S. 59, 69 (1963). *But see Ex parte* Collett, 337 U.S. 55, 61 (1949) (explaining that, where the words of a statute are plain on its face, there is ordinarily no need to resort to legislative history).

51. One court observed that, "[h]ad Congress intended to insulate sexual harassers from liability as long as those sexual harassers selected their victims carefully, not only should Congress have spoken more clearly, it could have at least said something." Williams v. District of Columbia, 916 F. Supp. 1, 9 (D.D.C. 1996).

52. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-64 (1986) ("The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. The principal argument in opposition to the amendment was that 'sex discrimination' was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'") (citations omitted).

53. *See* Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1378 (8th Cir. 1996).

54. For examples of these decisions, see *supra* note 42.

*Smith*, that the statute was enacted to protect against "an imbalance of power," where a gender-biased atmosphere is created by a dominant gender.[55] In reaching this conclusion, that court cited neither congressional records nor legislative history.[56] Instead, the court relied heavily upon a student note, written before *Meritor*, that did not address same-sex discrimination.[57] In addition, the *Goluszek* conclusion finds no support in Supreme Court cases. To the contrary, the Supreme Court had previously extended Title VII's protection to men without mentioning the idea adopted in *Goluszek* that Title VII was designed to protect against discrimination by a "dominant gender."[58] In 1993, the Supreme Court explained, in *Harris v. Forklift Systems, Inc.*, that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[59] The Court's gender-neutral interpretation of the statutory language in *Harris* means that the conclusion of *Goluszek* is incompatible with the Court's current discrimination jurisprudence.[60] Lack of legislative history and

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55. 697 F. Supp. 1452 (N.D. Ill. 1988).

56. It is baffling that the *Goluszek* court came to such a conclusion when Congresswoman May, in arguing for the inclusion of the word "sex" in Title VII, added that the bill was "an endeavor to have all persons, men and women, possess the same rights and opportunities." Miller v. Vesta, No. 94-C-1270, 1996 WL 683725, at *5 (E.D. Wis. Nov. 22, 1996) (citation omitted).

One court that considered the legislative history concluded that "Congress did not intend such sweeping regulation. The suggestion that Title VII was intended to regulate everything sexual in the workplace would undoubtedly have shocked every member of the 88th Congress." Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 749 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 70 (1996). In response, one judge has observed that, "[the Goluszek] decision and others like it represent a kind of social judgment about Congress' purposes in enacting Title VII that is at odds with what Congress actually said." Kaplan v. Dacomed Corp., No. 95-C-6987, 1996 WL 89148, at *1 (N.D. Ill. Feb. 27, 1996).

57. *See Goluszek*, 697 F.Supp. at 1456 (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449 (1984)).

58. *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) (holding that an employer's health insurance plan violated Title VII by discriminating against male employees).

59. 510 U.S. 17, 21 (1993) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).

60. Analogously, *Goluszek* could be used to ban white plaintiffs from suing for race discrimination under Title VII, because the plaintiff would have been a member of the dominant race. Yet, the Supreme Court has held that Title VII proscribes racial discrimination against whites in private employment on the same terms as racial discrimination against nonwhites. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).

In defense of *Goluszek*, one court "notes that the corollary of reverse-race

the Court's reasoning that Congress intended Title VII to remedy all forms of "disparate treatment of men and women" compel a finding that Title VII encompasses cases in which the perpetrator and the victim are of the same sex.

Several courts rely heavily upon *Goluszek's* incorrect reasoning regarding the legislative history of Title VII,[61] with the result that congressional intent is frustrated. In 1994, the Fifth Circuit, in *Garcia v. Elf Atochem North America,*[62] summarily denied the viability of same-sex harassment claims. The shortcomings of *Garcia* are well documented;[63] it is mainly criticized for its citation of *Goluszek.*[64] The *Goluszek-Garcia* approach creates a requirement that the victim and perpetrator must be of the opposite sex. This requirement yields the inconsistent result that a homosexual perpetrator is shielded from liability for conduct for which a heterosexual perpetrator would be liable.[65] This is undesirable because Title VII focuses on the nature of the conduct, and not on the identity of the perpetrator.[66] In *Meritor,*

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discrimination would be reverse-sexual harassment discrimination, i.e. a woman sexually harassing a man." Schoiber v. Emro Mktg. Co., 941 F. Supp. 730, 735 n.10 (N.D. Ill. 1996). This misunderstands the original argument, interpreting racial discrimination to include a necessary condition that the victim and perpetrator be of the opposite race. Yet, Court decisions show a lack of concern for the identity of the perpetrator, and focus instead on disparate treatment on the basis of the race of the victim. *See McDonald,* 427 U.S. at 280 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (explaining elements to prove a prima facie case of racial discrimination under Title VII)). Hence, if one speaks in terms of "reverse-race" discrimination, the correct analogy is not women harassing men, but *any* perpetrator discriminating against men on the basis of sex.

61. *See* Sardinia v. Dellwood Foods, Inc., No. 94 CIV. 5458, 1995 WL 640502, at *4 (S.D.N.Y. Nov. 1, 1995) ("Every case . . . disclosed by research to support the proposition that this Circuit should not recognize same-sex harassment claims relies in whole or in part on [Goluszek].").

62. 28 F.3d 446, 451-52 (5th Cir. 1994).

63. *See, e.g.,* Lisa Wehren, *Same-Gender Sexual Harassment Under Title VII: Garcia v. Elf Atochem Marks a Step in the Wrong Direction,* 32 Cal. W. L. Rev. 87 (1995).

64. *Harris* seems directly to contradict *Goluszek. See supra* note 59. Despite this fact, several district courts persist in following the *Goluszek-Garcia* approach. *See, e.g.,* Benekritis v. Johnson, 882 F. Supp. 521 (D.S.C. 1995). Judge Luttig asserts that some courts fear increased litigation if same-sex discrimination were to become actionable. *See* Wrightson v. Pizza Hut, 99 F.3d 138, 144 (4th Cir. 1996) (describing fear of increased litigation). The judge responds that courts should not use "the guise of interpretation to deny that [a cause of action] exists, whatever the practical consequences," because the courts must "faithfully interpret[] the statutes enacted by the Congress and signed into law by the President." *Id.*

65. This inconsistency is avoided under the approach of the Fourth Circuit, because a homosexual perpetrator could be liable for same-sex harassment.

66. Courts have reached this conclusion by analyzing *Harris* and *Meritor,* because the Supreme Court, using gender-neutral language, focused on the nature and severity of the conduct in those cases. *See, e.g.* Sardinia v. Dellwood Foods, Inc., No. 94 CIV. 5458,

the Supreme Court explained that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"[67] Considering that an individual can receive "unwelcome" sexual advances from persons of either sex, Title VII should not be limited to cases involving members of the opposite sex.[68] *Quick* explains that "Congress intended to define discrimination in the broadest possible terms, so it did not enumerate specific discriminatory practices nor 'elucidate the parameter of such nefarious activities.'"[69] Thus, when courts limit Title VII's protection by creating additional requirements, the limitation is unjustified, in light of congressional intent to remedy all forms of disparate treatment of men and women.

In previous Title VII cases, the Supreme Court has indicated a willingness to defer to the statutory interpretation of the EEOC, the federal agency charged with enforcing anti-discrimination laws. In *Meritor*, the Court explained that, although non-binding, the EEOC Guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[70] The position of the EEOC is that Title VII protects employees from same-sex discrimination: "The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the opposite sex." [71] Encouraged by the Supreme Court, several courts have referred to the EEOC Guidelines and have concluded that Title VII protects against same-sex harassment.[72] *Quick* chose not to

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1995 WL 640502, at *5 (S.D.N.Y. Nov. 1, 1995). The Court's analysis of Title VII's protection from race discrimination also supports this claim. *See supra* note 60.

67. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986) (citing 29 CFR § 1604.11(a) (1985) (EEOC Guidelines)).

68. According to one court, there is "no logic" in requiring that the perpetrator and victim be of the opposite sex, because, "like 'unwelcome' heterosexual advances, 'unwelcome' homosexual advances may manifest themselves as quid pro quo harassment or create the same type of 'hostile' work environment that Title VII protects against." Waag v. Thomas Pontiac, Buick, GMC, Inc., 930 F. Supp. 393, 401 (D. Minn. 1996).

69. Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1377 (8th Cir. 1996) (citation omitted).

70. 477 U.S. at 65 (quoting General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))). *See also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976).

71. Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 750 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 70 (1996) (citing EEOC Compl. Man. (CCH) § 615.2(b)(3)).

72. *See, e.g.*, Ladd v. Sertoma Handicapped Opportunity Program, Inc., 917 F. Supp.

discuss the view of the EEOC.[73] Nonetheless, consideration of that view supports *Quick*'s result.

*Quick*'s recognition of a claim for same-sex harassment is consistent with the congressional intent underlying Title VII, as revealed by that statute's language, its legislative history, and the recommendations of the EEOC. Courts should consider the language of Title VII and, because there is an absence of legislative history to the contrary, interpret that language broadly to further Title VII's core purpose of anti-discrimination. If Congress had intended to restrict the scope of this remedial statute to particular classes of people, it would have placed explicitly restrictive language in the statute. When courts create additional requirements for a prima facie claim, such as proof that the victim is of the opposite sex from the perpetrator or that the perpetrator is homosexual, they are inappropriately legislating from the bench. Refraining from interpreting Title VII to include additional requirements, the *Quick* court clearly recognized its proper role when it acknowledged that same-sex harassment claims fall within Title VII.

*Debra R. Volland*

766, 767 (N.D. Okla. 1995).

73. The district court quoted from the EEOC Guidelines that "the victim does not have to be of the opposite sex from the harasser." Quick v. Donaldson, 895 F. Supp. 1288, 1295 n.6 (S.D. Iowa 1995). Nonetheless, the court concluded that the heterosexual male-to-male conduct was not actionable under Title VII, because the discrimination did not occur because of Quick's gender. *See id.* at 1295-96 n.6. The appeals court did not mention the view of the EEOC.