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

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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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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.¹ Rachel Juino was a volunteer firefighter with Fire District 5 from November 2009 to April 2010.² Although she did not receive a salary, Juino responded to thirty-nine calls for which she received \$78 in reimbursement.³ She also received a life insurance policy, a uniform and badge, and emergency and first responders’ training.⁴

Soon after she started volunteering at Fire District 5, Juino alleged that a male firefighter was sexually harassing her.⁵ 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.⁶ No disciplinary action was taken, and Juino left Fire District 5 in April 2010 due to continuing harassment.⁷

Juino brought a sexual harassment suit against Fire District 5 for violations of Title VII of the Civil Rights Act of 1964⁸ (Title VII).⁹ The Middle District of Louisiana dismissed the Title VII claim, finding that Juino was not an “employee” within the meaning of Title VII.¹⁰

Juino appealed to the Fifth Circuit, which addressed the issue as a matter of first impression.¹¹ 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.¹²

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

1. *See Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 432 (5th Cir. 2013).

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.

8. 42 U.S.C. § 2000e(17) (2012).

9. *See Juino*, 717 F.3d at 432.

10. *See Juino*, 2012 WL 527972, at *9.

11. *See Juino*, 717 F.3d at 432.

12. *Id.* at 439–40.

national origin.”¹³ 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.”¹⁴

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.”¹⁵ Under Title VII, an employee is defined as “an individual employed by an employer.”¹⁶ The U.S. Supreme Court has found that this definition “is completely circular and explains nothing.”¹⁷ As a result, what constitutes an employee is a “recurring question”¹⁸ 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.¹⁹ 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.²⁰ 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.²¹ 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,²² Fourth,²³ Eighth,²⁴ Tenth,²⁵ and Eleventh²⁶ Circuits by adopting a version of the threshold-

13. 42 U.S.C. § 2000e-2(a)(1).

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)).

15. 42 U.S.C. § 2000e(b).

16. *Id.* § 2000e(f).

17. *See* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992).

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”).

19. *See* Mitchell H. Rubinstein, *Our Nation’s Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 170 (2006).

20. *See* Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 658 (2012).

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 Sixth²⁷ and Ninth²⁸ Circuits have held that remuneration alone is not dispositive and should be considered in conjunction with other common law agency or economic realities factors.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.”³⁰ In these difficult economic times, our nation has increasingly relied on the services of volunteers.³¹ They can be found in almost every industry, private and public, and they compose a national workforce.³² Volunteers often function like traditional employees, reporting to work every day and serving side-by-side with full-time employees.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.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.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.³⁶

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

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).

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).

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 . . .”).

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

30. Rubinstein, *supra* note 20, at 658.

31. *See* discussion *infra* notes 70–81, 89–90.

32. Rubinstein, *supra* note 19, at 147.

33. Rubinstein, *supra* note 20, at 658.

34. Rubinstein, *supra* note 19, at 149–50.

35. Rubinstein, *supra* note 20, at 658.

36. *See* discussion *infra* Part III.

37. *See* discussion *infra* Part IV.A.

threatens the health of the entire workforce,³⁸ families,³⁹ employers,⁴⁰ and society at large.⁴¹

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.”⁴² 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.”⁴³

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.

42. 42 U.S.C. § 2000e-2(a)(1) (2012).

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

44. *Charge Statistics: FY 1997 Through FY 2013*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Nov. 26, 2014).

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.*

47. Press Release, EEOC, EEOC Releases FY 2013 Enforcement and Litigation Data (Feb. 5, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/2-5-14.cfm>.

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).

54. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (describing the same definition of employee under ERISA).

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.”⁵⁶

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.”⁵⁷ 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.”⁵⁸ This test, also known as the common law agency test, is discussed in greater detail in Part II.B.⁵⁹

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.”⁶⁰ These courts apply what is known as the threshold-remuneration test, which is discussed in Part II.A.⁶¹

3. Legislative History and Purpose of Title VII

Congress intended for Title VII to grant all individuals the right to be employed without discrimination⁶² and to eliminate discrimination in employment contexts.⁶³ Title VII sought “to assure equality of employment opportunities, in particular to protect employees with little bargaining power.”⁶⁴

56. See *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 120–21 (1944).

57. *Darden*, 503 U.S. at 322–23 (citing *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989)).

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.

62. See H.R. REP. NO. 88-914, at 26 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2401.

63. See *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983) (“Title VII . . . was enacted for the sole purpose of eliminating discrimination.”); accord Craig J. Ortner, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2622–23 (1998).

64. Nicola Kean, *The Unprotected Workforce: Why Title VII Must Apply to Workfare Participants*, 9 TEX. J. C.L. & C.R. 159, 166 (2004) (citations omitted).

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

65. *County of Washington v. Gunther*, 452 U.S. 161, 178 (1981).

66. 467 U.S. 69 (1984).

67. 519 U.S. 337 (1997).

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.

75. Tara Kpere-Daibo, *Employment Law—Antidiscrimination—Unpaid and Unprotected: Protecting Our Nation’s Volunteers Through Title VII*, 32 U. ARK. LITTLE ROCK L. REV. 135, 140 (2009) (quoting *NLRB v. Hearst Publications*, 322 U.S. 111, 124 (1944)).

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

77. *See id.* at 124.

78. 548 U.S. 53 (2006).

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.⁹⁸ President Richard Nixon established National Volunteer Week, and President Ronald Reagan created the President's Volunteer Award.⁹⁹ President George H.W. Bush founded a White House office and the Points of Light Foundation to promote volunteerism.¹⁰⁰ President Bill Clinton helped establish the Corporation for National Service to oversee AmeriCorps and other programs.¹⁰¹ President George W. Bush called on Americans to “recognize and celebrate the important work” of volunteers.¹⁰²

In an environment of budget cuts and government shutdowns, volunteerism is even more critical.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ 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.”¹⁰⁶

Scholars have noted that despite our increased reliance on volunteerism, efforts to protect volunteers have not increased.¹⁰⁷ 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,”¹⁰⁸ and the definition of employee “developed from common law tort principles involving vicarious liability of employers—not employment law dogma.”¹⁰⁹

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.

104. *See* Sheryl Gay Stolberg, *Obama Calls for Day of Service to Kick Off Inaugural Festivities*, N.Y. TIMES (Dec. 6, 2012), <http://thecaucus.blogs.nytimes.com/2012/12/06/obama-calls-for-day-of-service-to-kick-off-inaugural-festivities/>; *see also* *Obama Announces National Day of Service Will Kick Off Inauguration*, HUFFINGTON POST (Dec. 7, 2012), http://www.huffingtonpost.com/2012/12/06/president-barack-obama-announces-national-day-of-service_n_2253372.html.

105. *See* Stolberg, *supra* note 104; *see also* *Obama Announces National Day of Service Will Kick Off Inauguration*, *supra* note 104.

106. UNITED WE SERVE, <http://www.serve.gov> (last visited Nov. 26, 2014).

107. Kpere-Daibo, *supra* note 75, at 136.

108. Rubenstein, *supra* note 20, at 609–10.

109. *Id.* at 610.

However, employers may have incentives to maintain this ambiguity. Employers are in business to earn a profit and may “engag[e] in purposeful manipulation in order to avoid a finding of employee status at all costs.”¹¹⁰

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.¹¹¹

Second, uncertainty in the law creates “a breeding ground for litigation.”¹¹² And, unlike other areas of the law, volunteers cannot contract around the issue.¹¹³ Courts are careful to conduct fact-based inquiries without relying heavily on the labels that parties place on the work relationship.¹¹⁴ 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.¹¹⁵

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.¹¹⁶

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.¹¹⁷ Employers should be able to know their liability in advance.¹¹⁸

Fifth, clarity in the law is essential to prevent abuse.¹¹⁹ Volunteers have the potential to be exploited by employers looking for inexpensive labor.¹²⁰ A clear definition of employee will help to curb exploitation of a vulnerable volunteer workforce.¹²¹

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) (“[A]n 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.

117. 42 U.S.C. § 2000e(b) (2012).

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

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.

127. See *Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 434–35 (5th Cir. 2013).

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

139. See *Juino*, 717 F.3d at 435; accord *O’Connor*, 126 F.3d at 115–16; *Graves*, 907 F.2d at 73.

140. See *Juino*, 717 F.3d at 435; accord *O’Connor*, 126 F.3d at 115–16; *Graves*, 907 F.2d at 73.

141. See *Juino*, 717 F.3d at 437; accord *O’Connor*, 126 F.3d at 115–16; *Graves*, 907 F.2d at 73.

142. See *Juino*, 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).

145. See *Graves*, 907 F.2d at 71.

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.

148. See *O’Connor*, 126 F.3d at 113–15.

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 benefits¹⁵⁶ 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.

167. Congress intended for Title VII to grant all individuals the right to be employed without discrimination. H.R. REP. NO. 88-914, at 26 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2391, 2401. Title VII "was enacted for the sole purpose of eliminating discrimination." *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983).

168. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 344-45 (1997); *Hishon v. King & Spalding*, 467 U.S. 69, 74 (1984).

169. Kean, *supra* note 64, at 166.

170. 503 U.S. 318 (1992).

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).

176. 490 U.S. 730 (1989).

Act.”¹⁷⁷ 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 *Cnty. 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.

184. *See Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 439 (5th Cir. 2013).

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,¹⁸⁸ creating unknowable variables in the law that disadvantage workers.¹⁸⁹

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.”¹⁹⁰ Courts have employed this test under “the conventional master-servant relationship as understood by common-law agency doctrine.”¹⁹¹ “Control” is a relative factor “judged not by its actual exercise but rather by the employer’s authority to use it.”¹⁹² Traditionally, this approach has been used to determine whether a party is an employee or an independent contractor.¹⁹³

Under the common law agency test no single factor is determinative.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.”¹⁹⁵ However, the right to control is given significant weight.¹⁹⁶

The two landmark Supreme Court cases are *Reid* and *Darden*. In *Reid*, the Court articulated the common law agency test to determine whether a sculptor was an employee or an independent contractor.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.¹⁹⁸

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

188. See *supra* note 159 and accompanying text.

189. The lack of clarity in the law leaves volunteers open to potential abuse. See Rubinstein, *supra* note 20, at 615–16.

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)).

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

192. Ortnier, *supra* note 63, at 2628.

193. See *Juino*, 717 F.3d at 435.

194. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989).

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).

196. See *Reid*, 490 U.S. at 752.

197. *Id.* at 752–53.

198. *Id.* at 751–52.

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

expressly rejected the suggestion that the term employee refers only to formal, salaried employees.²⁰⁰

In *Darden*, the Court reaffirmed the *Reid* factors²⁰¹ 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

employee depends on ‘all of the incidents of the relationship[,] with no one factor being decisive.’” (quoting *Darden*, 503 U.S. at 324); accord Rubinstein, *supra* note 19, at 618.

200. *Reid*, 490 U.S. at 742 n.8.

201. *Darden*, 503 U.S. at 323–24 (quoting *Reid*, 490 U.S. at 751–52).

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.

210. 519 U.S. 202 (1997).

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.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.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.²¹⁴

C. Economic Realities Test

The economic realities test was first articulated by the Supreme Court in *Bartels v. Birmingham*,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.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.”²¹⁷

The Sixth Circuit first introduced the economic realities test into the Title VII context to determine employee status in *Armbruster v. Quinn*.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.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.”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.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

212. Ortner, *supra* note 63, at 2628.

213. *Id.*

214. *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.

215. 332 U.S. 126 (1947).

216. *See id.* at 126.

217. *See id.* at 130.

218. 711 F.2d 1332 (6th Cir. 1983).

219. *See id.* at 1339.

220. *Id.* at 1340.

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).

223. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 290-91 (1985) (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").

224. 471 U.S. 290 (1985).

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.

evidenced by his or her economic dependency on the putative employer.²³⁴ 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.’”²³⁵

Opponents argue that the economic realities test “fails to provide a clear, workable standard for defining employee status.”²³⁶ 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.²³⁷

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.²³⁸ 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.”²³⁹

D. Hybrid Test

In an attempt to find a middle ground,²⁴⁰ 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.²⁴¹ However, courts still heavily rely on the common law “right to control” analysis,²⁴² and the right to control an employee’s conduct is the most significant part of the test.²⁴³

The hybrid test was first adopted by the District of Columbia Circuit in *Spirides v. Reinhardt*.²⁴⁴ 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.”²⁴⁵ 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

234. *Id.* at 1340–41; *see also* Ortner, *supra* note 63, at 2629.

235. Ortner, *supra* note 63, at 2630.

236. *Id.*

237. *Id.*

238. *See* Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992).

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.*

242. Ortner, *supra* note 63, at 2630.

243. *See* Deal v. State Farm Cnty. Mutual Ins. Co. of Tex., 5 F.3d 117, 119 (5th Cir. 1993).

244. 613 F.2d 826 (D.C. Cir. 1979).

245. *Cobb v. Sun Papers, Inc.* 673 F.2d 337, 341 (11th Cir. 1982).

schedule.”²⁴⁶ 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.”²⁴⁷ Additional factors such as the “intention of the parties” are also considered.²⁴⁸

The economic realities portion of the hybrid test is not limited to cash benefits only.²⁴⁹ 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.²⁵⁰

Scholars have noted that the hybrid test is popular and many courts have chosen to apply it.²⁵¹ Proponents state that it offers the best of both worlds.²⁵² It incorporates the advantages of the economic realities test,²⁵³ which is more flexible and expansive, while still maintaining the right to control analysis.²⁵⁴

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.²⁵⁵ However, proponents reject this argument on the grounds that the *Darden* Court never stated that the *Reid* factors were not exhaustive.²⁵⁶ 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.”²⁵⁷ 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.²⁵⁸

Lastly, opponents criticize the hybrid test as another rearticulation of the common law agency test.²⁵⁹ For example, the Second Circuit has stated that there is “little discernable difference between the hybrid test and the

246. *Deal*, 5 F.3d at 119; *see also* *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 319 (1992); *Roque v. Jazz Casino Co.*, 388 F. App’x 402 (5th Cir. 2010).

247. *Deal*, 5 F.3d at 119; *see also Darden*, 503 U.S. at 319.

248. *See Spirides*, 613 F.2d at 832.

249. *See Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985) (finding that compensation in the form of benefits rather than cash is wages in another form).

250. *Id.*

251. *See Ortner*, *supra* note 63, at 2630; *see also Rubinstein*, *supra* note 19, at 168.

252. Rubinstein, *supra* note 19, at 168.

253. *See* discussion *supra* notes 229–35.

254. *See Rubinstein*, *supra* note 20, at 626.

255. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992).

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).

259. *Frankel v. Bally, Inc.*, 987 F.2d 86, 90 (2d Cir. 1993); *accord Lambertsten v. Utah Dep’t of Corr.*, 79 F.3d 1024, 1028 (10th Cir. 1996); *Folkerson v. Circus Circus Enters.*, No. CV-92-01065-PMP, 1995 WL 608432, at *33 (9th Cir. Oct. 16, 1995); *Wilde v. County of Kandiyo*, 15 F.3d 103, 106 (8th Cir. 1994); *accord Kean*, *supra* note 64, at 189; Rubinstein, *supra* note 19, at 168.

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.

263. See *supra* notes 227–28, 259–62 and accompanying text.

264. See discussion *supra* Part I.A.3.

265. Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 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

Contribution of Workplace Injustice to Occupational Health Disparities, 57 AM. J. INDUS. MED. 573 (2013).

267. *See id.* at 578–79.

268. *Id.*

269. *See* Monica L. Sherer, *No Longer Just Child’s Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2135 (1993) (“Victims of sexual harassment, as well as bystanders, often express a loss of belief in justice and a caring community.”).

270. Okechukwu et al., *supra* note 266, at 578.

271. *See* Richard C. Sorenson et al., *Solving the Chronic Problem of Sexual Harassment in the Workplace: An Empirical Study of Factors Affecting Employee Perceptions and Consequences of Sexual Harassment*, 34 CAL. W. L. REV. 457, 460 (1998).

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.”²⁷⁸ Witnesses of workplace bullying have reported increased anxiety²⁷⁹ and acute pain.²⁸⁰ Witnessing sexual harassment resulted in lower job satisfaction and psychological health in a study of female workers.²⁸¹ Another study correlated witnessing mistreatment with poor psychological health.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.²⁸³ Perceptions of discrimination are influenced by job attitudes, including work satisfaction, prior experiences of discrimination, and overall work contexts.²⁸⁴ One study warned that perceptions create significant physical and emotional costs that should not be trivialized.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.”²⁸⁶ Perceptions of “unfairness, in the form of every-day inappropriate behaviors . . . is a very real, prevalent and damaging part of the work environment.”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.²⁸⁸ Discrimination is a problem of subtle bias creeping into the everyday.²⁸⁹ No worker is totally immune to

278. See Okechukwu et al., *supra* note 266, at 578.

279. *Id.* at 578–79.

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 . . .”).

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.”).

282. *Id.*

283. Eliza K. Pavalko et al., *Does Perceived Discrimination Affect Health? Longitudinal Relationships Between Work Discrimination and Women’s Physical and Emotional Health*, 43 J. HEALTH & SOC. BEHAV. 18, 18–19 (2003).

284. *Id.* at 22.

285. *Id.* at 28. Perceptions of discrimination are one of “the more significant life events affecting health and well-being.” *Id.*

286. See LEVEL PLAYING FIELD INST., THE COST OF EMPLOYEE TURNOVER DUE SOLELY TO UNFAIRNESS IN THE WORKPLACE 2 (2007), available at <https://www.lphi.org/sites/default/files/corporate-leavers-survey.pdf>.

287. *Id.* at 3.

288. *Id.*

289. See Tristin K. Green, *Targeting Workplace Context: Title VII As a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 659 (2003).

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.

291. Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 80 (2001).

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.³⁰⁰ 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.³⁰¹ 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.³⁰²

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.”³⁰³

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.³⁰⁴ The effects of discrimination can manifest into feelings of alienation, disconnectedness, and overburdening among family members.³⁰⁵

Professor Zachary Kramer refers to this as “exporting.”³⁰⁶ 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).³⁰⁷ Kramer categorizes the harm experienced by families in two ways: disruption harm and exclusion harm.³⁰⁸ Disruption harm occurs when employees bring the effects of workplace discrimination home with them and, consequently, are unable to participate productively in family life.³⁰⁹ For example, children are harmed when a distraught employee is too stressed to play or help with school work.³¹⁰ The employee might seek support and consolation from the partner, overburdening and creating tension in the relationship.³¹¹ The child may try to cope by taking on additional responsibilities at home.³¹² Children are particularly vulnerable because they have a more difficult time

300. *Id.*

301. *See* Okechukwu et al., *supra* note 266, at 580.

302. David L. Brunnsma, Book Review, 82 SOC. FORCES 1240, 1240–42 (2004) (reviewing JOE R. FEAGIN & KARYN D. MCKINNEY, *THE MANY COSTS OF RACISM*).

303. *Id.*

304. Okechukwu et al., *supra* note 266, at 580.

305. Parents have reported that workplace discrimination negatively affected their family relations. *See* Brunnsma, *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.

317. See Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 86 (2001).

318. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 338–40 (2000).

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,³²² the workplace has actually emerged as an essential forum for public discourse.³²³ The workplace is “where we learn about each other, work together, and exchange social and political views.”³²⁴ Work enables Americans to satisfy the basic preconditions of civic participation that was once fulfilled through traditional public forums.³²⁵

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.”³²⁶ Such “citizenship harm” places a greater burden on the law to intervene and protect those individuals.³²⁷

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.³²⁸ Modern society depends upon our “social capital”—“networks, norms, and trust . . . that enable participants to act together more effectively to pursue shared objectives.”³²⁹ The workplace is a potentially transformative source of such capital.³³⁰

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.”³³¹

Professor Cynthia Estlund examined the tremendous influence that work can have on civic society.³³² She noted that “[t]he workplace is the single most important site of cooperative interaction and sociability among adult citizens outside the family.”³³³ 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.*

323. See Eddie A. Jauregui, *The Citizenship Harms of Workplace Discrimination*, 40 COLUM. J.L. & SOC. PROBS. 347, 348 (2007).

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.

330. See Estlund, *supra* note 317, at 2.

331. Jauregui, *supra* note 323, at 361.

332. Estlund, *supra* note 317, at 3–4.

333. *Id.*

sense of connectedness among citizens, of ‘being in this together,’ in a complex and heterogeneous democratic society.”³³⁴

Coming together and sharing a physical space in a cooperative work environment can transform attitudes on divisive issues such as race and sex.³³⁵ When employees leave work, they share their new attitudes with their family and communities.³³⁶ 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.³³⁷ However, the necessary precondition to Estlund’s thesis is a cooperative work environment.³³⁸ Workplaces can easily become environments of hierarchy, coercion, and harassment.³³⁹ “When the workplace also functions as a cultural or social force . . . the implications of workplace hierarchy and exclusion can take on greater meaning.”³⁴⁰ Victims and bystanders of such discrimination feel “a loss of belief in justice and a caring community.”³⁴¹ 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.³⁴² 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.³⁴³

Over the past twenty-five years, there has been a public perception that discrimination in the workplace is largely a thing of the past.³⁴⁴ In fact, studies have shown a latent judicial bias against plaintiffs in employment claims.³⁴⁵ Despite the increase in employment litigation, plaintiffs are unlikely to succeed when compared with other federal claims.³⁴⁶

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.³⁴⁷

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.

340. Jauregui, *supra* note 323, at 362.

341. *See* Sherer, *supra* note 269, at 2135.

342. Minna J. Kotkin, *Secrecy in Context: The Shadowy Life of Civil Rights Litigation*, 81 CHI.-KENT L. REV. 571, 572 (2006).

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.³⁴⁸ And, when workplace discrimination is not “brought to light in a public forum,” an important form of deterrence is lost.³⁴⁹

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.³⁵⁰ Discrimination fosters toxic work environments, which lead to a loss of productivity, decreased worker satisfaction, increased turnover, and legal penalties.³⁵¹ Workplace discrimination undercuts productivity, morale, and loyalty.³⁵² 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.³⁵³

Discrimination harms retention, which is important to a company’s financial strength and competitive edge.³⁵⁴ One study found that two million individuals leave their jobs due to cumulative daily interactions that create a discriminatory or unfair workplace.³⁵⁵ Witnesses to bullying are negatively affected and 20 percent of them decide to leave the organization as a result of their experience.³⁵⁶ Turnover is expensive,³⁵⁷ and employers risk losing their best and brightest.

Discrimination also results in significant reputational costs.³⁵⁸ Employees who leave jobs due to unfairness later discourage potential customers and job applicants from working with their former employers.³⁵⁹ 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.

348. Kotkin, *supra* note 265, at 931; *see also* Kotkin, *supra* note 342, at 573.

349. Kotkin, *supra* note 265, at 930; *see also* Kotkin, *supra* note 342, at 575.

350. Sorenson et al., *supra* note 271, at 458.

351. *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.”).

352. Vickers, *supra* note 351, at 269.

353. 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/>.

354. *See id.*

355. LEVEL PLAYING FIELD INST., *supra* note 286, at 4.

356. Vickers, *supra* note 351, at 269.

357. *See* Burns, *supra* note 353, at 2–3.

358. LEVEL PLAYING FIELD INST., *supra* note 286, at 6–8.

359. *Id.*

In short, workplace discrimination is costly.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 2006.³⁶¹ In 2006, this perceived unfairness cost U.S. employers \$64 billion on an annual basis.³⁶² “There can be no health or wellness in organizations without careful attention to the well-being of individual employees.”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-REMUNERATION 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.”³⁶⁴ In comparison, the threshold-remuneration test employs compensation as a singularly dispositive factor to determine whether an employment relationship exists.³⁶⁵ Under this narrow test, volunteers are often disqualified from Title VII protections due to a lack of substantial compensation.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.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.³⁶⁸

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

360. Workplace discrimination imposes significant financial harm on business, creating inefficiencies and costs that reduce profits and undermine the bottom line. *Id.* at 4–5.

361. *Id.* at 4.

362. *Id.*

363. Vickers, *supra* note 351, at 267.

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).

365. *See supra* note 152; *see also O’Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997).

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.

367. *See Fisk, supra* note 291, at 79 (finding that non-targeted coworkers suffer collateral harms, which often go unrecognized by current law).

368. *See discussion infra* Part IV.A.

369. *See discussion supra* Part I.A.3.

370. *See supra* note 265.

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,³⁷¹ organizational,³⁷² and societal³⁷³ 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.”³⁷⁴ Workplace discrimination is especially toxic because work is where the majority of the adult population spends its waking hours.³⁷⁵ And, it is where “much of one’s ‘significance’ is fostered.”³⁷⁶

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.

374. Carla Gonçalves Gouveia, *From Laissez-Fair to Fair Play: Workplace, Violence & Psychological Harassment*, 65 U. TORONTO FAC. L. REV. 137, 138 (2007).

375. See David C. Yamada, *United States: Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251, 254 (2010) (“[T]he majority of the adult population spends more waking hours at work than anywhere else . . .”).

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.³⁷⁷ Studies have shown that bystanders³⁷⁸ suffer harm to an equal or greater degree than direct victims of discrimination.³⁷⁹ Bystanders often express a loss of belief in justice and a caring community,³⁸⁰ as well as anxiety, overall poor health, and pain.³⁸¹

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.³⁸² 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.³⁸³ Non-targeted coworkers often develop a fear of becoming the target.³⁸⁴ Fear can quickly dominate the workplace and result in poor morale, decreased loyalty, and low productivity.³⁸⁵

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.³⁸⁶ 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.³⁸⁷ 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.”).

385. Gary Namie & Ruth Namie, *Introduction to the Symposium on Workplace Bullying: Workplace Bullying: How to Address America’s Silent Epidemic*, 8 EMP. RTS. & EMP. POL’Y J. 315, 326 (2004).

386. See *supra* notes 286–87 and accompanying text.

387. See discussion *supra* Part III.A.2.

with the targeted volunteer.³⁸⁸ 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.”³⁸⁹ 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.³⁹⁰ The injury is borne beyond the walls of the workplace, and families suffer as a result of workplace discrimination against volunteers.³⁹¹

Families function as interconnected units.³⁹² As such, negative health effects of workplace discrimination are shared through familial interactions and communication.³⁹³ Like any other worker, volunteers are susceptible to “exporting” the effects of discrimination, manifesting into feelings of alienation, disconnectedness, and overburdening within their families.³⁹⁴

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.³⁹⁵ As a result, they may internalize the harm and blame themselves for the volunteer’s behavior.³⁹⁶

Harm to the family is especially troubling because the family is where children build foundational principles of morality, ethics, justice, and good citizenship.³⁹⁷ It is the bedrock of civil society.³⁹⁸ Parents serve as the primary role models for how children should treat others and how they should understand their role in society.³⁹⁹ 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.

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.⁴⁰⁰ 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.⁴⁰¹ As traditional forms of public engagement have declined, the workplace has become an essential forum for public discourse.⁴⁰²

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.⁴⁰³ Such “citizenship harm” places a greater burden on the law to intervene and protect those individuals.⁴⁰⁴

The workplace is an important site for political and moral learning.⁴⁰⁵ 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.⁴⁰⁶ The workplace brings people from varying backgrounds together to work toward a common goal.⁴⁰⁷ It can transform attitudes on divisive issues such as race and sex.⁴⁰⁸ Employees can export these progressive views into their communities.⁴⁰⁹

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.”⁴¹⁰ 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.⁴¹¹ 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,⁴¹² Title VII ensures that volunteers are not invisible victims. Title VII creates a public record of workplace discrimination.⁴¹³ 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.⁴¹⁴ 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 past⁴¹⁵ and that there is a latent judicial bias against plaintiffs in employment claims.⁴¹⁶ Title VII plaintiffs are unlikely to succeed when compared with other federal claimants.⁴¹⁷ Traditional employees bringing Title VII claims would benefit from a record that reflected discrimination claims made by other victims, such as volunteers.⁴¹⁸ If discrimination against volunteers is not recognized, their stories cannot be used to inform or change perceptions of workplace discrimination.⁴¹⁹

Furthermore, an important form of deterrence is lost.⁴²⁰ 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.⁴²¹ If volunteers are not recognized, they become invisible victims. Their experiences cannot benefit traditional, paid employees who are suffering similar discrimination.

410. Estlund, *supra* note 317, at 4.

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 employers⁴³² 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

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,

434. See discussion *supra* Part III.

435. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992).

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).

437. See *County of Washington v. Gunther*, 452 U.S. 161, 178 (1981).

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.

443. H.R. REP. NO. 88-914, at 26 (1963), reprinted in 1964 U.S.C.C.A.N. 2355, 2391, 2401.

in particular to protect employees with little bargaining power.”⁴⁴⁴ Volunteers are particularly vulnerable workers with little bargaining power.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 *Darden*.⁴⁴⁶ In *Darden*, the Supreme Court held that the common law agency test is the default standard when Congress has been silent on the appropriate one.⁴⁴⁷ The threshold-remuneration test imposes an artificial antecedent question of whether an individual is “hired” before proceeding to the common law agency factors.⁴⁴⁸

Proponents of the threshold-remuneration test argue that the *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.⁴⁴⁹ However, courts, such as the Sixth Circuit, have sufficiently rebutted this argument.⁴⁵⁰ In *Bryson*, the Sixth Circuit clarified that the “Supreme Court included the term ‘hired party’ in *Darden* only in a direct quote from its decision in *Reid*, and the *Reid* Court’s use of ‘hired party’ was in the context of the ‘work for hire’ provision from the Copyright Act.”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.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.”⁴⁵³ Under the threshold-remuneration test, employee status turns on whether an individual received adequate compensation to establish an employment relationship.⁴⁵⁴ After *Haavistola*, it is unclear what indirect benefits are sufficient enough to be considered substantial compensation.⁴⁵⁵ As a result, the outcome of such claims will depend on the particular judge’s interpretation of substantial compensation.⁴⁵⁶ This creates

444. Kean, *supra* note 64, at 166 (internal quotation marks omitted).

445. *See supra* note 169 and accompanying text.

446. *See, e.g., Bryson v. Middlefield Volunteer Fire Dep’t, Inc.*, 656 F.3d 348, 354 (6th Cir. 2011).

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

448. *See supra* note 27.

449. *See, e.g., O’Connor v. Davis*, 126 F.3d 112, 115 (2d Cir. 1997).

450. *See supra* note 27.

451. *See supra* note 177 and accompanying text.

452. *See Bryson*, 656 F.3d at 354 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989)).

453. *See supra* notes 159, 180–81 and accompanying text.

454. *See Pietras v. Bd. of Fire Comm’rs of Farmingville Fire Dist.*, 180 F.3d 468, 473 (2d Cir. 1999); *see also O’Connor*, 126 F.3d at 116.

455. *See supra* note 159 and accompanying text.

456. For example, in *Pietras*, the Second Circuit found that a volunteer firewoman could be an “employee” under Title VII because she received insurance retirement benefits. *See Pietras*, 180 F.3d at 473. However, in *Juino*, the Fifth Circuit found that insurance and

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.⁴⁵⁷ 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.”⁴⁵⁸ 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.⁴⁵⁹ This commitment to volunteerism has only been strengthened.⁴⁶⁰

Despite our nation’s increased reliance on volunteers, efforts to protect them have not increased.⁴⁶¹ And, there is a growing need for protection as they are particularly vulnerable to exploitation.⁴⁶²

Discrimination against volunteers creates a serious public health issue.⁴⁶³ 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.⁴⁶⁴ Discrimination must be reconceptualized as a general public health issue.⁴⁶⁵ Discrimination against volunteers threatens the health of the entire workforce,⁴⁶⁶ families,⁴⁶⁷ civil society,⁴⁶⁸ and employers.⁴⁶⁹ Therefore, courts should reject the threshold-

retirement benefits were not sufficient in a similar volunteer firefighter context. *See Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 439–40 (5th Cir. 2013).

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.

461. Kpere-Daibo, *supra* note 75, at 136.

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.