Workplace Discrimination As a Public Health Issue: The Necessity of Title VII Protections for Volunteers

Elizabeth R. Langton
Fordham University School of Law

Recommended Citation
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NOTES

WORKPLACE DISCRIMINATION
AS A PUBLIC HEALTH ISSUE:
THE NECESSITY OF TITLE VII PROTECTIONS
FOR VOLUNTEERS

Elizabeth R. Langton*

What constitutes an employee is a recurring issue in U.S. employment law, especially with respect to volunteers. Under Title VII, an employee is defined as “an individual employed by an employer.” The U.S. Supreme Court has found that this definition is circular and explains nothing. Given the vague statutory definition of “employee,” circuit courts are split over the correct test to determine employee status for the purposes of Title VII.

Workplace discrimination is especially toxic because the majority of the adult population spends its waking hours at work. Thus far, courts have been focused on the individual nature of workplace discrimination. However, the harms of such discrimination are borne beyond the targeted individual and negatively impact coworkers, families, employers, and society at large.

This Note argues that courts must reconceptualize workplace discrimination as a public health issue. Given the health implications, courts should reject the overly narrow threshold-remuneration test and adopt a broad definition of employee in the interest of public health.

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* J.D. Candidate, 2015, Fordham University School of Law; B.A., 2007, Davidson College.

I would like to thank Professor Tanya Hernandez and Professor Eileen Minnefor for their advice and guidance in writing this Note. I would also like to thank my family and friends for their constant support.
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INTRODUCTION

Livingston Parish Fire District No. 5 (“Fire District 5”) is a government subdivision of the State of Louisiana and primarily relies on volunteers to provide fire and emergency services. Rachel Juino was a volunteer firefighter with Fire District 5 from November 2009 to April 2010. Although she did not receive a salary, Juino responded to thirty-nine calls for which she received $78 in reimbursement. She also received a life insurance policy, a uniform and badge, and emergency and first responders’ training.

Soon after she started volunteering at Fire District 5, Juino alleged that a male firefighter was sexually harassing her. After a physical altercation with this male firefighter, Juino allegedly began to fear for her personal safety and reported the male firefighter’s conduct to her superiors. No disciplinary action was taken, and Juino left Fire District 5 in April 2010 due to continuing harassment.

Juino brought a sexual harassment suit against Fire District 5 for violations of Title VII of the Civil Rights Act of 1964 (Title VII). The Middle District of Louisiana dismissed the Title VII claim, finding that Juino was not an “employee” within the meaning of Title VII.

Juino appealed to the Fifth Circuit, which addressed the issue as a matter of first impression. The court found that Juino was not an employee for the purposes of Title VII because she did not receive a salary or “significant” indirect benefits.

Pursuant to Title VII, it is illegal “for an employer to fail or refuse to hire or to discharge any individual, or otherwise to 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

2. See id.
3. See id. at 439. As a volunteer firefighter, Juino was entitled to a $2 reimbursement for every emergency call to which she responded. See Juino v. Livingston Parish Fire Dist. No. 5, No. 11-466, 2012 WL 527972, at *6 (M.D. La. Feb. 14, 2012), aff’d, 717 F.3d 431 (5th Cir. 2013) (order granting partial summary judgment for Fire District 5 and dismissing Juino’s Title VII claims without prejudice pursuant to Rule 12(b)(1) due to lack of subject matter jurisdiction).
4. See Juino, 717 F.3d at 439.
5. Id. at 432. Juino stated that the male firefighter called her cell phone frequently, followed her around the fire department and bragged to other firefighters that he was sleeping with her. See Juino, 2012 WL 527972, at *2.
6. See Juino, 717 F.3d at 432. The male firefighter jerked Juino’s head from side to side and pulled her air pack valve off her face mask. See Juino, 2012 WL 527972, at *1.
7. See Juino, 717 F.3d at 432.
9. See Juino, 717 F.3d at 432.
11. See Juino, 717 F.3d at 432.
12. Id. at 439–40.
Title VII prohibits “harassment that takes the form of a tangible employment action, such as a demotion or denial of promotion, or the creation of a hostile or abusive working environment.”

To sustain a claim under Title VII, an employer must have at least fifteen employees “for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.” Under Title VII, an employee is defined as “an individual employed by an employer.” The U.S. Supreme Court has found that this definition “is completely circular and explains nothing.” As a result, what constitutes an employee is a “recurring question” in our nation’s employment laws.

Given the vague statutory definition of employee, courts have created various tests to determine employee status for the purposes of Title VII. These tests include: (1) the threshold-remuneration test, (2) the common law agency test, (3) the economic realities test, and (4) the hybrid test, which combines the common law agency and economic realities tests. Courts have used the latter three tests interchangeably, and scholars have argued that the economic realities and hybrid tests are simply restatements of the common law agency test. Therefore, the main question is whether courts should adopt the threshold-remuneration test or some formulation of the common law agency test.

In Juino, the Fifth Circuit joined the Second, Fourth, Eighth, Tenth, and Eleventh Circuits by adopting a version of the threshold-

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14. Juino, 717 F.3d at 433–34 (citing Lauderdale v. Tex. Dep’t of Criminal Justice, 512 F.3d 157, 162 (5th Cir. 2007)).
16. Id. § 2000e(f).
18. See Smith v. Castaways Family Diner, 453 F.3d 971, 975 (7th Cir. 2006) (stating that what constitutes an employee is “a recurring question”).
21. See Cobb v. Sun Papers, Inc., 673 F.2d 337, 339–40 (11th Cir. 1982) (finding that the economic realities tests is merely “a common law type of analysis in which the employer’s right to control the employee is the most important factor rather than the determinative factor”); Perry v. City of Country Club Hills, 607 F. Supp. 771, 773 n.2 (E.D. Mo. 1983).
22. See, e.g., O’Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997) (holding that an unpaid intern who did not receive remuneration was not an employee under Title VII).
23. See, e.g., Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 222 (4th Cir. 1993) (finding that remuneration was dispositive but remanding to determine whether the volunteer firefighter’s receipt of indirect benefits was substantial enough to establish an employment relationship).
24. See, e.g., Graves v. Women’s Prof’l Rodeo Ass’n, 907 F.2d 71, 73–74 (8th Cir. 1990) (holding that members of a professional rodeo association were not employees under Title VII because they did not receive compensation).
25. See, e.g., McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974, 979 (10th Cir. 1998) (finding that a medical student who did not receive remuneration failed to establish an employment relationship under Title I of the Americans with Disabilities Act).
remuneration test. However, the Sixth\textsuperscript{27} and Ninth\textsuperscript{28} Circuits have held that remuneration alone is not dispositive and should be considered in conjunction with other common law agency or economic realities factors.\textsuperscript{29}

How to determine employee status for the purposes of Title VII remains of “paramount concern because liability is almost wholly dependent upon employ[ee] status.”\textsuperscript{30} In these difficult economic times, our nation has increasingly relied on the services of volunteers.\textsuperscript{31} They can be found in almost every industry, private and public, and they compose a national workforce.\textsuperscript{32} Volunteers often function like traditional employees, reporting to work every day and serving side-by-side with full-time employees.\textsuperscript{33}

However, unlike traditional employees, volunteers are particularly vulnerable to abuse because they are not given the same employment rights and protections under Title VII because of ambiguity in the law.\textsuperscript{34} Few areas of employment law have been so highly litigated, and “the time is ripe for an authoritative distinction” among the various definitions of employee.\textsuperscript{35}

Thus far, courts have focused on the individual nature of workplace discrimination, viewing each incident of harassment singularly—only with respect to the impact on the particular individual. They have taken a tort-like approach, seeking to remedy only the particular harm caused to the targeted individual. However, the extent of the injury extends beyond that individual.\textsuperscript{36}

Courts must reconceptualize discrimination as a broader public health issue.\textsuperscript{37} Discrimination against volunteers creates a toxic work environment, even for those individuals who are not the direct targets. It

\textsuperscript{26} See, e.g., Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1244 (11th Cir. 1998) (finding that an officer-director of the condominium association who received no compensation for her position was not an employee under Title VII).

\textsuperscript{27} See, e.g., Bryson v. Middlefield Volunteer Fire Dep’t, Inc., 656 F.3d 348, 354 (6th Cir. 2011) (finding that remuneration is only one dispositive factor and not an independent antecedent requirement); Armbruster v. Quinn, 711 F.2d 1332, 1340–41 (6th Cir. 1983) (finding that “manufacturer’s representatives”—who did not work in the defendant’s corporate office, did not exclusively sell the defendant’s product lines, and received no compensation other than commissions—could be construed as employees under Title VII).

\textsuperscript{28} See, e.g., Fichman v. Media Ctr., 512 F.3d 1157, 1160 (9th Cir. 2008) (noting that remuneration was not a dispositive factor when determining whether directors and independent producers of a nonprofit media company were “employees” under the Americans with Disabilities Act and Age Discrimination in Employment Act); Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 755 (9th Cir. 1979) (“Economic realities, not contractual labels, determine employment status . . . .”)

\textsuperscript{29} See Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 434–35 (5th Cir. 2013).

\textsuperscript{30} Rubinstein, supra note 20, at 658.

\textsuperscript{31} See discussion infra notes 70–81, 89–90.

\textsuperscript{32} Rubinstein, supra note 19, at 147.

\textsuperscript{33} Rubinstein, supra note 20, at 658.

\textsuperscript{34} Rubinstein, supra note 19, at 149–50.

\textsuperscript{35} Rubinstein, supra note 20, at 658.

\textsuperscript{36} See discussion infra Part III.

\textsuperscript{37} See discussion infra Part IV.A.
threatens the health of the entire workforce, families, employers, and society at large.

Through the lens of public health, this Note explores the circuit split over the appropriate test to define “employee” under Title VII and whether remuneration should be an initial threshold test. Part I provides an overview of the relevant protections of Title VII, its definition of employee, and the legislative history and purpose of the statute. It then discusses the role of volunteers today. Part II analyzes the various approaches taken by the circuit courts in determining whether a volunteer is an employee under Title VII. Part III explores the health effects of workplace discrimination on coworkers, families, society, and employers. Lastly, Part IV argues that courts must reconceptualize workplace discrimination against volunteers as a public health issue. Given the public health implications of such discrimination, it asserts that courts should reject the threshold-remuneration test and adopt a broad definition of employee that includes volunteers as a prophylactic measure to protect the public interest. It then provides supplemental support for rejecting the threshold-remuneration test by citing arguments unrelated to public health.

I. BACKGROUND: UNDERSTANDING TITLE VII AND VOLUNTEERS TODAY

This part provides an overview and background of Title VII. It then defines “volunteer” for the purposes of this Note and discusses the role of volunteers today.

A. Background and Overview of Title VII

This section discusses the protections and privileges under Title VII. It then examines the definitions of “employee” under Title VII. Lastly, it explores the legislative history and purpose of Title VII.

1. Protections and Privileges Under Title VII

Pursuant to Title VII, it is illegal “for an employer to fail or refuse to hire or to discharge any individual, or otherwise to 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.” As a result, Title VII prohibits “harassment that takes the form of a tangible employment action, such as a demotion or denial of promotion, or the creation of a hostile or abusive working environment.”

38. See discussion infra Part III.A.
39. See discussion infra Part III.B.
40. See discussion infra Part III.D.
41. See discussion infra Part III.C.
43. Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 433–34 (5th Cir. 2013) (citing Lauderdale v. Tex. Dep’t of Criminal Justice, 512 F.3d 157, 162 (5th Cir. 2007)).
The U.S. Equal Employment Opportunity Commission (EEOC) enforces federal laws, such as Title VII, that prohibit workplace discrimination.\(^{44}\) Across all federal statutes, in fiscal year 2013, the EEOC received 93,727 private sector workplace discrimination charges from October 1, 2012 to September 30, 2013.\(^{45}\) The claims most frequently levied in these discrimination charges were: (1) retaliation (all statutes) at 38,539, (2) race at 33,068, (3) sex at 27,687, and (4) disability at 25,957.\(^{46}\) During the same period, the EEOC obtained $372.1 million for victims of workplace discrimination.\(^{47}\) For Title VII alone, the EEOC received 67,558 charges and resolved 70,175 charges in fiscal year 2013.\(^{48}\) The EEOC secured $255.9 million for victims of Title VII discrimination during the same time period.\(^{49}\)

2. Definition of “Employee” Under Title VII

Employee status is a “long-recognized rub”\(^{50}\) and a “recurring question”\(^{51}\) in our nation’s employment laws. To sustain a claim under Title VII, an employer must have at least fifteen employees “for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”\(^{52}\) An employee is defined as “an individual employed by an employer,”\(^{53}\) which the Supreme Court has found to be a circular definition that explains nothing.\(^{54}\) As a result, circuit courts are split over the correct test to determine whether an individual is an employee.

Other employment statutes fail to provide clarity. “[T]he statutory language defining employee status in virtually all of our nation’s employment laws is vague, conclusory, and largely useless.”\(^{55}\) The


\(^{45}\) Id. The number of total charges is the number of individual charge filings received by the EEOC. Id. Since claimants may file charges asserting multiple bases (e.g., retaliation, race, sex, disability and age), the number of total charges is less than the number of total bases of discrimination for 2013. Id.

\(^{46}\) Id.


\(^{48}\) Title VII of the Civil Rights Act of 1964 Charges (includes concurrent charges with ADEA, ADA and EPA) FY 1997–FY 2013, EEOC, http://www1.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm (last visited Nov. 26, 2014). The EEOC carries over unresolved charges from previous fiscal years, which means that it often resolves more charges than it receives. Id.

\(^{49}\) Id.

\(^{50}\) FedEx Home Delivery v. NLRB, 563 F.3d 492, 496 (D.C. Cir. 2009) (finding that employment status is not subject to a bright-line test).

\(^{51}\) Smith v. Castaways Family Diner, 453 F.3d 971, 975 (7th Cir. 2006) (stating that what constitutes an employee is “a recurring question”).

\(^{52}\) 42 U.S.C. § 2000e(b) (2012).

\(^{53}\) Id. § 2000e(f).


\(^{55}\) Rubinstein, supra note 20, at 608.
Supreme Court has even acknowledged that there is not one “simple, uniform and easily applicable test” and that “[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship.”

In an effort to clarify, the Supreme Court provided that, “when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” The Court explained that, “[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished.” This test, also known as the common law agency test, is discussed in greater detail in Part II.B.

Several courts have asserted that the common law agency test does not immediately apply in the volunteer context because, unlike independent contractors, there is a threshold question as to whether volunteers are “hired parties.” These courts apply what is known as the threshold-remuneration test, which is discussed in Part II.A.

3. Legislative History and Purpose of Title VII

Congress intended for Title VII to grant all individuals the right to be employed without discrimination and to eliminate discrimination in employment contexts. Title VII sought “to assure equality of employment opportunities, in particular to protect employees with little bargaining power.”

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58. Id. at 323–24 (quoting Reid, 490 U.S. at 751).
Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.
Reid, 490 U.S. at 751–52.
59. See discussion infra Part II.B.
60. See discussion infra Part II.B.
61. See discussion infra Part II.A.
The Supreme Court has given this intent significant weight when defining the scope of Title VII. The Court stated: “Congress itself has indicated, a ‘broad approach’ to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy.”65 As a result, the Court has generally defined the scope of the employment relationship expansively to effectuate Congress’s broad remedial purpose. *Hishon v. King & Spalding*66 and *Robinson v. Shell Oil Co.*67 are two landmark cases illustrating this trend.

In *Hishon*, the Court found that a female associate at a law firm could bring a Title VII claim after she was denied partnership, even though partners of the firm were not employees under Title VII.68 The Court held that an employment relationship may be an “informal” one and “arise by the simple act of . . . providing a workplace.”69 The “terms, conditions, or privileges” of that relationship should be interpreted broadly to ensure fairness in employment.70 As a result, the Court found that partnership status was a “term, condition, or privilege of employment” because there was an implicit agreement that the associate would be considered for partnership if she remained in good standing.71

In *Robinson*, the Court rejected rigid dictionary definitions to read Title VII more expansively.72 The Court found that the word “employed” was “not so limited in its possible meanings” as to only include present employment.73 The Court expanded the definition of “employee” to include current and former employees because such a reading was “more consistent with the broader context of Title VII” and allowed “unfettered access to [Title VII’s] remedial mechanisms.”74

The Court has also held that context matters when interpreting employment law statutes, finding that they “should be interpreted in context rather than just examining their plain meaning.”75 In *NLRB v. Hearst Publications*,76 the Court found that the term employee should:

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

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68. *Hishon*, 467 U.S. at 76–79.
69. Id. at 74.
70. Id.
71. Id. at 76.
72. See *Robinson*, 519 U.S. at 342.
73. Id. (rejecting the implicit assumption that “employed” means currently employed).
74. Id. at 346.
76. 322 U.S. 111 (1944).
statute, which must be read in the light of the mischief to be corrected and the end to be attained.77

The Court has even extended Title VII’s scope beyond the workplace. In Burlington Northern & Santa Fe Railway, Co. v. White,78 the Court expanded the definition of adverse action under Title VII’s antiretaliation provision to include acts of retaliation by employers unrelated to the workplace.79

Relying on Congress’s intent to give Title VII a broad remedial purpose, several circuit courts have followed the Court and interpreted Title VII expansively.80 For example, in Smith v. Castaways Family Diner,81 the Seventh Circuit relied in part on the underlying purpose of Title VII to find that the husband and the mother of a restaurant owner were employees for the purposes of whether the restaurant met the fifteen-employee threshold to be considered an employer.82

However, some circuits, such as the Eighth Circuit, have interpreted Title VII less expansively and simply looked at the ordinary meaning of the term employee.83 Proponents of this approach base their arguments on statements from one of the statute’s initial drafters, who stated that any definitional gaps should be given their “common dictionary meaning, except as expressly qualified by the act.”84

B. Volunteers Today

This Note explores volunteers, workers on the “borderland” between employee and nonemployee.85 This section defines “volunteers” for the purposes of this Note and discusses their role today.

1. Who Is a Volunteer?

Volunteers are an essential part of our society, economy, and government. Webster’s Dictionary defines a volunteer as “one who enters into or offers himself for any service of his own free will.”86 Black’s Law

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77. See id. at 124.
79. See id. at 57 (noting the breadth of the provision and its primary goal of unfettered access).
80. See infra notes 82–84 and accompanying text.
81. 453 F.3d 971 (7th Cir. 2006).
82. See id. at 987.
83. Graves v. Women’s Prof’l Rodeo Ass’n, 907 F.2d 71, 73 (8th Cir. 1990).
84. See 110 CONG. REC. 7188, 7216 (1964); see also Kpere-Daibo, supra note 75, at 141.
85. In NLRB v. Hearst Publications, Inc., Justice Rutledge coined the term “borderland” when referring to quasi-employers who are stuck between being an employer and non-employer. See 322 U.S. 111, 121 (1944). In Hearst Publications, the Court was asked to determine whether a newsboy was an employee under the National Labor Relations Act. See id. at 111. “Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.” See id. at 121.
86. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2564 (1986).
Dictionary states that a volunteer is a “voluntary actor or agent in a transaction; [especially], 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.”87 Volunteers work in our schools, hospitals, police and fire departments, civic and political organizations, community service organizations, and non-profit organizations.88 They can be found in almost every industry, private and public.89 They compose a national volunteer workforce.90 The recent economic recession has changed our volunteer workforce such that it not only includes “do-gooders” who volunteer for their own pleasure but also includes jobseekers who volunteer to secure vital training, much-needed compensation, or otherwise expensive insurance and benefits.91

Given the wide range of individuals who fall into the broad definition of volunteer, Professor Mitchell Rubinstein has divided volunteers into two subgroups: “pure volunteer” and “volunteer plus.”92 A “pure volunteer” receives nothing in return for his or her services.93 Cases that involve “pure volunteers” are easy, and courts have more consistently denied pure volunteers coverage under the various employment statutes.94

A “volunteer plus” receives something in return for his or her services.95 For example, Juino is a “volunteer plus.” Although she did not receive a salary, Juino received $78 in compensation for responding to thirty-nine calls, a life insurance policy, a uniform and badge, and training.96 Individuals that fall under the “volunteer plus” category are the more difficult cases, and courts have struggled to determine whether this subgroup is protected under Title VII.97

87. BLACK’S LAW DICTIONARY 1807 (10th ed. 2014).
88. See Rubinstein, supra note 19, at 147.
89. See id.
90. See Kpere-Daibo, supra note 75, at 137.

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. They work in education, government, sales, banking and finance, agriculture, medicine, manufacturing, transportation, and more.

Id.

91. As the job market gets smaller, more students are seeking unpaid internships after graduating from school. See Rubinstein, supra note 19, at 149. “In some industries, an internship has become a ‘virtual requirement in the scramble to get a foot in the door.’” Id.
92. See id. at 153.
93. See id.
94. See id. at 154.
95. See id. at 153.
96. See Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 439 (5th Cir. 2013).
97. See Rubinstein, supra note 19, at 157.
2. What Are the Roles of Volunteers Today?

Historically, public policy in the United States has strongly valued and encouraged volunteerism. President Richard Nixon established National Volunteer Week, and President Ronald Reagan created the President’s Volunteer Award. President George H.W. Bush founded a White House office and the Points of Light Foundation to promote volunteerism. President Bill Clinton helped establish the Corporation for National Service to oversee AmeriCorps and other programs. President George W. Bush called on Americans to “recognize and celebrate the important work” of volunteers.

In an environment of budget cuts and government shutdowns, volunteerism is even more critical. On January 19, 2008, one day before his inauguration, President Barack Obama announced a National Day of Service, asking Americans to organize and participate in community service. This has become a tradition for President Obama, who organized another National Day of Service on January 19, 2013, the day before his second inauguration. National Service Days are just one element of President Obama’s nationwide service initiative, “United We Serve,” which “call[s] on all Americans to participate in our nation’s recovery and renewal by serving in our communities.”

Scholars have noted that despite our increased reliance on volunteerism, efforts to protect volunteers have not increased. Some degree of uncertainty can be expected given the nontraditional nature of the volunteer-employer relationship. Rubinstein has noted: “Most of our labor and employment laws were drafted with the notion of full time traditional employment in mind, which is often no longer the case,” and the definition of employee “developed from common law tort principles involving vicarious liability of employers—not employment law dogma.”

98. See id. at 148. Over the past few decades, U.S. Presidents have encouraged volunteerism. Kpere-Daibo, supra note 75, at 135–36.
99. See Kpere-Daibo, supra note 75, at 135.
100. Id.
101. Id.
102. Id.
103. See Rubenstein, supra note 19, at 148–49.
105. See Stolberg, supra note 104; see also Obama Announces National Day of Service Will Kick Off Inauguration, supra note 104.
109. Id. at 610.
However, employers may have incentives to maintain this ambiguity. Employers are in business to earn a profit and may “engage[e] in purposeful manipulation in order to avoid a finding of employee status at all costs.”

C. Why Does the Distinction Between Volunteers and Employees Matter?

The distinction between volunteer and employee is important for several reasons. First, the question of whether volunteers are employees remains of paramount concern because Title VII’s protections apply to employees only, and courts will not have jurisdiction under Title VII if individuals are not deemed employees.

Second, uncertainty in the law creates “a breeding ground for litigation.” And, unlike other areas of the law, volunteers cannot contract around the issue. Courts are careful to conduct fact-based inquiries without relying heavily on the labels that parties place on the work relationship. Some argue that this is a conscious decision by the courts to protect workers with weak bargaining power against employers who may try to contract out of the Title VII protections.

Third, employment status has significant consequences on eligibility for a public pension, collective bargaining agreement, and protections under various other state and federal employment laws.

Fourth, under Title VII, employer status is heavily dependent upon a court’s definition of employee. To be deemed an employer under Title VII, an organization must have at least fifteen employees as statutorily defined under Title VII. Employers should be able to know their liability in advance.

Fifth, clarity in the law is essential to prevent abuse. Volunteers have the potential to be exploited by employers looking for inexpensive labor. A clear definition of employee will help to curb exploitation of a vulnerable volunteer workforce.

110. Id. at 615.
111. See, e.g., Brown v. J. Kaz, Inc., 581 F.3d 175, 181 (3d Cir. 2009) (finding that Title VII protections did not extend to the plaintiff because she was not an “employee”).
112. Rubinstein, supra note 20, at 609.
113. See, e.g., Narayan v. EGL, Inc., 616 F.3d 895, 903–04 (9th Cir. 2010) (finding that an agreement declaring that an individual is an independent contractor and not an employee is not dispositive); Schwieger v. Farm Bureau Ins. Co. of Neb., 207 F.3d 480, 483 (8th Cir. 2000) (“An employer ‘may not avoid Title VII by affixing a label to a person that does not capture the substance of the employment relationship.’” (quoting Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 (8th Cir. 1996))); see also Rubinstein, supra note 20, at 609.
114. Kean, supra note 64, at 177.
115. See id.
116. See Rubinstein, supra note 20, at 616.
118. See Rubinstein, supra note 19, at 150.
119. See id.
120. See id. at 150–51.
121. See id. at 151.
Lastly, understanding one’s employment status is also important for self-identification and personal fulfillment. Work plays an important role in shaping an employee’s identity, and the workplace has gradually become a principal site for employees’ social lives.122 William Blackstone famously noted that work is one of the “three great relations in private life.”123

II. THE CIRCUIT SPLIT: THE VARIOUS TESTS TO DETERMINE EMPLOYMENT STATUS

Circuit courts are divided with respect to the appropriate test to determine whether a volunteer is an employee for the purposes of Title VII.124 The Second,125 Fourth,126 Fifth,127 Eighth,128 Tenth,129 and Eleventh130 Circuits have adopted a version of the threshold-remuneration test. However, the Sixth131 and Ninth132 Circuits have held that remuneration alone is not dispositive and should be considered in conjunction with other common law agency or economic realities factors.

This part analyzes the four approaches taken by the circuit courts: (1) the threshold-remuneration test, (2) the common law agency test, (3) the economic realities test, and (4) the hybrid test. It also discusses the strengths and weaknesses of each approach.

A. Threshold-Remuneration Test

In Juino, the Fifth Circuit joined the Second,133 Fourth,134 Eighth,135 Tenth,136 and Eleventh137 Circuits by adopting a version of the threshold-remuneration test, which creates a two-step inquiry to determine whether an individual is an employee under Title VII.138 The first step requires the plaintiff to show that he or she received direct compensation or substantial indirect benefits that are “not merely incidental to the activity

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122. See Zachary A. Kramer, After Work, 95 CAL. L. REV. 627, 645–46 (2007). In some cases, our work and home lives become so reversed that employees organize their social lives around their work relationships. Id. at 646.
123. Rubinstein, supra note 20, at 608 (quoting WILLIAM BLACKSTONE, COMMENTARIES *422).
124. Rubinstein, supra note 19, at 171.
125. See supra note 22.
126. See supra note 23.
128. See supra note 24.
129. See supra note 25.
130. See supra note 26.
131. See supra note 27.
132. See supra note 28.
133. See supra note 22.
134. See supra note 23.
135. See supra note 24.
136. See supra note 25.
137. See supra note 26.
138. See Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 435 (5th Cir. 2013); 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, 73–74 (8th Cir. 1990).
performed.” 139 Direct compensation includes salary and wages. 140 Indirect benefits include, but are not limited to, disability pensions, survivor’s benefits, and group life insurance. 141 If direct compensation or substantial indirect benefits are shown, the court proceeds to the second step, which analyzes the employment relationship under the common law agency or economic realities test factors. 142

The leading cases for the threshold-remuneration test are *Graves v. Women’s Professional Rodeo Ass’n* 143 and *O’Connor v. Davis*. 144 In *Graves*, the plaintiff, a male rodeo barrel racer, brought a Title VII action against the Women’s Professional Rodeo Association (WPRA), alleging that it denied him membership on the basis of his gender. 145 The Eighth Circuit held that a membership list for the WPRA reasonably could not be construed as a list of employees primarily because the WPRA members were not compensated. 146 The court stated that there was an initial threshold question of whether an “employment relationship” existed “according to the ordinary meaning of the words.” 147

In *O’Connor*, the Second Circuit held that an unpaid intern was not an employee because she received no compensation. 148 The Second Circuit held that unlike independent contractors, unpaid interns had to first show that they were “hired” before the court could engage in a common law agency test. 149 Since the intern was not compensated, she had not been “hired.” 150 In both *Graves* and *O’Connor*, compensation was a prerequisite before any common law agency or economic realities factors could be considered. 151

As a result, much of the inquiry turns on what constitutes substantial compensation. 152 In *Haavistola v. Community Fire Company of Rising Sun, Inc.* 153 the Fourth Circuit explored this issue further. 154 A female

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139. *See Juiño*, 717 F.3d at 435; accord *O’Connor*, 126 F.3d at 115–16; *Graves*, 907 F.2d at 73.
140. *See Juiño*, 717 F.3d at 435; accord *O’Connor*, 126 F.3d at 115–16; *Graves*, 907 F.2d at 73.
141. *See Juiño*, 717 F.3d at 437; accord *O’Connor*, 126 F.3d at 115–16; *Graves*, 907 F.2d at 73.
142. *See Juiño*, 717 F.3d at 435; accord *O’Connor*, 126 F.3d at 115–16; *Graves*, 907 F.2d at 73.
143. 907 F.2d 71 (8th Cir. 1990).
144. 126 F.3d 112 (2d Cir. 1997).
146. *Id.* at 74. The court also found that there was no duty of service to the WPRA or to anyone else. However, this was far less important than the lack of compensation. *See id.* at 73.
147. *Id.* at 73.
149. *Id.* at 115–16.
150. *Id.*
151. *See id.; Graves*, 907 F.2d at 73–74.
152. *See Pietras v. Bd. of Fire Comm’rs of Farmingville Fire Dist.*, 180 F.3d 468, 473 (2d Cir. 1999) (“[W]e have stated that the question of whether someone is or is not an employee under Title VII usually turns on whether he or she has received ‘direct or indirect remuneration’ from the alleged employer.” (quoting *O’Connor*, 126 F.3d at 116)).
153. 6 F.3d 211 (4th Cir. 1993).
volunteer firefighter brought a gender discrimination claim against her fire company.\(^{155}\) Although the plaintiff had received no “direct” compensation, the Fourth Circuit found that the district court erred by not allowing the jury to determine whether the indirect benefits\(^ {156}\) that the plaintiff received were significant compensation or merely the “inconsequential incidents of an otherwise gratuitous relationship.”\(^ {157}\) Haavistola has been interpreted to mean that a person can be an employee without receiving a salary or paycheck.\(^ {158}\) However, scholars have noted that, after Haavistola, it is unclear what indirect benefits are sufficient to establish compensation.\(^ {159}\)

Proponents of the threshold-remuneration test argue that the common law agency and economic realities tests are inappropriate in the volunteer context because they were created to differentiate between employees and independent contractors,\(^ {160}\) not volunteers. They argue that both employees and independent contractors are “hired” parties and, “thus, a prerequisite to considering whether an individual is one or the other under common-law agency principles is that the individual have been hired in the first instance.”\(^ {161}\) Proponents of the threshold-remuneration test, therefore, argue that the common law agency and economic realities tests are inappropriate for the volunteer context because they “ignore[] the antecedent question of whether [the putative employee] was hired” by the putative employer.\(^ {162}\) Proceeding directly to the common law agency or economic realities tests assumes facts that have not yet been established.

Proponents also contend that the threshold-remuneration test is the most practical for distinguishing between volunteers and employees because it “takes into account the fact that in the least there must be a hiring, as well as the fact that the putative employer must control the work of the individual in question.”\(^ {163}\) It is a comprehensive test that realistically limits the universe of potential employees. Under a broader test, Title VII’s protections would extend to a seemingly limitless population, which would have significant implications for employment law.

\(^{154}\) See generally id.

\(^{155}\) Id. at 213–14.

\(^{156}\) The plaintiff received a disability pension, survivors’ benefits, scholarships for dependents upon disability or death, bestowal of state flag upon death in the line of duty, Federal Public Safety Officers’ Benefits, insurance coverage, reimbursement for job-related expenses, the option to secure a special commemorative registration plate for private vehicles without paying extra fees, and the ability to obtain certification as a paramedic. Id. at 221.

\(^{157}\) Id. at 222.

\(^{158}\) Ortner, supra note 63, at 2637.

\(^{159}\) Id. “For example, after Haavistola, a court may consider benefits that ‘create career opportunities’ as counting toward the compensation requirement.” Id. at 2638 (quoting Neff v. Civil Air Patrol, 916 F. Supp. 710, 713 (S.D. Ohio 1996)).

\(^{160}\) See Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 435 (5th Cir. 2013); see also Ortner, supra note 63, at 2628.

\(^{161}\) See Juino, 717 F.3d at 436 (quoting O’Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997)); see also Ortner, supra note 63, at 2628.

\(^{162}\) O’Connor, 126 F.3d at 115.

\(^{163}\) Rubinstein, supra note 19, at 179.
However, opponents of the threshold-remuneration test cite its narrowness and rigidity as reasons for its rejection. They say our nation’s reliance on volunteers necessitates a more expansive definition of employee,164 because volunteers are an essential part of our society, economy, and government.165 Some scholars believe that “there is a movement away from employees having long-term, established relationships with their employers in favor of a more short-term contingent relationship. . . . [R]elationships will be increasingly atypical and will not involve a direct employer-employee relationship.”166 They maintain the rigidity of the threshold-remuneration test will not allow Title VII to adapt to the changing nature of our workforce.

Opponents argue that the threshold-remuneration test is at odds with Congress’s broad remedial purpose.167 As seen in Robinson and Hishon, the Supreme Court has adopted expansive definitions of the employment relationship to effectuate the intent of Congress.168 Furthermore, Title VII was meant “to protect employees with little bargaining power,”169 such as volunteers.

Opponents also assert that the threshold-remuneration test does not comport with Nationwide Mutual Insurance Co. v. Darden,170 which held that the common law agency test is the default standard when Congress has been silent on the appropriate one.171 Courts that employ the threshold-remuneration test argue that the Court’s use of the term “hired party” in Darden necessitates an antecedent question of whether parties are in fact “hired” before proceeding to the common law agency test.172 In the case of volunteers, they hold that hiring is determined by compensation.173 However, courts, such as the Sixth Circuit, have rejected this argument.174 In Bryson v. Middlefield Volunteer Fire Department,175 the Sixth Circuit stated that “[t]he Supreme Court included the term ‘hired party’ in Darden only in a direct quote from its decision in [Community for Creative Non-Violence v. Reid],176 and the Reid Court’s use of ‘hired party’ was in the context of the ‘work for hire’ provision from the Copyright

164. See discussion supra Part I.B.1.
165. See discussion supra Part I.B.2.
166. Rubinstein, supra note 20, at 640–41.
169. Kean, supra note 64, at 166.
171. Id.
172. See, e.g., O’Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997); see also supra notes 161–62 and accompanying text.
173. See supra notes 146–60 and accompanying text.
174. See Bryson, 656 F.3d at 354 (finding that remuneration is only one dispositive factor and not an independent antecedent requirement).
175. 656 F.3d 348 (6th Cir. 2011).
Act.” Therefore, the Darden Court’s use of the term “hired party” was not a conscious decision to create an antecedent question of whether the parties were “hired” before proceeding to the common law agency test. 178 “The [Supreme] Court’s instruction to apply the common law of agency is not limited to when the individual receives significant remuneration but rather ‘when Congress has used the term “employee” without defining it.’” 179 Therefore, since employee has not been adequately defined by Congress, courts such as the Sixth Circuits have employed the common law agency test as stated in Darden.

Lastly, opponents assert that the threshold-remuneration test lacks clarity as to what constitutes adequate compensation. 180 Under the threshold-remuneration test, the existence of an employment relationship ultimately turns on whether there is adequate compensation. 181 The issue of compensation is straightforward when there is a paycheck or salary; however, things become much less clear when a plaintiff alleges an employment relationship based on the receipt of indirect benefits.

This ambiguity has led to inconsistencies. For example, in Pietras v. Board of Fire Commissioners, 182 the Second Circuit found that a volunteer firewoman could be an employee under Title VII because she received insurance retirement benefits. 183 However, in Juino, the Second Circuit found that that insurance and retirement benefits were not sufficient in a similar volunteer firefighter context. 184

Some courts have sought to clarify “indirect benefits” by requiring some sort of economic reward in connection with indirect benefits. 185 For example, the Tenth Circuit found that a medical student was not an employee of the school because his education alone did not satisfy the remuneration requirement. 186 Similarly, the Eighth Circuit held that a graduate researcher was not an employee because the research the plaintiff obtained for her dissertation was not compensation. 187 Regardless, however, scholars note that there is a lack of clarity as to what constitutes

177. Bryson, 656 F.3d at 354. Although the [Supreme] Court did not define “hired party” in Reid, it did define “hiring party”: “By ‘hiring party,’ we mean to refer to the party who claims ownership of the copyright by virtue of the work for hire doctrine.” We doubt that the [Supreme] Court would define “hiring party” as such while at the same time considering ‘hired party’ to carry much more substantive weight in requiring that it be an individual who received significant remuneration for his services. Id. (citations omitted).

178. See id.

179. Id. at 354 (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989)).

180. See discussion supra note 159.

181. See supra note 152; see also Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 221–22 (4th Cir. 1993).

182. 180 F.3d 468 (2d Cir. 1999).

183. See id. at 473.


185. Kean, supra note 64, at 178.

186. See McGuinness v. Univ. of N.M. Sch. Of Med., 170 F.3d 974, 979 (10th Cir. 1998).

187. See Jacob-Mua v. Veneman, 289 F.3d 517, 521 (8th Cir. 2002).
substantial compensation,\textsuperscript{188} creating unknowable variables in the law that disadvantage workers.\textsuperscript{189}

\section*{B. Common Law Agency Test}

The common law agency test assesses “the extent to which the one for whom the work is being done has the right to control the details and the means by which the work is to be performed.”\textsuperscript{190} Courts have employed this test under “the conventional master-servant relationship as understood by common-law agency doctrine.”\textsuperscript{191} “Control” is a relative factor “judged not by its actual exercise but rather by the employer’s authority to use it.”\textsuperscript{192} Traditionally, this approach has been used to determine whether a party is an employee or an independent contractor.\textsuperscript{193}

Under the common law agency test no single factor is determinative.\textsuperscript{194} Remuneration is not an independent antecedent requirement but one of many factors that should be considered with “all of the incidents of the relationship.”\textsuperscript{195} However, the right to control is given significant weight.\textsuperscript{196}

The two landmark Supreme Court cases are \textit{Reid} and \textit{Darden}. In \textit{Reid}, the Court articulated the common law agency test to determine whether a sculptor was an employee or an independent contractor.\textsuperscript{197} The Court considered “the hiring party’s right to control the manner and means by which the product is accomplished” and identified the following factors:

1. the skill required;
2. the source of the instrumentalities and tools;
3. the location of the work;
4. the duration of the relationship between the parties;
5. whether the hiring party has the right to assign additional projects to the hired party;
6. the extent of the hired party’s discretion over when and how long to work;
7. the method of payment;
8. the hired party’s role in hiring and paying assistants;
9. whether the work is part of the regular business of the hiring party;
10. whether the hiring party is in business;
11. the provision of employee benefits; and
12. the tax treatment of the hired party.\textsuperscript{198}

Courts have noted that these \textit{Reid} factors are not exclusive and other factors may be considered.\textsuperscript{199} Interestingly, in footnote eight, the Court

\begin{footnotes}
\item[188] See supra note 159 and accompanying text.
\item[189] The lack of clarity in the law leaves volunteers open to potential abuse. See Rubinstein, supra note 20, at 615–16.
\item[190] Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 434 (5th Cir. 2013) (quoting Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985)).
\item[192] Ortner, supra note 63, at 2628.
\item[193] See Juino, 717 F.3d at 435.
\item[195] Darden, 503 U.S. at 324; see also Bryson v. Middlefield Volunteer Fire Dep’t, Inc., 656 F.3d 348, 354 (6th Cir. 2011).
\item[196] See Reid, 490 U.S. at 752.
\item[197] Id. at 752–53.
\item[198] Id. at 751–52.
\item[199] See Fichman v. Media Ctr., 512 F.3d 1157, 1160 (9th Cir. 2008) (“The [Supreme] Court noted that these factors were not exhaustive, and that whether an individual is an
\end{footnotes}
expressly rejected the suggestion that the term employee refers only to formal, salaried employees. 200

In Darden, the Court reaffirmed the Reid factors 201 and held that the common law agency test should be used where the statute does not clearly define a term. 202 The Court stated: “When Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” 203 The Court continued: “In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished.” 204

Proponents of the common law agency test generally cite Darden as justification, arguing that it set the common law agency test as the default standard when Congress has not specified an appropriate standard. 205 For example, in Bryson, the Sixth Circuit held that “the Court’s instruction to apply the common law of agency is not limited to when the individual receives significant remuneration but rather ‘when Congress has used the term “employee” without defining it.’” 206

In Darden, the Court recognized that courts had struggled with finding the appropriate definition of employee and tried to provide some clarity. 207 In fact, the Darden Court rejected its prior holdings in NLRB v. Hearst Publications and United States v. Silk, 208 in which the Court had applied a version of the economic realities test. 209 In Walters v. Metropolitan Educational Enterprises, Inc, 210 the Court again suggested that the common law agency test would be the appropriate test to apply to determine whether an individual is an employee under Title VII. 211

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200. Reid, 490 U.S. at 742 n.8.
202. Id. at 323.
203. Id. at 322–23.
204. See id. at 323–24 (quoting Reid, 490 U.S. at 751–52).
205. See, e.g., Bryson v. Middlefield Volunteer Fire Dep’t, Inc., 656 F.3d 348, 354 (6th Cir. 2011) (quoting Reid, 490 U.S. at 739–40); see also Kean, supra note 64, at 185 (“Recent Supreme Court decisions make it clear that the Supreme Court believes that the common-law agency test is the appropriate test to apply in situations like Title VII where the statute does not provide [adequate] guidance . . . .”).
206. Bryson, 656 F.3d at 354 (quoting Reid, 490 U.S. at 739–40). The Bryson court dismissed any meaning in the Supreme Court’s use of the term “hired party,” stating that it resulted from the Court lifting a direct quote from Reid, which discussed the “work for hire” provision from the Copyright Act. Id.
207. See Darden, 503 U.S. at 322–23 (“[W]hen Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”).
208. 331 U.S. 704 (1947).
209. Darden, 503 U.S. at 325.
211. See id. at 211.
Opponents argue that the common law agency test is too “mechanistic” in its analysis and focuses only on the extent of the authority to control.\textsuperscript{212} They contend that this test is limiting because it does not fully consider the extent of the individual’s dependence on the putative employer.\textsuperscript{213} Opponents also assert that the common law agency test is inappropriate for the volunteer context given that the common law agency test has been traditionally used when determining whether an individual is an employee or an independent contractor.\textsuperscript{214}

C. Economic Realities Test

The economic realities test was first articulated by the Supreme Court in Bartels v. Birmingham,\textsuperscript{215} a case in which the Court had to determine whether an individual was an independent contractor for purposes of payment of social security taxes.\textsuperscript{216} The Court stated that “[o]bviously 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.”\textsuperscript{217}

The Sixth Circuit first introduced the economic realities test into the Title VII context to determine employee status in Armbruster v. Quinn.\textsuperscript{218} The court held that the manufacturer’s representatives—who did not work in the defendant’s corporate office, did not exclusively sell the defendant’s product lines, and received no salary other than commissions—could be construed as employees under Title VII.\textsuperscript{219} Rejecting that the term employee was meant “in a technical sense,” the court held that the correct test to determine employment status was one that examined the “economic realities underlying the relationship between the individual and 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.”\textsuperscript{220}

In contrast with the common law agency test, the economic realities test examines the extent to which the putative employee is dependent, as a matter of economic reality, on the services that he or she is rendering to the putative employer.\textsuperscript{221} The Ninth Circuit identified the following factors to be considered:

(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

\textsuperscript{212} Ortner, \textit{supra} note 63, at 2628.
\textsuperscript{213} Id.
\textsuperscript{214} See Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 435 (5th Cir. 2013); see also Ortner, \textit{supra} note 63, at 2628.
\textsuperscript{215} 332 U.S. 126 (1947).
\textsuperscript{216} See id. at 126.
\textsuperscript{217} See id. at 130.
\textsuperscript{218} 711 F.2d 1332 (6th Cir. 1983).
\textsuperscript{219} See id. at 1339.
\textsuperscript{220} Id. at 1340.
\textsuperscript{221} See Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 434 (5th Cir. 2013).
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.222

It is important to note that the economic realities test is not limited to 
cash benefits only.223 For example, in Tony & Susan Alamo Foundation v. 
Secretary of Labor,224 the Court used the economic realities test to 
determine that volunteers who were not given cash salaries but did receive 
food, clothing, shelter, and other benefits were employees for the purpose 
of the Fair Labor Standards Act.225 The Court found that the volunteers 
were employees in part because they expected to receive in-kind benefits in 
exchange for their services.226

The economic realities factors are very similar to the common law 
agency factors, as both tests ultimately measure the extent of the control, be 
it economic or some other form of control, the employer has over the 
employee. The very first factor to be considered is the right to control, 
which is the cornerstone of the common law agency test.227 As a result, 
opponents argue that the economic realities test is just a rearticulation of the 
common law agency test.228

However, proponents contend that the economic realities test is a more 
expansive version of the common law agency test and, therefore, provides a 
unique approach.229 Rubinstein states that the “economic reality test 
developed because of the narrow focus of the common law test on the 
standard of control.”230 Other scholars have also cited the economic 
realities test as an attempt by the court to broaden the analysis.231

For example, in Armbruster, the Sixth Circuit adopted the economic 
realities test because it rejected a technical interpretation of “employee”232 
and allowed the court to more fully consider the underlying employment 
relationship to determine “whether that individual is likely to be susceptible 
to the discriminatory [employment] practices.”233 The economic realities 
test was intended to be a more flexible definition that eschewed 
technicalities and focused on the vulnerability of the individual, as

222. Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9th Cir. 1979).
(finding that “the fact that the compensation was received primarily in the form of benefits 
rather than cash is in this context immaterial . . . [these] benefits are . . . wages in another 
form”).
225. See id. at 301–02.
226. Id.
227. See Rubinstein, supra note 20, at 626.
228. See supra note 21; see also Rubinstein, supra note 20, at 626.
229. Ortner, supra note 63, at 2628; accord Rubinstein, supra note 20, at 626.
230. Rubinstein, supra note 19, at 164.
231. See Ortner, supra note 63, at 2628.
232. See Armbruster v. Quinn, 711 F.2d 1332, 1341 (6th Cir. 1983).
233. Id. at 1340.
One scholar has noted that the “‘economic realities’ analysis offers the advantages of ‘avoid[ing] the rigidity of the common law test and . . . accommodat[ing] the present range of employment relationships and the new patterns that may evolve in the future.’”

Opponents argue that the economic realities test “fails to provide a clear, workable standard for defining employee status.” The “vague requirement that employees be vulnerable to the kind of employment practices that Title VII was intended to prevent” extends Title VII’s breadth enormously.

Lastly, some opponents reject the economic realities test in light of the statement in *Darden*, which indicated that the common law agency test is the default standard when Congress has not specified an appropriate standard. However, proponents of the economic realities test, such as the Ninth Circuit, rebut this argument because the *Darden* Court noted that the *Reid* factors were not exhaustive and that employment relationship depends on “all of the incidents of the [employment] relationship with no one factor being decisive.”

**D. Hybrid Test**

In an attempt to find a middle ground, the hybrid test combines both the common law and economic reality tests. By incorporating the economic realities factors, the hybrid test was meant to offer a more expansive alternative to the common law agency test. However, courts still heavily rely on the common law “right to control” analysis, and the right to control an employee’s conduct is the most significant part of the test.

The hybrid test was first adopted by the District of Columbia Circuit in *Spirides v. Reinhardt*. Under this test, “it is the economic realities of the relationship viewed in light of the common law principles of agency and the right of the employer to control the employee that are determinative.” When determining the extent of control, the hybrid test examines “whether the alleged employer has the right to hire and fire the employee, the right to supervise the employee, and the right to set the employee’s work

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234. *Id.* at 1340–41; see also *Ortner*, supra note 63, at 2629.
236. *Id.*
237. *Id.*
239. See *Fichman v. Media Ctr.*, 512 F.3d 1157, 1160 (9th Cir. 2008); accord *Rubinstein*, supra note 19, at 618.
240. See *Rubinstein*, supra note 20, at 626.
241. *Id.*
244. 613 F.2d 826 (D.C. Cir. 1979).
245. *Cobb v. Sun Papers*, Inc. 673 F.2d 337, 341 (11th Cir. 1982).
schedule.” The economic realities component of the test has focused on “whether the alleged employer paid the employee’s salary, withheld taxes, provided benefits, and set the terms and conditions of employment.” Additional factors such as the “intention of the parties” are also considered.

The economic realities portion of the hybrid test is not limited to cash benefits only. In *Tony & Susan Alamo Foundation v. Secretary of Labor*, the Court found that the volunteers were employees in part because they expected to receive in-kind benefits in exchange for their services.

Scholars have noted that the hybrid test is popular and many courts have chosen to apply it. Proponents state that it offers the best of both worlds. It incorporates the advantages of the economic realities test, which is more flexible and expansive, while still maintaining the right to control analysis.

However, opponents argue that the hybrid test is inappropriate in light of *Darden*, which indicated that the common law agency test is the default standard when Congress has not specified an appropriate standard. However, proponents reject this argument on the grounds that the *Darden* Court never stated that the *Reid* factors were not exhaustive. In fact, the *Darden* Court stated that the employment relationship depends on “all of the incidents of the employment relationship with no one factor being decisive.” The hybrid test maintains the *Darden* right to control analysis and merely expands upon it by allowing courts to consider the economic realities of the employment relationship in light of the common law principles.

Lastly, opponents criticize the hybrid test as another rearticulation of the common law agency test. For example, the Second Circuit has stated that there is “little discernable difference between the hybrid test and the

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247. *Deal*, 5 F.3d at 119; see also *Darden*, 503 U.S. at 319.
248. See *Spirides*, 613 F.2d at 832.
250. Id.
251. See *Ortner*, supra note 63, at 2630; see also *Rubinstein*, supra note 19, at 168.
253. See discussion supra notes 229–35.
254. See *Rubinstein*, supra note 20, at 626.
256. See *Fichman v. Media Ctr.*, 512 F.3d 1157, 1160 (9th Cir. 2008); accord *Rubinstein*, supra note 20, at 618.
257. See *Fichman*, 512 F.3d at 1160 (quoting *Darden*, 503 U.S. at 324); accord *Rubinstein*, supra note 20, at 618.
258. See *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 341 (11th Cir. 1982).
common law agency test.” 260 The court continued: “Both place their
greatest emphasis on the hiring party’s right to control the manner and
means by which the work is accomplished and consider a nonexhaustive list
of factors as part of a flexible analysis of the ‘totality of the
circumstances.'” 261 The Eighth, Ninth, and Tenth Circuits have made
similar observations. 262

III. THE PUBLIC HEALTH EFFECTS OF WORKPLACE DISCRIMINATION

Given that courts have used the common law agency, economic realities,
and hybrid tests interchangeably and scholars contend that the latter two
tests are derivations of the common law agency test, 263 the main question is
whether courts should adopt the threshold-remuneration test or some form
of the common law agency test.

It is well established that Title VII has a broad purpose. 264 It not only
remediates prior harm but also protects the public welfare by deterring
future discriminatory conduct. 265 Therefore, when defining the scope of
Title VII, courts must consider how it will affect Title VII’s ability to
protect the public welfare. In doing so, courts must explore the full extent
of the injury caused by discrimination, beyond just the targeted individual.
How does discrimination affect non-targeted coworkers who are forced to
work in toxic environments? How does it affect families, the health of the
business, and society at large?

This part examines the public health implications of workplace
discrimination. Part III.A discusses the health effects of discrimination on
the entire workplace, including non-targeted coworkers who are injured by
witnessing or merely perceiving discrimination. Part III.B reviews the
effects of workplace discrimination on familial health. Part III.C considers
the effects of workplace discrimination on civic society. Lastly, Part III.D
explores the effects of workplace discrimination on employer health.

A. Coworker Health: The Effects of Discrimination
on the Entire Workforce

It is well established that targeted victims of discrimination often suffer
trauma that manifests in physical and psychological harm. 266 However, the

260. Frankel, 987 F.2d at 90.
261. Id.
262. See Lambertsten, 79 F.3d at 1028; Folkerson, 1995 WL 608432, at *3; Wilde, 15
F.3d at 106.
264. See discussion supra Part I.A.3.
927, 930 (2006) (“The whole thrust of equal employment legislation was that, by facilitating
employee suits, discrimination would be brought to public attention and the litigation
process would serve to deter other employers from similar conduct.”).
266. Cassandra A. Okechukwu and colleagues provide an interesting analysis of the
physical and psychological harms included by targeted individuals. Cassandra A.
Okechukwu et al., Discrimination, Harassment, Abuse, and Bullying in the Workplace:
health consequences of discrimination extend across the workplace beyond the targeted individual.267

This section examines the health effects of discrimination on bystanders. It then explores the effects of mere perceptions of discrimination in the workplace. Lastly, it examines the degree to which group-based identities increase vulnerabilities.

1. Health Effects on Bystanders

Studies have shown that bystanders—those individuals who are not directly targeted by discrimination but share a workplace with the targeted individual and witness the discrimination—may suffer harm to an equal or greater degree than those who have been victims.268 Bystanders often express a loss of belief in justice and a caring community,269 as well as anxiety, overall poor health, and pain.270

Professor Richard Sorenson and his colleagues examined the extent to which sexual harassment affects bystanders.271 The study exposed a female participant population to a series of vignettes, which consisted of four sexually harassing incidents: (1) a non-harassing greeting, (2) unwanted repeated requests for a date, (3) unwanted repeated requests for an affair, and (4) unwanted sexualized touch.272 Each participant was randomly assigned to either a direct victim perspective or bystander perspective.273

The study found that sexual harassment is an “emotionally devastating event” for bystanders, as well as direct victims.274 Both groups reported significant negative effects, including depression, loss of motivation, and adoption of work-related coping strategies.275 Interestingly, there was no statistically significant difference in negative effects between direct victims and bystanders.276 The study concluded that the effects of discrimination are felt across the workforce, resulting in a loss of productivity, decreased worker satisfaction, and increased turnover.277

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267. See id. at 578–79.
268. Id.
270. Okechukwu et al., supra note 266, at 578.
272. Id. at 480–81.
273. Id. at 481.
274. Id. at 491.
275. Id. at 486–87. Coping strategies represent behaviors that workers adopt to mediate the impact of discrimination. Id. at 478–79. Sorenson identified four main coping strategies: direct action, inhibition of actions, intrapsychic modes, and information search. Id.
276. Id. at 486.
277. Id. at 491.
Other studies have also shown that “non-targeted witnesses of workplace injustice may also be at risk for adverse health outcomes.”\textsuperscript{278} Witnesses of workplace bullying have reported increased anxiety\textsuperscript{279} and acute pain.\textsuperscript{280} Witnessing sexual harassment resulted in lower job satisfaction and psychological health in a study of female workers.\textsuperscript{281} Another study correlated witnessing mistreatment with poor psychological health.\textsuperscript{282} Therefore, coworkers who witness discrimination are at risk of significant physical and emotional harm.

2. Health Effects Caused by Mere Perceptions of Discrimination

A coworker does not need to witness discrimination to suffer harm. Studies have shown that mere perceptions of discrimination negatively impact the health of employees.\textsuperscript{283} Perceptions of discrimination are influenced by job attitudes, including work satisfaction, prior experiences of discrimination, and overall work contexts.\textsuperscript{284} One study warned that perceptions create significant physical and emotional costs that should not be trivialized.\textsuperscript{285} Another study estimated that, each year, two million individuals leave their jobs due to perceptions of an unfair working environment caused by daily events such as “small comments, whispered jokes, and not-so-funny emails.”\textsuperscript{286} Perceptions of “unfairness, in the form of every-day inappropriate behaviors . . . is a very real, prevalent and damaging part of the work environment.”\textsuperscript{287}

As a result, the discussion is no longer limited to the effects of overt, targeted discrimination on a particular individual; subtle perceptions can lead to negative consequences.\textsuperscript{288} Discrimination is a problem of subtle bias creeping into the everyday.\textsuperscript{289} No worker is totally immune to

\begin{footnotesize}
\begin{enumerate}
\item[278.] See Okechukwu et al., supra note 266, at 578.
\item[279.] Id. at 578–79.
\item[280.] Id. at 578 (“Workers who witnessed repeated bullying in their workplace were almost twice more likely to report acute pain than those who did not . . . .”).
\item[281.] Id. at 579 (“Among a sample of female employees in a public utility and food processing plant, Glomb [and colleagues] found that observing sexual harassment was linked to lower psychological well-being, similar to individuals who experienced the harassment directly.”).
\item[282.] Id.
\item[284.] Id. at 22.
\item[285.] Id. at 28. Perceptions of discrimination are one of “the more significant life events affecting health and well-being.” Id.
\item[287.] Id. at 3.
\item[288.] Id.
\item[289.] See Tristin K. Green, Targeting Workplace Context: Title VII As a Tool for Institutional Reform, 72 FORDHAM L. REV. 659, 659 (2003).
\end{enumerate}
\end{footnotesize}
discrimination because many aspects of discrimination are rooted in daily interactions, take many forms, and have many sources.290

3. Group-Based Identities

Potential for harm may increase if the non-targeted coworker shares a group-based identity with the targeted individual. Professor Catherine Fisk has noted that “[t]he development of any group-based identity is rooted in both positive and negative identifications with one’s group.”291 An attack on an individual member of the group may be internalized as a threat to the entire group. Psychological studies have shown a particular vulnerability of women and minorities due to group-based identities.292 For example, if a male manager harasses a female employee with sexually harassing remarks and then fires her based on her gender, other women in the workplace may feel threatened by this male manager. They may feel that, as women, they are potential targets of discrimination and so internalize the fear and harm, even if they are not the direct targets.

This is particularly harmful because there is an “extraordinary destructiveness of being shamed for one’s very identity.”293 Therefore, discriminatory conduct threatens the health of individuals who share group-based identities with the targeted individual.

B. Familial Health: The Effects of Workplace Discrimination on Families

The extent of the injury caused by discrimination is not limited to the workplace.294 “[W]ork experiences linger with [employees] long after they leave the workplace and color their interactions with their families.”295 As a result, families suffer harm in the wake of workplace discrimination.296

Families function like a system, an interconnected unit.297 Each family has a careful balance of assigned roles and duties within this unit.298 For example, Partner A grocery shops every Sunday for the upcoming week. Partner B is responsible for cooking dinner each night. Child A sets the table each night, and Child B takes out the trash every evening. While this example may be a bit idealistic and oversimplistic, it illustrates the interconnectedness of families. When one family member is burdened, the balance is disturbed and another family member must pick up the slack.299

290. Pavalko et al., supra note 283, at 18.
292. Id. at 79.
293. Id. at 80.
294. Kramer, supra note 122, at 630.
295. Id.
296. See id.
297. See Okechukwu et al., supra note 266, at 579–80.
298. Kramer, supra note 122, at 640.
299. Id. at 638–40.
Negative health effects of workplace discrimination are shared through familial interactions and communication. One method has been characterized as the “kick the dog” phenomenon, in which an abused employee, knowingly or unknowingly, undermines the family when he or she is at home. In one study, a mother stated:

[T]he anger sometimes builds up, and you’re not even aware that it’s there—so the moment your spouse, or your child, if there is anything that may seem like it was belittling or demeaning, you’re responding to them with a level of anger, even, that is really inappropriate for the situation.

Another respondent stated that “the pressure at work drains them mentally to the point that when they go home they are unable to deal with their children or partners in an effective and loving way.”

The stress and depression can also cross over onto other family members. One study of Mexican-American families found that male employees’ reports of workplace racism directly correlated with depressive symptoms for both them and their wives. The effects of discrimination can manifest into feelings of alienation, disconnectedness, and overburdening among family members.

Professor Zachary Kramer refers to this as “exporting.” Employees “export” the effects of discrimination to their families by taking both the substance of their work and their social interactions with coworkers out of the workplace and into their private lives (and vice versa). Kramer categorizes the harm experienced by families in two ways: disruption harm and exclusion harm. Disruption harm occurs when employees bring the effects of workplace discrimination home with them and, consequently, are unable to participate productively in family life. For example, children are harmed when a distraught employee is too stressed to play or help with school work. The employee might seek support and consolation from the partner, overburdening and creating tension in the relationship. The child may try to cope by taking on additional responsibilities at home.

Children are particularly vulnerable because they have a more difficult time

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300. Id.
301. See Okechukwu et al., supra note 266, at 580.
303. Id.
304. Okechukwu et al., supra note 266, at 580.
305. Parents have reported that workplace discrimination negatively affected their family relations. See Brunsma, supra note 302, at 1240–42. It can directly affect family members due to lack of resources from deserved promotions or physical absence, or indirectly due to the employee’s stress and poor health. See Okechukwu et al., supra note 266, at 579–80.
306. See Kramer, supra note 122, at 628.
307. Id.
308. Id. at 640–42.
309. Id.
310. Id.
311. Id. at 640.
312. Id. at 641–42.
understanding discrimination and rationalizing the reason for the employees’ behavior.313
Exclusion harm occurs when employees try to shield their families from workplace discrimination by keeping their work and private lives separate.314 When employees exclude partners from their work lives, they are alienating their partners from an important part of their lives.315 Children may experience harm in the form of mixed messages about the value and role of work. “[A]n important part of parenting involves teaching children about work, which includes instilling in them a strong work ethic and an appreciation of the value of work.”316 Therefore, the effects of workplace discrimination impact the home. Discrimination threatens the health of the employee, as well as their partners and children.

C. Civic Health: The Effects of Workplace Discrimination on Civil Society

If public engagement and societal integration are essential components of modern society, then courts have an interest in ensuring that workplaces are cooperative environments that promote, rather than discourage, engagement and integration.317 This section explores arguments that workplace discrimination imposes citizenship harm and depletes social capital. It discusses the role of Title VII in setting the public discourse on workplace discrimination.

1. Citizenship Harm: The Workplace As a Forum for Public Discourse

Public discourse is essential for legitimate self-governance.318 Public discourse serves as a medium of social integration through which diverse members of a democratic society can form a cohesive citizenry.319 Everyday citizens participate in public discourse through civic engagement.320 However, civic engagement is declining as more Americans “bowl alone.”321

313. Id. at 647.
314. Id. at 628. As a result, families are deprived of the social, emotional, and political benefits associated with work. Id.
315. Id. at 645–47. Work plays an important role in shaping an employee’s identity, and the workplace has gradually become a principal site for employees’ social lives. Id. According to the author, in some cases, our work and home lives become so reversed that employees organize their social lives around their work relationships. Id. at 646.
316. Id. at 648.
319. Id.
320. Id.
321. See id. at 303.
Some scholars blame this decline on the increasing demands of the workplace. However, as traditional forms of public life have waned, the workplace has actually emerged as an essential forum for public discourse. The workplace is “where we learn about each other, work together, and exchange social and political views.” Work enables Americans to satisfy the basic preconditions of civic participation that was once fulfilled through traditional public forums.

Given the importance of the workplace in democratic life, employers who exclude individuals from the workplace or discriminate therein “inflict citizenship harm on those individuals by diminishing their ability to participate in one of the most important forums affecting public life.” Such “citizenship harm” places a greater burden on the law to intervene and protect those individuals.

2. Depletion of Social Capital: The Workplace As a Tool for Civic Integration and Social Equality

Scholars contend that the workplace is also a progressive tool for civic integration and societal equality. Modern society depends upon our “social capital”—“networks, norms, and trust . . . that enable participants to act together more effectively to pursue shared objectives.” The workplace is a potentially transformative source of such capital.

Work plays an integral role not only in how we understand ourselves but also in how we perceive our society and interact with others. “Given the patterns of residential and educational segregation in this nation, for many Americans work provides the only opportunity to learn from and about people different from themselves.”

Professor Cynthia Estlund examined the tremendous influence that work can have on civic society. She noted that “[t]he workplace is the single most important site of cooperative interaction and sociability among adult citizens outside the family.” She found that “workplace interactions among coworkers—former strangers from different families, neighborhoods, backgrounds—can help to foster an ephemeral but essential

322. Putnam argues that Americans are “devoting less time to voluntary organizations” that are traditional forms of public life that were essential to effective and legitimate democratic self-governance. Id.
324. Id.
325. Id.
326. Id. at 348–49.
327. Id. at 349.
328. See generally Estlund, supra note 317.
329. PUTNAM, supra note 318, at 48–64; see Estlund, supra note 317, at 1.
331. Jauregui, supra note 323, at 361.
333. Id.
sense of connectedness among citizens, of ‘being in this together,’ in a complex and heterogeneous democratic society.”

Coming together and sharing a physical space in a cooperative work environment can transform attitudes on divisive issues such as race and sex. When employees leave work, they share their new attitudes with their family and communities. The workplace is, therefore, an important tool for exporting progressive values and building new relationships among communities.

Estlund focuses on the positive power of the workplace. However, the necessary precondition to Estlund’s thesis is a cooperative work environment. Workplaces can easily become environments of hierarchy, coercion, and harassment. “When the workplace also functions as a cultural or social force . . . the implications of workplace hierarchy and exclusion can take on greater meaning.” Victims and bystanders of such discrimination feel “a loss of belief in justice and a caring community.” Workplaces can breed civil discord just as easily as they can foster civil harmony.

3. Invisible Harm: Setting Public Discourse on Workplace Discrimination

Basic civil rights violations are a matter of public concern. Title VII is not only an important remedial tool for victims of abuse, it is also a way of keeping a public record of workplace discrimination, which informs the public discourse.

Over the past twenty-five years, there has been a public perception that discrimination in the workplace is largely a thing of the past. In fact, studies have shown a latent judicial bias against plaintiffs in employment claims. Despite the increase in employment litigation, plaintiffs are unlikely to succeed when compared with other federal claims.

Title VII protections are necessary not only to inform the public but also to deter future discriminatory conduct. Employment legislation was meant to facilitate discrimination claims so that discrimination would be brought to light in a public forum and remedial mechanisms would deter employers from similar conduct.

334. Id. at 4.
335. Kramer, supra note 122, at 633.
336. Id.
337. See generally Estlund, supra note 317.
338. See generally id.
339. Id. at 5.
341. See Sherer, supra note 269, at 2135.
343. See id. at 571–75.
344. Id. at 572.
345. Kotkin, supra note 265, at 931–32.
346. Id.; see also Kotkin, supra note 342, at 573.
347. Kotkin, supra note 265, at 930; see also Kotkin, supra note 342, at 575.
As a result, Professor Minna Kotkin argues that secrecy skews the public discourse on workplace discrimination against workers.\footnote{Kotkin, supra note 265, at 931; see also Kotkin, supra note 342, at 573. Kotkin, supra note 265, at 930; see also Kotkin, supra note 342, at 575.} And, when workplace discrimination is not “brought to light in a public forum,” an important form of deterrence is lost.\footnote{Kotkin, supra note 265, at 930; see also Kotkin, supra note 342, at 575.}

\textbf{D. Employer Health: The Effects of Workplace Discrimination on the Employer}

Discrimination also jeopardizes the health of the business or organization. Studies have shown that discrimination continues to be a widespread problem with significant consequences not only for the victim but also for the organization.\footnote{Sorenson et al., supra note 271, at 458.} Discrimination fosters toxic work environments, which lead to a loss of productivity, decreased worker satisfaction, increased turnover, and legal penalties.\footnote{Id. at 491; see also Margaret H. Vickers, Towards Employee Wellness: Rethinking Bullying Paradoxes and Masks, 18 EMP. RESPS. & RTS. J. 267, 267 (2006) (“There can be no health or wellness in organizations without careful attention to the well-being of individual employees.”).} Workplace discrimination undercuts productivity, morale, and loyalty.\footnote{Vickers, supra note 351, at 269.} Discrimination can also increase health-based costs (e.g., employee health insurance and worker’s compensation), as employees seek remedies for the physical and emotional effects of discrimination.\footnote{Crosby Burns, The Costly Business of Discrimination, CENTER FOR AM. PROGRESS 2–3 (2012), http://www.americanprogress.org/issues/lgbt/report/2012/03/22/11234/the-costly-business-of-discrimination/.} Discrimination harms retention, which is important to a company’s financial strength and competitive edge.\footnote{See id.} One study found that two million individuals leave their jobs due to cumulative daily interactions that create a discriminatory or unfair workplace.\footnote{Id. at 491; see also Margaret H. Vickers, Towards Employee Wellness: Rethinking Bullying Paradoxes and Masks, 18 EMP. RESPS. & RTS. J. 267, 267 (2006) (“There can be no health or wellness in organizations without careful attention to the well-being of individual employees.”).} Witnesses to bullying are negatively affected and 20 percent of them decide to leave the organization as a result of their experience.\footnote{Vickers, supra note 351, at 269.} Turnover is expensive,\footnote{See Burns, supra note 353, at 2–3.} and employers risk losing their best and brightest.

Discrimination also results in significant reputational costs.\footnote{LEVEL PLAYING FIELD INST., supra note 286, at 6–8.} Employees who leave jobs due to unfairness later discourage potential customers and job applicants from working with their former employers.\footnote{Id.} In a modern digital world, a disgruntled employee’s negative experiences can be communicated to millions of customers and employees within seconds. A single voice can have a major impact, especially when it involves critical issues such as race and sex.

\begin{thebibliography}{99}
\bibitem{Kotkin note 265} Kotkin, supra note 265, at 931; see also Kotkin, supra note 342, at 573.
\bibitem{Kotkin note 265} Kotkin, supra note 265, at 930; see also Kotkin, supra note 342, at 575.
\bibitem{Sorenson et al. note 271} Sorenson et al., supra note 271, at 458.
\bibitem{Id. note 491} Id. at 491; see also Margaret H. Vickers, Towards Employee Wellness: Rethinking Bullying Paradoxes and Masks, 18 EMP. RESPS. & RTS. J. 267, 267 (2006) (“There can be no health or wellness in organizations without careful attention to the well-being of individual employees.”).
\bibitem{Vickers note 351} Vickers, supra note 351, at 269.
\bibitem{Id. note 491} See id.
\bibitem{LEVEL PLAYING FIELD INST. note 286} LEVEL PLAYING FIELD INST., supra note 286, at 4.
\bibitem{Vickers note 351} Vickers, supra note 351, at 269.
\bibitem{See Burns note 353} See Burns, supra note 353, at 2–3.
\bibitem{LEVEL PLAYING FIELD INST. note 286} LEVEL PLAYING FIELD INST., supra note 286, at 6–8.
\bibitem{Id.} Id.
\end{thebibliography}
In short, workplace discrimination is costly.\textsuperscript{360} One study found that the annual cost of employees who leave due to perceived “unfairness” exceeds the cumulative settlements for all sex- and race-based lawsuits reported by the EEOC from 1997 to 2006.\textsuperscript{361} In 2006, this perceived unfairness cost U.S. employers $64 billion on an annual basis.\textsuperscript{362} “There can be no health or wellness in organizations without careful attention to the well-being of individual employees.”\textsuperscript{363} Discrimination puts the health of the business and the job of each employee at risk. Discrimination against volunteers not only undermines the bottom line, but it threatens the stability of organizations and the many families who depend on them.

IV. REJECTION OF THE THRESHOLD-RENUMERATION TEST:
PUBLIC HEALTH NECESSITATES A BROAD DEFINITION OF EMPLOYEE
UNDER TITLE VII

The question remains as to whether courts should adopt the threshold-remuneration test or proceed directly to some form of the common law agency or economic realities test. The common law agency test and its derivations use compensation as one of several factors considered in conjunction with “all of the incidents of the [putative employment] relationship.”\textsuperscript{364} In comparison, the threshold-remuneration test employs compensation as a singularly dispositive factor to determine whether an employment relationship exists.\textsuperscript{365} Under this narrow test, volunteers are often disqualified from Title VII protections due to a lack of substantial compensation.\textsuperscript{366}

As a result, courts must consider the implications of adopting a narrow test that often excludes volunteers from Title VII protections. Thus far, the literature has been overly focused on the individual nature of workplace discrimination.\textsuperscript{367} It has viewed each incidence of discrimination only with respect to the impact on the particular individual. However, the harm caused by discrimination extends beyond the targeted individual—in this case, the volunteer.\textsuperscript{368}

Title VII has a broad purpose.\textsuperscript{369} It not only remediates prior harm but also protects the public welfare.\textsuperscript{370} Therefore, when defining the scope of

\begin{itemize}
  \item \textsuperscript{360} Workplace discrimination imposes significant financial harm on business, creating inefficiencies and costs that reduce profits and undermine the bottom line. \textit{Id.} at 4–5.
  \item \textsuperscript{361} \textit{Id.} at 4.
  \item \textsuperscript{362} \textit{Id.}
  \item \textsuperscript{363} Vickers, supra note 351, at 267.
  \item \textsuperscript{364} Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 324 (1992); Bryson v. Middlefield Volunteer Fire Dep’t, Inc., 656 F.3d 348, 354 (6th Cir. 2011).
  \item \textsuperscript{365} See supra note 152; see also O’Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997).
  \item \textsuperscript{366} See, e.g., Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 435 (5th Cir. 2013); see also supra notes 22, 24, 26.
  \item \textsuperscript{367} See Fisk, supra note 291, at 79 (finding that non-targeted coworkers suffer collateral harms, which often go unrecognized by current law).
  \item \textsuperscript{368} See discussion infra Part IV.A.
  \item \textsuperscript{369} See discussion supra Part I.A.3.
  \item \textsuperscript{370} See supra note 265.
\end{itemize}
Title VII, courts must consider how it will affect Title VII’s ability to protect the public welfare.

Part IV.A argues that workplace discrimination against volunteers poses a significant public health issue by creating chronic health issues for the entire workforce, families, civil society, and employers. As a result, Part IV.B asserts that courts should reject the threshold-remuneration test and adopt a broad definition of employee that includes volunteers in the interest of public health. Lastly, Part IV.C provides supplemental support for the rejection of the threshold-remuneration test by referencing arguments unrelated to public health.

A. Reconceptualizing the Issue: Workplace Discrimination Against Volunteers As a Public Health Issue

Courts must reconceptualize discrimination as a broader public health issue and adopt a pluralistic understanding of the harm caused by discrimination. Excessive focus on harm incurred by the single target of discrimination glosses over the familial, organizational, and societal impact of workplace discrimination.

Discriminatory conduct bleeds into daily interactions and creates an “arena of emotional brutality” that is characterized by “injuries of depleted self-esteem, lower morale and apathy.” Workplace discrimination is especially toxic because work is where the majority of the adult population spends its waking hours. And, it is where “much of one’s ‘significance’ is fostered.”

First, the section asserts that discrimination against volunteers negatively affects the health of the entire workplace, including non-targeted coworkers who are injured by witnessing or merely perceiving discrimination. Second, this section argues that discrimination against volunteers jeopardizes familial health. Third, this section contends that discrimination against volunteers harms civil society. Lastly, this section asserts that discrimination against volunteers threatens the health of businesses and organizations that permit such conduct.

371. See discussion supra Part III.B.
372. See discussion supra Part III.A, D.
373. See discussion supra Part III.C.
376. Fisk, supra note 291, at 80.
1. Coworker Health: Discrimination Against Volunteers

Harms the Entire Workforce

The harmful effects of workplace discrimination against volunteers are not just borne by volunteers. Discrimination against volunteers threatens the entire workplace.

First, coworkers who witness discrimination against volunteers suffer bystander harm. Studies have shown that bystanders suffer harm to an equal or greater degree than direct victims of discrimination. Bystanders often express a loss of belief in justice and a caring community, as well as anxiety, overall poor health, and pain.

Therefore, coworkers who witness discrimination against volunteers are put at risk of physical and psychological harm. Adopting a narrow definition of employee that excludes volunteers jeopardizes the health of even paid, traditional employees who are bystanders to the discrimination.

Second, discrimination against volunteers increases perceptions of discrimination in the workplace. The inquiry is no longer limited to the effects of overt, targeted discrimination on a particular employee. Studies have shown that mere perceptions of discrimination can lead to negative consequences. Non-targeted coworkers often develop a fear of becoming the target. Fear can quickly dominate the workplace and result in poor morale, decreased loyalty, and low productivity.

Employees are perceptive and know when discrimination happens. Coworkers may witness it directly, hear about it through water-cooler talk, or just feel its effect in daily interactions. Discriminatory conduct against volunteers will subtly creep into everyday workplace interactions, creating a toxic work environment. Perceived mistreatment is a very real and damaging part of the work environment. A narrow definition of employee that favors traditional, paid employees over volunteers will foster perceptions of discrimination and inequality.

Lastly, as a result, discriminatory conduct against volunteers threatens the health of traditional, paid coworkers who share a group-based identity.

377. See discussion supra Part III.A.1.
378. For the purposes of this Note, “bystanders” means those individuals who are not directly targeted but share a workplace with the targeted individual and witness the discrimination.
379. See supra note 268 and accompanying text.
380. See supra note 269 and accompanying text.
381. Okechukwu et al., supra note 266, at 578.
382. See discussion supra Part III.A.2.
383. Pavalko et al., supra note 283, at 18.
384. See Okechukwu et al., supra note 266, at 578–79 (“Researchers have posited that the influence on bystander health is partly because bystanders develop a fear of becoming a target.”).
386. See supra notes 286–87 and accompanying text.
387. See discussion supra Part III.A.2.
with the targeted volunteer. The law should offer special protection to individuals who suffer discrimination for immutable characteristics, as there is an “extraordinary destructiveness of being shamed for one’s very identity.” Discrimination against volunteers has consequences not only for the targeted individual but also for those who share similar group-based identities. Courts should be particularly sensitive and adopt a broad definition of employee.

2. Familial Health: Workplace Discrimination Against Volunteers Jeopardizes the Home

The extent of the injury caused by discrimination against volunteers is not limited to the workplace. The injury is borne beyond the walls of the workplace, and families suffer as a result of workplace discrimination against volunteers.

Families function as interconnected units. As such, negative health effects of workplace discrimination are shared through familial interactions and communication. Like any other worker, volunteers are susceptible to “exporting” the effects of discrimination, manifesting into feelings of alienation, disconnectedness, and overburdening within their families.

Discrimination against volunteers puts children at particular risk. Children are particularly vulnerable to the effects of discrimination because they have a more difficult time understanding the reason for the volunteer’s behavior. As a result, they may internalize the harm and blame themselves for the volunteer’s behavior.

Harm to the family is especially troubling because the family is where children build foundational principles of morality, ethics, justice, and good citizenship. It is the bedrock of civil society. Parents serve as the primary role models for how children should treat others and how they should understand their role in society. Corrupting the family will lead to dangerous public health consequences not only for the family unit but also for a future generation of citizens who will lead our nation.

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388. See discussion supra Part III.A.3.
389. Fisk, supra note 291, at 79.
390. Kramer, supra note 122, at 630.
391. Id.
392. See supra note 297.
393. See Kramer, supra note 122, at 630.
394. See supra note 305 and accompanying text.
395. See Kramer, supra note 122, at 640–42.
396. See id.
397. Id. at 647–48. “Children first begin to develop their moral and political capacities in the home, among their families. This is where they learn about forming healthy relationships with others, and where they develop a sense of self and how they fit into civil society.” Id. at 648.
398. See id.
399. Id.
Discrimination against volunteers threatens the health of the family. By not protecting volunteers, courts are putting the well being of their partners and children at risk.

3. Civic Health: Discrimination Against Volunteers Threatens Civil Society

The workplace—when it is an equal, cooperative environment—is a powerful tool to promote civic engagement and effective democratic self-governance. However, if discrimination against volunteers is allowed, the workplace can serve as a vehicle for social hostility imposing citizenship harm, depleting social capital, and skewing the public discourse.

First, discrimination against volunteers inflicts citizenship harm. Public discourse legitimizes and facilitates modern democratic self-governance. As traditional forms of public engagement have declined, the workplace has become an essential forum for public discourse.

Employers who exclude volunteers from the workplace or discriminate therein inflict citizenship harm, by disturbing relationships among co-citizens and their ability to grasp the meaning of the existing political order. Such “citizenship harm” places a greater burden on the law to intervene and protect those individuals.

The workplace is an important site for political and moral learning. A narrow definition of “employee” that uses compensation as a dispositive factor creates a second class of workers—those employees who are less valuable and less worthy of a workplace free from discrimination. It imposes a caste-like system, within which volunteers are relegated to a second-class tier. It creates a marginalized workforce that instills moral and political values that are inherently at odds with modern democratic society.

Second, discrimination against volunteers depletes social capital and inhibits societal integration and equality. Modern society depends upon “social capital,” and the workplace is an essential source of such capital. The workplace brings people from varying backgrounds together to work toward a common goal. It can transform attitudes on divisive issues such as race and sex. Employees can export these progressive views into their communities.

However, employees can export negative experiences into their communities just as easily as they can positive ones. In theory, the workplace is an ideal place to promote civic integration because Title VII

400. See discussion supra Part III.C.1–2.
401. See supra notes 318–21 and accompanying text.
402. See supra notes 322–25 and accompanying text.
403. See supra note 326 and accompanying text.
404. See supra note 327 and accompanying text.
405. See Jauregui, supra note 323, at 348.
406. See supra notes 329–30 and accompanying text.
407. See supra notes 332–36 and accompanying text.
408. Kramer, supra note 122, at 633.
409. Id.
“seek[s] to reconstruct the workplace as a realm of equality on the basis of race, sex, and other traits that have traditionally been the basis for subordination and sometimes segregation, and that still divide us.” However, if Title VII’s protections are granted to only a narrow subset of workers receiving compensation, workplaces can easily become environments of hierarchy, coercion, and harassment. The workplace can be a powerful progressive tool only if the workplace is a positive, cooperative environment that protects vulnerable groups, like volunteers, from discrimination.

Lastly, by bringing their discrimination to light in a public forum, Title VII ensures that volunteers are not invisible victims. Title VII creates a public record of workplace discrimination. If Title VII does not recognize volunteers as employees, the record will not accurately reflect the actual level of discrimination in a particular workplace or across the nation. Prospective employees will not be able to properly evaluate potential employers. Judges will render decisions based on an imprecise record. Public policy perceptions of discrimination will be inaccurate, and our legislatures will not be able to make necessary reforms.

Studies have shown that there is a public perception that discrimination in the workplace is largely a thing of the past and that there is a latent judicial bias against plaintiffs in employment claims. Title VII plaintiffs are unlikely to succeed when compared with other federal claimants. Traditional employees bringing Title VII claims would benefit from a record that reflected discrimination claims made by other victims, such as volunteers. If discrimination against volunteers is not recognized, their stories cannot be used to inform or change perceptions of workplace discrimination.

Furthermore, an important form of deterrence is lost. Employment legislation was meant to facilitate discrimination claims so that discrimination would be brought to light in a public forum and remedial mechanisms would deter employers from similar conduct. If volunteers are not recognized, they become invisible victims. Their experiences cannot benefit traditional, paid employees who are suffering similar discrimination.

411. Id. at 5.
412. See supra note 347 and accompanying text.
413. See supra note 343 and accompanying text.
414. See generally Kotkin, supra note 342, at 571–74 (discussing the effect of secret settlements in federal employment litigation generally).
415. See supra note 344 and accompanying text.
416. See supra note 345 and accompanying text.
417. See supra note 346 and accompanying text.
418. See generally Kotkin, supra note 342, at 571–74.
419. Id.
420. See Kotkin, supra note 265, at 930; see also Kotkin, supra note 342, at 573.
421. Kotkin, supra note 265, at 930; see also Kotkin, supra note 342, at 573.
4. Employer Health: Discrimination Against Volunteers
   Harms Employer Health

Employment scholarship often focuses on the harm discrimination inflicts on employees. However, discrimination against volunteers jeopardizes the health of the employer as well.\(^{422}\) Discrimination fosters toxic work environments, which undercuts productivity, morale, and loyalty.\(^{423}\) This negatively affects retention, which is important to a company’s financial strength and competitive edge.\(^{424}\) Discrimination also results in significant reputational costs, as employees who leave jobs later discourage potential customers and job applicants from working with their former employers.\(^{425}\) Discrimination puts the health of the business and the job of each employee at risk.\(^{426}\)

B. Proposing a Broad Definition of “Employee” in the Interest of Public Health

Workplace discrimination against volunteers poses a larger public health issue.\(^{427}\) The harm extends beyond the targeted individual to coworkers, families, businesses, and civic society.\(^{428}\) As a result, each incidence of discrimination against volunteers can no longer be viewed only with respect to the impact to the particular volunteer. A tort-like approach seeking to remedy only the particular harm caused to the target of discrimination is inadequate. The harm caused to the entire workforce,\(^{429}\) families,\(^{430}\) civil society,\(^{431}\) and employers\(^{432}\) requires a more proactive approach.

To truly combat the public health issues caused by workplace discrimination, courts must take prophylactic measures to prevent discrimination and the resulting familial, organizational, and societal harm. One such preventative measure is to adopt a broad definition of employee that prohibits discrimination against volunteers in the workplace.

The threshold-remuneration test imposes a narrow definition of employee, in which compensation is a singularly dispositive factor.\(^{433}\) Under this test, any volunteer not receiving “substantial compensation” would not be considered an employee, leaving a significant population of workers unprotected. This would open the door for increased workplace discrimination.

\(^{422}\) See discussion supra Part III.D.
\(^{423}\) See supra note 352 and accompanying text.
\(^{424}\) See supra notes 354–57 and accompanying text.
\(^{425}\) See supra notes 358–59 and accompanying text.
\(^{426}\) See discussion supra Part III.D.
\(^{427}\) See discussion supra Part III.
\(^{428}\) See discussion supra Part III.
\(^{429}\) See discussion supra Part III.A.
\(^{430}\) See discussion supra Part III.B.
\(^{431}\) See discussion supra Part III.C.
\(^{432}\) See discussion supra Part III.D.
\(^{433}\) See discussion supra Part II.A.
discrimination, which has serious health consequences beyond just the targeted individual.434

In comparison, the common law agency, economic realities, and hybrid tests offer broad and flexible definitions of employee, in which compensation is one of several factors considered in conjunction with “all the incidents of the [putative employment] relationship.”435 The Supreme Court has generally defined the scope of the employment relationship expansively to effectuate Congress’s broad remedial purpose for Title VII.436 The Court has stated that it must avoid interpretations that deprive victims of discrimination of a remedy.437 There is no reason why the employment relationship should not be interpreted expansively once more to include volunteers and provide them a remedy.

When deciding among the common law agency, economic realities, and hybrid tests, courts should adopt the broadest approach to best protect the public from the negative health effects of workplace discrimination. The hybrid test is popular,438 as it appears to offer the best of both worlds.439 It incorporates the more expansive economic realities factors, while still maintaining the right to control analysis.440 However, courts should not feel bound to selecting one of these three existing tests, as the factors listed in the common law agency test were never meant to be exhaustive.441 Regardless of which of the three tests is selected, courts should be careful not to adopt the threshold-remuneration test.

C. Supplemental Support for Rejecting the Threshold-Remuneration Test

For those who are not satisfied with rejecting the threshold-remuneration test solely on the grounds that discrimination against volunteers creates substantial public health issues, there are several other reasons for reaching this conclusion.

First, the narrow threshold-remuneration test is at odds with the broad remedial purpose of Title VII.442 Congress intended Title VII to grant all individuals the right to be employed without discrimination.443 Title VII served a remedial purpose “to assure equality of employment opportunities,

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434. See discussion supra Part III.
436. See Robinson v. Shell Oil Co., 519 U.S. 337, 342 (1997) (finding that the term “employee” is flexible and can be interpreted broadly to maintain Title VII’s broad remedial purpose); Hishon v. King & Spalding, 467 U.S. 69, 77–79 (1984).
438. See Ortner, supra note 63, at 2630; see also Rubinstein, supra note 19, at 168.
439. Rubinstein, supra note 19, at 168.
440. See Rubinstein, supra note 20, at 626.
441. See Fichman v. Media Ctr., 512 F.3d 1157, 1160 (9th Cir. 2008) (“The [Supreme] Court noted that these factors were not exhaustive, and that whether an individual is an employee depends on ‘all of the incidents of the relationship[,] with no one factor being decisive.’”) (quoting Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 450 n.10, 451 (2003)); accord Rubinstein, supra note 20, at 618.
442. See supra notes 167–69 and accompanying text.
in particular to protect employees with little bargaining power."^{444} Volunteers are particularly vulnerable workers with little bargaining power.\textsuperscript{445} Without Title VII protection, volunteers become second-class citizens, deprived of the privileges and protections of full-time employees. It is doubtful that Congress intended to stratify the workforce with unequal disbursement of Title VII’s protections.

Second, the threshold-remuneration test does not comport with the standard set in \textit{Darden}.\textsuperscript{446} In \textit{Darden}, the Supreme Court held that the common law agency test is the default standard when Congress has been silent on the appropriate one.\textsuperscript{447} The threshold-remuneration test imposes an artificial antecedent question of whether an individual is “hired” before proceeding to the common law agency factors.\textsuperscript{448}

Proponents of the threshold-remuneration test argue that the \textit{Darden} Court’s use of the term “hired party” was a conscious decision to create an antecedent question of whether a party was hired or not.\textsuperscript{449} However, courts, such as the Sixth Circuit, have sufficiently rebutted this argument.\textsuperscript{450} In \textit{Bryson}, the Sixth Circuit clarified that the “Supreme Court included the term ‘hired party’ in \textit{Darden} only in a direct quote from its decision in \textit{Reid}, and the \textit{Reid} Court’s use of ‘hired party’ was in the context of the ‘work for hire’ provision from the Copyright Act.”\textsuperscript{451} The Court intended the common law agency test to apply “when Congress has used the term ‘employee’ without defining it,” not just when the individual receives significant remuneration.\textsuperscript{452}

Third, the threshold-remuneration test creates new areas of uncertainty in the law given the lack of clarity as to what constitutes “substantial compensation.”\textsuperscript{453} Under the threshold-remuneration test, employee status turns on whether an individual received adequate compensation to establish an employment relationship.\textsuperscript{454} After \textit{Haavistola}, it is unclear what indirect benefits are sufficient enough to be considered substantial compensation.\textsuperscript{455} As a result, the outcome of such claims will depend on the particular judge’s interpretation of substantial compensation.\textsuperscript{456} This creates

\begin{footnotesize}
444. Kean, \textit{supra} note 64, at 166 (internal quotation marks omitted).
445. \textit{See supra} note 169 and accompanying text.
446. \textit{See, e.g.}, \textit{Bryson v. Middlefield Volunteer Fire Dep’t}, Inc., 656 F.3d 348, 354 (6th Cir. 2011).
448. \textit{See supra} note 27.
450. \textit{See supra} note 27.
451. \textit{See supra} note 177 and accompanying text.
453. \textit{See supra} notes 159, 180–81 and accompanying text.
454. \textit{See Pietras v. Bd. of Fire Comm’rs of Farmingville Fire Dist.}, 180 F.3d 468, 473 (2d Cir. 1999); \textit{see also O’Connor}, 126 F.3d at 116.
455. \textit{See supra} note 159 and accompanying text.
456. For example, in \textit{Pietras}, the Second Circuit found that a volunteer firewoman could be an "employee" under Title VII because she received insurance retirement benefits. \textit{See Pietras}, 180 F.3d at 473. However, in \textit{Juiino}, the Fifth Circuit found that insurance and
\end{footnotesize}
significant room for judicial discretion and unknowable variables in the law that prevent volunteers from planning their lives accordingly.

Lastly, the nature of the workplace has changed. Traditional paid employees are becoming less common as technology allows us to work remotely from any corner of the world. Furthermore, in these difficult economic times, individuals are working several jobs to make ends meet and traditional 9:00 a.m. to 5:00 p.m. jobs are harder to find. Since there are fewer full-time employees, “litigation with respect to the status of employers is likely to continue because relationships will be increasingly atypical and will not involve a direct employer-employee relationship.” The rigidity of the threshold-remuneration test would leave a substantial portion of nontraditional workers, such as volunteers, unprotected.

CONCLUSION

Volunteers are an essential part of our society, and the United States strongly encourages volunteerism. This commitment to volunteerism has only been strengthened.

Despite our nation’s increased reliance on volunteers, efforts to protect them have not increased. And, there is a growing need for protection as they are particularly vulnerable to exploitation.

Discrimination against volunteers creates a serious public health issue. A narrow definition of employee in which compensation is dispositive fosters toxic working environments by creating a class of workers that are entirely unprotected by Title VII. Such discrimination against volunteers can lead to widespread health costs because the harm of discrimination is not borne solely by the targeted individual. Discrimination must be reconceptualized as a general public health issue. Discrimination against volunteers threatens the health of the entire workforce, families, civil society, and employers. Therefore, courts should reject the threshold-

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457. “Indeed, some believe that there is a movement away from employees having long-term, established relationships with their employers in favor of a more short-term contingent relationship.” Rubinstein, supra note 20, at 640.
458. Id. at 640–41. “Today, there can even be workers without workplaces, and some employees work together in virtual worlds.” Id.
459. See supra notes 98–106 and accompanying text.
460. See supra notes 98–106 and accompanying text.
462. Rubinstein, supra note 19, at 150–51.
463. See discussion supra Part IV.A.
464. See discussion supra Part IV.A.
465. See discussion supra Part IV.A.
466. See discussion supra Part IV.A.1.
467. See discussion supra Part IV.A.2.
468. See discussion supra Part III.A.3.
469. See discussion supra Part IV.A.3.
remuneration test because discrimination against volunteers jeopardizes the public welfare.⁴⁷⁰

⁴⁷⁰ See discussion supra Part IV.A–B.