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Employment Law - Antidiscrimination - Unpaid and Unprotected: Protecting Our Nation's Volunteers Through Title VII

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EMPLOYMENT LAW—ANTIDISCRIMINATION—UNPAID AND
UNPROTECTED: PROTECTING OUR NATION’S VOLUNTEERS THROUGH
TITLE VII

I. INTRODUCTION

It was once said that “[v]olunteers don’t get paid not because they are worthless, but because they are priceless.”¹ Our country has always depended on the work of volunteers.² In 2007, more than sixty million Americans volunteered in the nonprofit sector alone.³ This figure does not even include unpaid work in public and for-profit industries, usually in the form of internships. Trying to calculate the sheer economic value of volunteer work to our country is near impossible.

Recognizing the impact and necessity of volunteers, United States presidents have done their part to encourage volunteerism in the last few decades. President Richard Nixon established National Volunteer Week in 1974 to celebrate volunteering.⁴ In 1987, President Ronald Reagan created the President’s Volunteer Award.⁵ President George H.W. Bush established the Points of Light Foundation, a private foundation committed to furthering volunteer efforts.⁶ He also established a White House office to promote volunteerism.⁷ In the 1990s, President Bill Clinton was instrumental in the creation of the Corporation for National Service, an entity that would oversee AmeriCorps and other volunteer programs.⁸ In 2005, President George W. Bush called upon Americans to “recognize and celebrate the important work” of volunteers.⁹ Now, President Barack Obama has proposed a plan

1. Sherry Anderson, Quote, <http://www.quotegarden.com/volunteer-apprec.html> (last visited Aug. 3, 2009).

2. See Diane C. Desautels, *Statutory Protection for Volunteers Against Discrimination: Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities*, 11 W. NEW ENG. L. REV. 93, 93 n.5 (1989). “Voluntarism is deeply rooted in American culture. In fact, it was the combined efforts of many unnamed volunteers that marked and shaped the development of the United States.” *Id.*

3. Debra Blum, *26 % of Americans Volunteer, New Study Finds*, CHRON. OF PHILANTHROPY, July 27, 2008, <http://philanthropy.com/news/updates/5284/26-of-americans-volunteer-new-study-finds> (last visited Aug. 3, 2009). See also *Volunteering in America*, Corporation for National and Community Service, <http://www.volunteeringinamerica.gov> (last visited Aug. 3, 2009).

4. Mitchell H. Rubinstein, *Our Nation’s Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 148 n.3 (2006). Every president since Nixon has also issued proclamations to promote this event. *Id.*

5. *Id.*

6. Jean Baldwin Grossman & Kathryn Furano, *Making the Most of Volunteers*, 62 LAW & CONTEMP. PROBS. 199, 200 (1999).

7. *Id.*

8. *Id.*

9. Rubinstein, *supra* note 4, at 148 n.3 (citing Proclamation No. 7885, 70 Fed. Reg.

for a massive expansion of AmeriCorps and Peace Corps, hoping to more than double their size.¹⁰ In addition, President Obama's plan seeks to expand programs that help match individuals with volunteer opportunities and provide incentives for those who do volunteer.¹¹

Despite these efforts to increase awareness of and participation in volunteerism, such efforts have not been matched by increased protections for volunteers. Courts have not applied the statutory protections that exist for paid employees to unpaid workers, and legislatures have failed to increase protections for volunteers as well.¹²

Consider, for example, the following situation: two individuals work for the same company, and each performs the same job duties. Unfortunately, each is subjected to discrimination by their employer. In virtually all aspects, these two individuals are identical. There is one important difference, however: the first individual is a paid employee, whereas the second is an unpaid intern—a volunteer.

At first glance, this may appear to be a benign difference, but in reality the mere fact that the intern is unpaid diminishes that individual's right to seek a remedy for the discriminatory treatment. The paid employee, on the other hand, may seek back pay, reinstatement, injunctive relief, compensatory and punitive damages, and more. This inequity is contrary to our country's public policy of equal and fair treatment and can lead to hostile and less productive work environments. The best course of action is to amend Title VII of the Civil Rights Act of 1964 ("Title VII") to include all workers—both paid and unpaid.

This note will discuss the current status of volunteers in America; the purpose, language, and legislative intent of Title VII; and the tests courts use to determine who is entitled to statutory protections. This note will then advocate an amendment to Title VII as well as provide a suggested wording for such an amendment. Finally, this note will discuss what actions may be taken in lieu of action by Congress.

II. BACKGROUND

Volunteers offer a variety of services in our lives and communities. This section will begin by discussing the importance of volunteers in our country and examining why volunteer protections are needed.¹³ A brief overview of Title VII will explain the purpose behind the Act, examine the

20,265 (Apr. 14, 2005)).

10. Service, <http://www.whitehouse.gov/agenda/service> (last visited Aug. 3, 2009).

11. "The White House" *Id.*

12. *See infra* Part II.

13. *See infra* Part II.A.

actual text of the statute, and seek to determine the legislative intent of Title VII.¹⁴ Finally, this section will look at the widespread inconsistency in the judicial application of Title VII with respect to volunteers and will address the main tests courts use to determine whether an individual is a employee within the definition of the Act.¹⁵

A. The Role and Status of Volunteers in Today's Society

Volunteers are an essential part of our society, economy, and government. By definition, a volunteer is “a person who voluntarily undertakes or expresses a willingness to undertake a service as one who renders a service or takes part in a transaction while having no legal concern or interest.”¹⁶ Alternatively, a volunteer is “[a] voluntary actor or agent in a transaction; esp., a person who, without an employer’s assent and without any justification from legitimate personal interest, helps an employee in the performance of the employer’s business.”¹⁷ For most of us, a volunteer is simply a person who works without pay. Although the term volunteer may bring to mind a “do-gooder” working in a nonprofit or social service context, in reality, volunteers participate in virtually every industry in our country. Volunteers can also be students, interns, and trainees, among others.¹⁸ They work in education, government, sales, banking and finance, agriculture, medicine, manufacturing, transportation, and more.

Generally speaking, our society has a clear public policy against allowing discrimination and harassment based on certain personal characteristics. Moreover, Congress has enacted laws to prevent this discrimination and provide remedies for victims.¹⁹ For example, antidiscrimination legislation has been passed in a variety of contexts: public accommodations, employment, tort law, and criminal law.²⁰ Some may claim that unpaid workers are unlikely to be the victims of discrimination, but as a plethora of case law shows, this simply is not the case.²¹ Employers discriminate against unpaid workers, and it becomes a matter of which workers are protected by law and

14. See *infra* Part II.B–D.

15. See *infra* Part II.E.

16. MERRIAM–WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com> (last visited Mar. 9, 2009).

17. BLACK’S LAW DICTIONARY 1606 (8th ed. 2004).

18. For the sake of simplicity, this note will use the terms “volunteer” and “unpaid worker” throughout. Readers should understand that these interchangeable terms are meant to refer to the broad class of those working without a direct salary or wage.

19. See, e.g., 42 U.S.C. § 2000e-2(a) (2006) (prohibiting discrimination in employment on the basis of race, color, religion, sex, or national origin).

20. E.g., Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2006).

21. E.g., O’Connor v. Davis, 126 F.3d 112 (2d Cir. 1997).

which are not.²² Determining what statutory law applies is problematic because unpaid workers do not fit neatly into any of the aforementioned categories, such as public accommodation law.²³ Although some victims may still have protections through civil torts or criminal prosecution, many feel that these protections are inadequate and provide an unjust result—especially in light of the services they are generously providing.

Public accommodation statutes have been used both successfully and unsuccessfully to protect unpaid workers who are victims of discrimination or harassment.²⁴ Another approach is to use employment statutes. For those advocating increased volunteer protections, this seems to be the preferred approach.²⁵

B. Preventing Discrimination Under Title VII

The primary legislation used to prevent discrimination in an employment context is Title VII of the Civil Rights Act of 1964.²⁶ The Civil Rights Act of 1964 was designed, in general, to prevent discrimination in many facets of American life, such as education, public facilities, and government.²⁷ Title VII focuses on preventing discrimination, particularly in an employment context.²⁸ In most instances, Title VII is easily applied. For example, Jane owns a business and hires John to work for her. She pays him a salary, and he has a set schedule each week. No one would dispute that John is Jane's employee. Therefore, Title VII protects John without a lengthy analysis of whether an employment relationship exists.²⁹ In a situation with an unpaid worker, such as a volunteer or an intern, that determination is not as obvious.

Determining whether one is an employee or not for the purposes of Title VII is a question of federal law, and to determine this, the court must

22. *See id.*

23. *See* Lauren Attard, Comment, *A Price on Volunteerism: The Public Has a Higher Duty to Accommodate Volunteers*, 34 *FORDHAM URB. L.J.* 1089, 1090–91 (2007).

24. *See id.* (discussing the Americans with Disabilities Act's public accommodation provisions applicability to volunteers).

25. *See, e.g.,* Leda E. Dunn, "Protection" of Volunteers Under the Federal Employment Law: *Discouraging Voluntarism?*, 61 *FORDHAM L. REV.* 451, 472 (1992) (advocating for amendments to federal employment statutes in order to expand coverage to volunteers).

26. 42 U.S.C. § 2000e-17e (2006).

27. *Id.*

28. *See* 42 U.S.C. § 2000e-2(a) (2006) (listing the proscribed discriminatory employment practices).

29. Even though an employment relationship clearly exists, it is important to note that Title VII only covers employers who have fifteen or more employees. *See infra* note 31.

consider both the statutory language and the legislative history.³⁰ Because of a “combination of poor drafting and judicial misinterpretation,”³¹ there is often inconsistency in the application of the law and the treatment of workers—especially unpaid workers. This note will next consider both the pertinent language of the Act³² and how the courts have analyzed the legislature’s intent.

C. The Language of Title VII

The first step in any statutory analysis requires a thorough examination of the statute at issue. The heart of Title VII as applied to discrimination in employment makes it unlawful for an employer to:

(1) to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify [the employer’s] employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.³³

This part of the statute is fairly straightforward and clearly identifies both the prohibited behavior and the protected classes. The confusion, especially with respect to volunteers and unpaid workers, lies in the definition section of the statute.³⁴ The statute defines an “employer” as “a person³⁵ engaged in an industry affecting commerce who has fifteen or more employees.”³⁶ An “employee,” however, is defined as “an individual employed by an employer.”³⁷

30. *Armbruster v. Quinn*, 711 F.2d 1332, 1339 (6th Cir. 1983).

31. *Dunn*, *supra* note 25, at 472.

32. Title VII encompasses many sections. This note will only focus on § 2000e and § 2000e-2(a), however, because these are the only sections pertinent to the current discussion.

33. 42 U.S.C. § 2000e-2(a) (2006).

34. 42 U.S.C. § 2000e (2006).

35. “Person” is also defined by the statute and is not limited to individuals; it can also include governmental agencies, corporations, trusts, and associations, among others. 42 U.S.C. § 2000e(a).

36. 42 U.S.C. § 2000e(b) (2006). The exceptions to this definition are the United States, a corporation owned by the government, an Indian tribe, certain departments and

These definitions are circular, unclear, and ambiguous. They provide little guidance in determining who qualifies as an “employee.” By stating that an employee is “employed by” the employer, the statute emphasizes that the key determinant is whether an employment relationship exists between the parties. But what constitutes an employment relationship? The statute is silent. Congress could have overcome the circular nature of this definition if it also included a definition of “employed” or “employment,” but again, the statute is silent. The job of interpreting the statute, therefore, falls upon courts that must examine the legislature’s intentions for both the Act itself and individual provisions, such as determining what the Act was designed to accomplish and how it would be accomplished.

D. The Legislative Intent Behind Title VII

Many courts have speculated on Congress’ intent in enacting this section.³⁸ What was its primary purpose? How broad or narrow did Congress intend the definitions to be? Congress’ expressed objective in enacting Title VII was to protect the “right of persons to be free from [improper] discrimination”³⁹ and to eliminate discrimination in employment contexts such as hiring, firing, compensation, and benefits.⁴⁰

One of the main reasons for this confusion and inconsistency is the definitional problem previously discussed. To deal with this, most courts and litigants have relied on the United States Supreme Court’s reasoning that, in employment law, statutes should be interpreted in context rather than just examining their plain meaning.⁴¹ Considering the meaning of “employee,” the Court reasoned that the term should:

not [be] treated by Congress as a word of art having a definite meaning . . . [r]ather it takes color from its surroundings . . . [in] the statute where it appears, and derives meaning from the context

agencies of the District of Columbia, and bona fide private membership clubs. *Id.*

37. 42 U.S.C. § 2000e(f) (2006). This definition also has exceptions. For example, state elected officials and their appointed staff are *not* employees. Because the statute does not expressly exclude volunteers, many plaintiffs have tried to argue that volunteers are automatically a protected group. *Smith v. Berks Cmty. Television*, 657 F. Supp. 794, 795 (E.D. Pa. 1987). Courts have consistently disagreed with this reasoning. *Id.*

38. *See, e.g., Armbruster v. Quinn*, 711 F.2d 1332, 1339 (6th Cir. 1983).

39. Craig J. Ortner, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 *FORDHAM L. REV.* 2613, 2623 (1998) (alteration in original) (quoting H.R. REP. NO. 88-914, at 26 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401).

40. *Armbruster*, 711 F.2d at 1340. (“Title VII . . . was enacted for the sole purpose of eliminating discrimination.”) *Id.*

41. *See NLRB v. Hearst Publ’ns*, 322 U.S. 111, 124 (1944).

of that statute, which must be read in light of the mischief to be corrected and the end to be attained.⁴²

Simply put, the “mischief to be corrected” is the occurrence of discrimination in employment; the “end to be attained” is the prevention of discrimination and the provision of relief to workers.⁴³ Other courts have simply looked at the ordinary meaning of the terms,⁴⁴ as well as statements from one of the Act’s initial drafters who stated his intention that any gaps in the definitions should be accorded their “common dictionary meaning, except as expressly qualified by the act.”⁴⁵ Merriam–Webster’s Online Dictionary defines “employee” as “one employed by another usually for wages or salary and in a position below the executive level.”⁴⁶ In Black’s Law Dictionary, “employee” means “[a] person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.”⁴⁷ The word “employer” is defined as “[a] person who controls and directs a worker under an express or implied contract of hire and who pays the worker’s salary or wages.”⁴⁸

Interpreting the Act’s purpose narrowly, the district court in *McBroom v. Western Electric Co., Inc.*,⁴⁹ stated that Congress was seeking to “eliminate a pervasive, objectionable history of *denying or limiting one’s livelihood* simply because of one’s race, color, sex, religion, or national origin.”⁵⁰ By inserting the italicized portion into its analysis, the court narrowed the purpose of the legislature from preventing all discrimination in employment to a focus on preventing discrimination that threatens individuals economically.

In *Albemarle Paper Co. v. Moody*, the United States Supreme Court narrowed Title VII’s purpose in another way when it held that the secondary purpose of the statute is to make whole those who are injured by employ-

42. *Id.* (citations omitted) (Even though this decision occurred before the passage of Title VII, the Court’s analysis remains applicable in all uses of the word “employee.”). *Accord Armbruster*, 711 F.2d at 1340. “[T]he construction of the word employee should encompass the history and purpose of the statute.” *Id.*

43. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975).

44. *Graves v. Women’s Prof’l Rodeo Ass’n*, 907 F.2d 71, 73 (8th Cir. 1990).

45. 110 Cong. Rec. 7216 (1964). *See also Graves*, 907 F.2d at 73; Ortnier, *supra* note 39, at 2625.

46. MERRIAM–WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com> (last visited Mar. 9, 2009).

47. BLACK’S LAW DICTIONARY 564 (8th ed. 2004).

48. *Id.* at 565.

49. 429 F. Supp. 909 (M.D.N.C. 1977).

50. *Id.* at 911 (emphasis added).

ment discrimination.⁵¹ On first glance, this may not seem to alter the application of Title VII, but by defining this as the statute's secondary purpose, the Court inadvertently limited who is protected by the statute. For example, courts have reasoned that because volunteers are unpaid workers, the remedy of back pay is "wholly inappropriate," and, therefore, the statute offers no true recourse for these workers.⁵² Courts have used this reasoning to deny Title VII protection to unpaid workers and volunteers.⁵³ The *Smith* court acknowledged in passing that volunteers do have the option of seeking injunctive relief but seemingly dismissed that as insignificant.⁵⁴

Some courts, and many plaintiffs, seek a broad interpretation of the definitions and provisions of Title VII, believing that this is Congress' true intention.⁵⁵ One example of this involves the express exclusion of certain workers under the definition of employee in the language of the statute.⁵⁶ The argument is that the exclusion of specific workers infers that Congress intended to "cover the full range of workers who may be subject to the harms the statute was designed to prevent," and, therefore, any workers not specifically excluded may seek the protection of the statute.⁵⁷ These individuals, however, have generally not received protection under Title VII.

E. Applying Title VII to Volunteers—Judicial Interpretation

Because of the ambiguous nature of the definitions in Title VII, it has been up to the courts to decide on a case-by-case basis whether unpaid workers and volunteers are entitled to protection under the Act. Whether there exists a sufficient employment relationship between the parties is normally the key question in these cases.⁵⁸ Because employment relationship is not defined within the statute, courts use several tests in making this

51. 422 U.S. 405, 418 (1975).

52. *E.g.*, *Smith v. Berks Cmty. Television*, 657 F. Supp. 794, 795 (E.D. Pa. 1987). *But see* discussion *infra* Part III.B.3.

53. *See, e.g.*, *Smith*, 657 F. Supp. at 794.

54. *Id.* *See also* *Dunn*, *supra* note 25, at 466. "[T]he court [in *Smith*] downplayed the significant remedy that *would* exist for volunteer workers: injunctive relief requiring, for example, cessation of discriminatory conduct or reinstatement of a volunteer worker previously terminated due to illegal discrimination." *Id.* For a discussion of remedies that might exist for unpaid workers, see Part III.B.3 of this note.

55. *Dunn*, *supra* note 25, at 466 (citing *EEOC v. Pettegrove Trucking Serv.*, 716 F. Supp. 1430, 1433 (S.D. Fla. 1989)). *See also* *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983). "[T]he term employee is clearly to be given a broad construction under all provisions of the Act." *Id.*

56. *See Armbruster*, 711 F.2d at 1339; *see also supra* note 29.

57. *Armbruster*, 711 F.2d at 1339.

58. *Ortner*, *supra* note 39, at 2631. Courts also use the finding of an employment relationship to determine employer liability, but that is not the focus of this note.

decision.⁵⁹ Two commonly used tests include the common-law agency test and the economic realities test.⁶⁰ More frequently, however, courts use a combination of the analyses performed under these two tests.⁶¹ Some scholars have labeled this the hybrid test.⁶²

More important than any of these three tests, however, is the benefits analysis.⁶³ Courts have consistently held that before a common-law agency or economic reality test can even begin, there must at least be a plausible employment relationship.⁶⁴ This is determined by the benefits analysis. Next, this note will explain how each test works and will then explore how the benefits analysis is used, either alone or as a preliminary test preceding one or both of the two main tests.

1. *The Common-Law Agency Test*

The common-law agency test refers, at its most basic level, to the degree of control exhibited in the putative employment relationship.⁶⁵ In fact, it is alternatively known as the “right-to-control” test.⁶⁶ Many courts use this test because they assume that Congress intended “the conventional master–servant relationship as understood by common-law agency doctrine” to apply to Title VII’s employer and employee definitions.⁶⁷

Courts have applied this test mainly in cases concerning a determination of whether there exists an employer–independent contractor relationship,⁶⁸ rather than situations in which there is an unpaid worker or volunteer.⁶⁹ In fact, some courts have even held that the control analysis is not

59. See Rubinstein, *supra* note 4, at 158–70, for a discussion of the different tests used by courts to determine the existence of an employer–employee relationship.

60. *Id.* at 158–67.

61. *Id.* at 167–70.

62. *Id.*

63. The term “benefits analysis” was created for the purposes of this note.

64. See *O’Connor v. Davis*, 126 F.3d 112, 115–16 (2d Cir. 1997); *Graves v. Women’s Prof’l Rodeo Ass’n*, 907 F.2d 71, 74 (8th Cir. 1990).

65. See generally RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

66. *Graves*, 907 F.2d at 74. See also Ortner, *supra* note 39, at 2628.

67. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992).

68. An independent contractor differs from both employees and unpaid workers. Randall John Chiera & Anthony F. Tagliagambe, *An Employee by Any Other Name Is Still an Employee: Determining Employment Status Under New York Law*, N.Y. St. B.J. 35, 36 (1992). Like paid employees and unpaid workers, independent contractors perform work for the employer. *Id.* Independent contractors receive compensation, but unlike paid employees they have the freedom to make many decisions employees do not. *Id.* For example, many independent contractors determine what hours to work, how to accomplish assigned tasks, and so forth. *Id.*

69. *Haavistola v. Cmty. Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 220 (4th Cir. 1993); *Smith v. Berks Cmty. Television*, 657 F. Supp. 794, 795 (E.D. Pa. 1987).

dispositive in volunteer cases.⁷⁰ On the other hand, the level of control remains a central issue in many cases because it is seen as a fundamental element of the employer–employee relationship, but it is not the “sole criterion” to be used.⁷¹

The actual right to control held by the putative employer refers not only to their right to control the end result, but also to control how that result is accomplished.⁷² Factors used in determining whether there is sufficient control by the principal over the worker to give rise to an employment relationship under Title VII include the following: (1) whether work in this occupational field is usually performed with or without supervision and direction; (2) the requisite skill level for that position; (3) which party furnishes the equipment and place of work; (4) length of time the putative employee has worked; (5) whether payment is determined by the amount of time worked or the jobs completed; (6) the manner of termination of the relationship (i.e., one or both parties, with or without notice, etc.); (7) whether annual leave is provided; (8) whether the work is an integral part of the putative employer’s business; (9) whether retirement benefits are accumulated; (10) whether social security taxes are paid by the putative employer; and (11) how the parties view the relationship.⁷³ Control is relative, however, and should be judged based on the employer’s *authority* to use that control, not by whether it is actually exercised.⁷⁴

One problem with the right-to-control test is that it does not always accurately determine an employer–employee relationship. The Eighth Circuit provided two examples to illustrate this point.⁷⁵ First, a university’s relationship with its students would meet the requirements for the employer–employee relationship under this test.⁷⁶ The university controls the actions of the students in many ways through rules and deadlines.⁷⁷ The court acknowledged there might even be a sufficient amount of control over *potential* students because of the requirements they must meet for admittance.⁷⁸ Second, the court illustrated its point by suggesting that even American

70. *Bryson v. Middlefield Volunteer Fire Dep’t, Inc.*, 546 F. Supp. 2d 527, 529 (N.D. Ohio 2008); *Haavistola*, 6 F.3d at 221.

71. *Graves v. Women’s Prof’l Rodeo Ass’n*, 907 F.2d 71, 72 (8th Cir. 1990).

72. Ortner, *supra* note 39, at 2628 (quoting *Smith v. Dutra Trucking Co.*, 410 F. Supp. 513, 516 (N.D. Cal. 1976), *aff’d*, 580 F.2d 1054 (9th Cir. 1978)).

73. *Haavistola*, 6 F.3d at 222 (citing *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979, 982 (4th Cir. 1983)).

74. Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 80–81 (1984).

75. *Graves*, 907 F.2d at 73.

76. *Id.*

77. *Id.*

78. *Id.*

Express could be construed to have employer–employee relationships with its cardholders and vendors because of the rules they are subjected to.⁷⁹ In light of these examples, it is easy to see why some have criticized the common-law agency test as limited, mechanical, and inconsistent with consideration of contextual circumstances, leading to the greatest number of potential “employees” being excluded from the statute’s protections.⁸⁰

2. *The Economic Realities Test*

The economic realities test, focusing on how economically dependent the individual is on the work he performs, was first formulated by the Supreme Court of the United States in *Bartels v. Birmingham*.⁸¹ Often, the economic realities test is framed as a balance of power argument,⁸² asking whether the worker, for example, has the power or ability to get up and walk away from the position or make necessary changes.⁸³ “Obviously control is characteristically associated with the employer–employee relationship but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.”⁸⁴ In other words, this test tries to discern the true “economic reality” of the parties’ relationship: To what degree is the worker affected by the business’s changes, successes, and failures? Is it an employer–employee relationship or not? One Sixth Circuit court put it this way: “[O]ne must examine the economic realities underlying the relationship between the individual and the so-called principal in an effort to determine whether that individual is likely to be susceptible to the discriminatory practices which the act was designed to eliminate.”⁸⁵ The theory behind this statement is that the more economically dependent individuals are, the more they might be forced to endure discrimination or harassment to maintain their position.

The courts employ several factors in an economic realities analysis, and they are remarkably similar to those used in the common-law agency analysis.⁸⁶ In fact, some scholars have suggested that the true test used by

79. *Id.*

80. Dowd, *supra* note 74, at 83.

81. 332 U.S. 126, 130 (1947) (determining whether an individual was an independent contractor for purposes of payment of social security taxes).

82. *See* Dowd, *supra* note 74, at 102.

83. *Id.*

84. *Bartels*, 332 U.S. at 130.

85. *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983).

86. *See Haavistola v. Cmty. Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 222 (4th Cir. 1993) (citing *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979, 982 (4th Cir. 1983)).

courts is actually a hybrid of the two.⁸⁷ Like those used by the right-to-control test, the factors laid out by the courts for an economic realities analysis include:

(1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending on his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer's business.⁸⁸

3. *The Benefits Analysis—An Alternative? A Threshold?*

Rather than use one of the previous tests, many courts have chosen to rely simply on a determination of the sufficiency of the benefits received by the worker in question.⁸⁹ For other courts, the benefits analysis has instead often been used as a threshold analysis for both the common-law agency and economic realities tests. Under the second option, the court uses the benefits analysis to determine whether or not a "hire" has occurred, which is a prerequisite to being able to use either the common-law agency test or the economic realities test.⁹⁰

If being used as a threshold analysis, the dispositive question for a benefits analysis is whether, and to what degree, the worker received either direct or indirect remuneration.⁹¹ If he or she did receive remuneration, a "hire" has occurred, and the court may proceed to using the common-law agency test or the economic realities test to determine whether or not an individual is an employee under Title VII.⁹²

In almost all unpaid worker cases, however, the remuneration may be insufficient or nonexistent; the second part of the analysis is, therefore, inapplicable and the worker is not an employee.⁹³ If no financial benefit is

87. Rubinstein, *supra* note 4, at 167–68.

88. *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979).

89. The court must determine whether the benefits received are sufficient to warrant a finding of an employment relationship. *See e.g., Haavistola*, 6 F.3d at 221–22.

90. *Bryson v. Middlefield Volunteer Fire Dep't, Inc.*, 546 F. Supp. 2d 527, 529–30 (N.D. Ohio 2008).

91. *Pietras v. Bd. of Fire Comm'rs of Farmingville Fire Dist.*, 180 F.3d 468, 473 (2d Cir. 1999); *O'Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997).

92. *O'Connor*, 126 F.3d at 115.

93. *Id.* at 115–16.

received, courts have found that “no plausible employment relationship can exist” because compensation is an essential condition to an employment relationship.⁹⁴ This is not to say that an individual must be salaried or earn an hourly wage to be an employee. The Second Circuit has held that it is “clear” that an employment relationship sufficient for Title VII can exist even if no wages are paid *as long as* the worker receives “numerous job-related benefits.”⁹⁵

Courts seem divided on what constitutes “numerous job-related benefits.” Some cases are clear-cut: the volunteers receive absolutely no benefits—they are simply donating their time for nothing in exchange. Thus, there is no benefit and the volunteer is not an employee. When the volunteer receives *something* in exchange for their services, the benefits determination can become unclear.

In *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, the plaintiff was a volunteer firefighter who was sexually assaulted by another volunteer.⁹⁶ When she sued for sex discrimination under Title VII, the district court granted summary judgment to the defendant.⁹⁷ It was undisputed that Haavistola received no *direct* remuneration,⁹⁸ yet she did receive many benefits as a result of her services, including group life insurance, state-funded disability pension, workers compensation coverage, tuition reimbursement for certain job-related courses, and survivors’ benefits for dependents.⁹⁹ On appeal, the Fourth Circuit discussed Haavistola’s benefits in detail and ultimately remanded the case, finding that the sufficiency of benefits with respect to the existence of an employment relationship is a question of fact rather than law; summary judgment was, therefore, inappropriate.¹⁰⁰

In a similar case, *Pietras v. Board of Fire Commissioners of Farmingville Fire District*, the Second Circuit upheld the district court’s finding that Pietras was an employee of the Farmingville Fire Department.¹⁰¹ Pietras was in training with the department and was considered a probationary firefighter.¹⁰² Although she did not receive a salary or wages, state law and

94. *Id.* at 116.

95. *Pietras*, 180 F.3d at 473.

96. 6 F.3d 211, 213 (4th Cir. 1993).

97. *Id.* at 214.

98. *Id.* at 219.

99. *Id.* at 221 (listing all of the benefits that Haavistola received).

100. *Id.* at 221–22. The Fourth Circuit disagreed that this was a matter of law because no statutory or case law defined what level of compensation was sufficient; it is, therefore, a matter for the fact-finder. *Id.* Despite the Fourth Circuit’s analysis, the jury on remand found that the facts did not support a determination that Haavistola was an “employee.” *Haavistola*, 839 F. Supp. 372 (D. Md. 1994).

101. 180 F.3d 468, 475 (2d Cir. 1999).

102. *Id.* at 471. To become a full member, Pietras and others were required to pass a

department by-laws awarded several benefits to Pietras and others like her.¹⁰³ She was entitled to a retirement pension, life insurance, death benefits, disability insurance, and even some medical benefits.¹⁰⁴

In an interesting twist, in *Rafi v. Thompson*¹⁰⁵ the court held that even nonmonetary benefits could be sufficient.¹⁰⁶ After Dr. Rafi was not selected for volunteer positions with the National Human Genome Research Institute and the National Institute of Health, he made a Title VII claim against the institutions.¹⁰⁷ Dr. Rafi presented evidence to show that there was a “clear path to employment” for volunteers.¹⁰⁸ That is, there was a high conversion rate of volunteers moving into full-time paid positions.¹⁰⁹ The judge held that this might constitute sufficient compensation and ruled that Dr. Rafi had made a “plausible showing” that the position would meet the Title VII employment standards.¹¹⁰

III. PROPOSAL

A. The Problem

Volunteers provide a valuable, essential service to our nation. Our economy *depends* on volunteerism, yet our laws provide insignificant protections for unpaid workers in the places in which they work or volunteer. If the issue is approached practically, rather than theoretically, justice would require that volunteers—who share many characteristics with employees—be protected by antidiscrimination legislation such as Title VII.¹¹¹ As mentioned earlier,¹¹² many erroneously believe that unpaid workers are not susceptible to the evils of discrimination and harassment.¹¹³ This belief is based on the faulty assumption that the only reason that one would “put up with” such treatment is in order to protect his or her economic security; be-

medical exam, a written exam, and a physical agility test. The physical agility test was the subject of her Title VII sex discrimination claim; she had already passed the other two tests. *Id.* at n.1.

103. *Id.* at 471.

104. *Id.*

105. 2006 WL 3091483, at *1 (D.D.C. 2006).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Desautels, *supra* note 2, at 135.

112. See *supra* Part II.A.

113. *Smith v. Berks Cmty. Television*, 657 F. Supp. 794, 795 (E.D. Pa. 1987).

cause an unpaid worker does not depend economically on his position, so the reasoning goes, he is free to leave if harassed or treated discriminately. Likewise, in situations where an individual is denied a position—albeit an unpaid or volunteer position—based on his membership in one of the protected classes, proponents of this view argue that there is no economic detriment to the individual and instead adopt a “no harm, no foul” approach.

If a paid employee and a volunteer are both subjected to sexual harassment by a supervisor, the above logic would suggest that the employee has economic incentives not to speak up or quit her job: her financial well-being, job stability, and future career goals. The volunteer, on the other hand, has no reason to stay, nor does he experience any detriment from leaving or from speaking up about the harassment. This argument is erroneous for many reasons.

First, unpaid workers are rarely wholly gratuitous. In fact, many volunteers receive at least some form of benefits,¹¹⁴ for some volunteers, these benefits can be quite significant. For example, they may receive monetary benefits, in-kind benefits, job experience, or even the proverbial “foot in the door” for future employment. Even when volunteers receive no tangible benefits, though, they are doing the work for some reason, perhaps simply a “warm, fuzzy feeling,”¹¹⁵ or the personal satisfaction they receive from serving. Regardless of how many or how few benefits they receive, by speaking up about discrimination or harassment they risk losing these benefits and the opportunity to continue their work.

Second, unpaid workers that are victims of discrimination or harassment in an employment context experience other detriments as well. Whether they remain in their position or not, these individuals experience a multitude of negative effects. These can include stigma or ridicule in the community, alienation from friends or coworkers, and an inability to find similar work. These individuals may also experience emotional setbacks, such as feeling ashamed or blaming themselves for what happened or their reaction to it. Finally, for many individuals internships and volunteer experiences are necessary stepping stones to future employment.¹¹⁶ Being deprived of that experience can have serious effects on one’s education and career.¹¹⁷

Arguably, volunteers and unpaid workers are *more* susceptible to harassment and discrimination *because of* their status as “non-employees.”¹¹⁸

114. See *supra* Part II.E.3 for a discussion of benefits.

115. Attard, *supra* note 23, at 1090.

116. David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 215 (2002).

117. See *id.*

118. See James J. LaRocca, *Lowery v. Klemm: A Failed Attempt at Providing Unpaid*

One possible reason is that supervisors and coworkers may see volunteers as a temporary workforce—more susceptible to harassment because they will soon leave.¹¹⁹ Similarly, particularly in intern situations, there is often a large imbalance of power between the worker and the supervisor. This position of power is often abused. In commenting on the Washington, D.C. intern culture, columnist Andrew Sullivan wrote: “Some of what goes on is truly depressing. . . . I know one longtime Washingtonian who even referred to each influx of interns, jokingly, as ‘the flesh.’”¹²⁰ Sullivan’s observations demonstrate the exploitive relationship between experienced politicians in Washington, D.C., and the young, relatively inexperienced interns.¹²¹ This is an example of how being an intern can increase the likelihood of discrimination, rather than diminish it. This gives employers little incentive to curb discrimination.

Alternatively, or perhaps in addition to these factors, with the current status of the laws, unscrupulous employers or supervisors may exploit the fact that the law provides no recourse for unpaid workers; they are ineligible for damages, reinstatement, or even injunctive relief under the current employment laws.

These results are contrary to public policy. Our culture has a strong public policy against discrimination and harassment in any form. We have numerous statutes aiming to protect people based on different classifications and in different situations. Committing discriminatory or harassing acts can correctly lead to disastrous consequences, such as suspension or termination, public criticism, community disrespect, and civil liability. Strictly from a public policy standpoint, the discrimination or harassment of any worker—paid or unpaid—is wrong and should be prohibited, prevented, and punished. With such community support behind preventing discrimination and harassment, it does not make sense to have laws that are ineffective in achieving this purpose.

Unpaid workers are usually doing this type of work for one of two reasons: (1) to gain job experience and promote future career goals,¹²² or (2) to give back to society in a way that is meaningful to them.¹²³ Both of these

Interns and Volunteers with Adequate Employment Protections, 16 B.U. PUB. INT. L.J. 131, 140 (2006).

119. *Id.*

120. Andrew Sullivan, *The Way We Live Now: 7-22-01; Sex and This City*, N.Y. TIMES MAG., July 22, 2001, at 15. Mr. Sullivan currently operates The Daily Dish on www.andrewsullivan.com and is a senior editor at The New Republic.

121. *See id.*

122. *See Ortner, supra* note 39, for a discussion on the growing importance of internships to obtaining gainful employment.

123. *See Attard, supra* note 23, at 1090.

motives are praiseworthy and should be promoted by society and its laws. It is unacceptable for these individuals to be subjected to discrimination, but still it happens. Volunteers or interns may be discriminated against by not being “hired” or promoted; by receiving different, lesser, or demeaning jobs; by being segregated based on their protected status; or through harassment, insults, or demeaning treatment. These are only a handful of the possibilities. None of them are acceptable. It is essential that Congress and the courts take affirmative steps to eliminate this practice and provide the employment protections that our nation’s volunteers deserve.

B. Legal Recognition of Unpaid Workers as Title VII Employees

The most effective way to eliminate employment discrimination and harassment against unpaid workers is for the law to recognize them as employees. The most efficient way for this to happen is for Congress to amend the Title VII “employee” definition to include unpaid workers such as volunteers and interns. In recognizing the complexity of passing a statutory amendment in Congress, there are ways for these interests to be promoted in the meantime. First, state legislatures can enact similar legislation. Second, courts must come to a consensus on which employment test will be used in order to achieve consistency and efficiency. Finally, employers and workers can minimize litigation by agreeing, in writing, about the designation of the parties’ relationship.

1. *The Best Solution—A Title VII Amendment*

Although scholars have proposed many different solutions, the best way to resolve the conflict in the courts, the circular nature of the laws, and the inadequate level of protection that this country provides volunteers is to amend Title VII of the Civil Rights Act of 1964 to expressly include unpaid workers. This change would not eliminate all of the problems of interpretation that Title VII presents, but it is a good starting point and would provide several benefits.

The Federal Employees’ Compensation Act (FECA) provides a decent starting model. In FECA, employees include “individual[s] rendering personal service to the United States . . . without pay or for nominal pay.”¹²⁴ Noting this, one author suggested that Title VII be amended using the following phrase: “an individual under an employer’s control who provides personal service to an employer, without pay or for nominal pay.”¹²⁵

124. Federal Employees’ Compensation Act, 5 U.S.C. § 8101(1)(b) (2006).

125. Dunn, *supra* note 25, at 471.

This definition, however, would only complicate the already protracted litigation over what constitutes “control,” as well as adding the extra analysis of whether the worker provides “personal service.” Furthermore, the use of the word “pay” in the definition proposed above would likely cause confusion, with some courts construing the word in its plain and literal sense—a salary or wage—and other courts construing “pay” as a concept that embodies both economic and other benefits.

The shortcomings of this author’s suggestion are easy to fix. By simplifying the definition and using broader, less ambiguous language, a suggested modification might be as follows: “Employee means an individual employed by an employer, *including those who provide services for an employer without benefits or for nominal benefits.*”

2. *Alternative and Interim Solutions*

Such an amendment obviously will not be enacted overnight. In the meantime, it is important for state legislatures, the judicial system, and employers to not ignore the plight of these workers and to understand the shortcomings of the Act as written.

State legislatures can help by enacting similar legislation. Every state has some form of employment discrimination law on the books.¹²⁶ For these states, they only need to amend their statutes to redefine “employee” like proposed for Title VII.¹²⁷ For states that do not currently have comprehensive employment discrimination laws, such laws should be enacted and should contain provisions like the one advocated. Ideally, both Congress and the states should enact this type of legislation. This way there is essentially a double layer of protection, and workers have an option of state or federal recourse. If both Congress and state legislatures take affirmative steps to protect unpaid workers, the community and the courts will receive the clear message that this behavior will not be tolerated and that victimized workers have rights and remedies, regardless of their pay status.

Courts, too, can actively protect the rights of unpaid workers through the resolution of litigation. To do this, courts must reach a consensus on which employment test should be used. This is important not only for consistency, but also for judicial efficiency. As part of this task, the courts must consider public policy, the effects of each of the employment tests,

126. Many state antidiscrimination laws mimic Title VII, but some states provide for more, less, or different protected classes than Title VII’s “race, color, religion, sex, or national origin.” Alabama, for example, only mentions age discrimination, ALA. CODE § 25-1-21 (2008), but Hawaii mentions sexual orientation, court or arrest record, marital status, and disability in addition to the five Title VII classes, HAW. REV. STAT. § 378-2 (2008).

127. See *supra* Part III.B.1.

and logical and fair results. Although this is something that can be done in the time before Congress amends the Act, the courts must take these steps regardless. These are issues that are likely to still arise even after implementation of the suggested amendment. Recognizing this and the importance of their decisions, courts should act quickly to develop a consistent and appropriate model.

The courts are not the only ones, however, who can aid this process. Employers can—and should—clearly define the relationship they have with their employees, volunteers, and interns. The parties should agree in writing that discrimination will not be tolerated, and the agreement should also detail each party's rights and responsibilities.¹²⁸

3. *Advantages and Benefits of Amending Title VII*

The main purpose of amending Title VII is to provide statutory protection to unpaid workers against discrimination and harassment, but there are many secondary benefits as well. Consistent with the general purpose of Title VII, the suggested amendment would further eliminate workplace discrimination and provide for more productive and welcoming work environments. Increased productivity is a benefit not only to individual employers, but also to our national economy as well. As alluded to earlier, amending Title VII would help “avoid protracted litigation over the threshold determination of employee status,” as well as provide a “benefit to plaintiffs, defendants, and the legal system.”¹²⁹

Plaintiffs benefit the most, though, because they now have a statutory right to be free of discrimination in their volunteer position. Perhaps more importantly, this amendment would provide plaintiffs with recourse if they are the victims of discrimination, opening a plethora of remedies for unpaid workers. Title VII and the courts currently provide many remedies for wronged workers, and it is unfair to exclude unpaid workers entirely simply because the remedies of back pay or front pay are inappropriate.¹³⁰ These remedies can include attorney's fees, reinstatement, injunctive relief, and even compensatory and punitive damages when appropriate.

4. *Remaining Concerns*

Even with new language specifically including unpaid workers, it will be up to the courts to interpret and apply the law appropriately. One fore-

128. See, e.g., 1 LES A. SCHNEIDER & J. LARRY STINE, WAGE & HOUR LAW § 3:15 (2008) (applies to FLSA, not Title VII).

129. Yamada, *supra* note 116, at 246.

130. See, e.g., Smith v. Berks Cmty. Television, 657 F. Supp. 794 (E.D. Pa. 1987).

seeable concern is that courts will still have to determine if there is a significant enough relationship¹³¹ between the volunteer and the employer to warrant protection for the volunteer and liability for the employer. Arguably, this determination will never become obsolete, but making the suggested changes will decrease the amount of guesswork courts must do. By expressly including unpaid workers, for example, the courts will no longer have to analyze whether the benefits are sufficient, or whether the worker is economically dependent on the position.

IV. CONCLUSION

Given the enormous impact of volunteerism on America's culture and economy, as well as the increasing necessity of volunteer and intern experience for individuals, the statutory protections afforded to unpaid workers are sadly lacking. Employment discrimination statutes such as Title VII fail to properly define "employee," and courts inconsistently apply the law.

An amendment to Title VII's definition of "employee" that would include unpaid workers is imperative. Volunteers would then be entitled to powerful remedies now reserved solely for paid workers, such as reinstatement, injunctive relief, damages, and attorney's fees. Enacting such an amendment would be consistent with public policy considerations encouraging volunteerism and discouraging discrimination.

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131. Courts will decide this by using the benefits analysis, common law agency test, or the economic realities test.

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