

February 2016

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### Recommended Citation

Lawrence D. Rosenthal, *No Good Deed Goes Unpunished: The Lack of Protection for Volunteers Under Federal Anti-Discrimination Statutes*, 2016 BYU L. Rev. 117 (2016).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2016/iss1/7>

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# No Good Deed Goes Unpunished: The Lack of Protection for Volunteers Under Federal Anti-Discrimination Statutes<sup>1</sup>

*Lawrence D. Rosenthal*<sup>2</sup>

## I. INTRODUCTION

One issue that often arises in cases involving Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA) is whether a particular individual is an “employee.”<sup>3</sup> There are many reasons why this issue is important. First, only employees can sue under these statutes.<sup>4</sup> Second, an entity might not be covered by these statutes if it does not have the statutorily required

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1. This Article will not focus on the employment status of volunteer student interns. For articles regarding that topic, see Craig Durrant, Comment, *To Benefit or Not To Benefit: Mutually Induced Consideration as a Test for the Legality of Unpaid Internships*, 162 U. PA. L. REV. 169 (2013); Anthony J. Tucci, Note, *Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Public Agencies*, 97 IOWA L. REV. 1363 (2012); David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215 (2002); and Craig J. Ortner, Note, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613 (1998).

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3. The definitions of “employee” are found in the following sections of the United States Code: 42 U.S.C. § 2000e(f) (2012) (Title VII); 42 U.S.C. § 12111(4) (2012) (ADA); and 29 U.S.C. § 630(f) (2012) (ADEA). Throughout this Article, I will spend most of my time referencing Title VII; however, the statements I make about Title VII also apply to the ADA and the ADEA unless otherwise noted.

4. See *infra* cases discussed in Part IV. As will be addressed later, Title VII prohibits employers from discriminating against “individuals,” not “employees.” 42 U.S.C. § 2000e-2(a)(1) (2012). Nevertheless, despite an early opinion that did not restrict the term “individuals” to “employees,” *Sibley Mem’l Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973), courts now restrict lawsuits to “employees” (and job applicants and former employees), *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998).

minimum number of employees.<sup>5</sup> Finally, the number of employees determines the damage caps under the 1991 Civil Rights Act.<sup>6</sup> As a result, in an effort to minimize liability under these federal statutes (and in an effort to save on labor costs), some entities limit the number of individuals they “employ” and rely on volunteers and/or independent contractors.<sup>7</sup>

This Article will focus on the fact that volunteers cannot sue under federal anti-discrimination statutes and do not count as employees when determining whether an entity has the statutorily required minimum number of employees to be covered under these statutes. Unfortunately for volunteers, the federal anti-discrimination statutes’ language and legislative history,<sup>8</sup> the Equal Employment Opportunity Commission’s (EEOC) interpretation of these statutes,<sup>9</sup> and case law<sup>10</sup> are fairly clear that volunteers cannot sue the entities to which they devote their time.<sup>11</sup> Although some courts have allowed certain “volunteers” to bring discrimination claims, they have not truly conferred the right to sue upon volunteers as a class; rather, these courts decided only that the plaintiffs were not volunteers at all but *employees* and could therefore pursue their

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5. For example, both Title VII and the ADA do not apply to entities with fewer than fifteen “employees.” 42 U.S.C. 2000e(b) (2012); 42 U.S.C. § 12111(5)(A) (2012). The ADEA does not apply to entities with fewer than twenty “employees.” 29 U.S.C. § 630(b) (2012).

6. 42 U.S.C. § 1981a (2012) (establishing limits on compensatory and punitive damages under Title VII and the ADA).

7. The Supreme Court has addressed the issue of who is an employee under various federal statutes; however, in those cases, the issue did not involve the distinction between employees and volunteers, but the distinction between employees and independent contractors. *See, e.g.*, Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449 (2003) (applying a multi-factor, common-law agency test focusing on control when deciding whether physician-shareholders in a medical practice group were “employees” under the ADA); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1991) (applying a multi-factor, common-law agency test for determining who qualifies as an “employee” under ERISA); and Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739–40 (1989) (applying a common-law agency test focusing on control to determine whether an individual was an “employee” under the Copyright Act).

8. *See infra* Section III.A.

9. *See* EEOC Compl. Man. § 2-III(A)(1)(c) (U.S. 2000).

10. *See infra* Part IV.

11. These volunteers might, however, be able to bring tort or contract claims against their “employers” if the facts of those cases give rise to either of those types of causes of action.

claims.<sup>12</sup> Thus, for volunteers to gain the protections of federal anti-discrimination statutes, they must prove that they are actually employees inaccurately labeled as “volunteers.”<sup>13</sup>

Interestingly, a split of authority has developed regarding how someone qualifies as an employee. Some courts first analyze the benefits an individual receives and require a showing that those benefits constitute sufficient remuneration.<sup>14</sup> If there is sufficient remuneration, courts then use a common-law agency test to evaluate the relationship.<sup>15</sup> Other courts do not look at remuneration as a *threshold* inquiry, but rather consider it as *one factor* in evaluating the relationship.<sup>16</sup> Regardless of which test is used, if the court determines the plaintiff is a volunteer, he will have no remedy under Title VII, the ADA, and the ADEA. Despite the time these individuals devote to various types of entities, and despite the risks some of these individuals take (especially volunteer firemen), courts have routinely rejected their requests for protection from discrimination.<sup>17</sup>

This Article will first address the statutory provisions that have led courts to leave volunteers unprotected.<sup>18</sup> Next, the Article will explore the statutes’ legislative history and the EEOC’s position regarding this issue.<sup>19</sup> The Article will then address the circuit split regarding how

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12. See *infra* Part IV. In some situations, the issue was not whether the *plaintiff* was an employee who could sue; rather, the court had to determine whether other individuals in the “workplace” were employees who would count toward the statutorily-required minimum number of employees for an entity to be subject to federal anti-discrimination statutes. See *infra* Part IV.

13. Because entities must have a minimum number of employees to be covered under federal anti-discrimination statutes, plaintiffs must also occasionally prove that their “co-workers” are “employees.” See *supra* notes 5, 12.

14. See *infra* Part IV.

15. See *infra* Part IV. Although this test evaluates many factors, it focuses mostly on the amount of control the “employer” exerts over the “employee.” See *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449 (2003) (applying a multi-factor, common-law agency test focusing on control when deciding whether physician-shareholders in a medical practice group were “employees” under the ADA).

16. See *infra* Section IV.B.

17. See *infra* Part IV.

18. See *infra* Part II.

19. See *infra* Part III. As will be addressed later, the EEOC’s position regarding the issue of how to determine an individual’s employment status is not entirely clear. I do, however, try to clarify this issue later in the Article. See *infra* notes 36, 66.

courts determine employment status.<sup>20</sup> Finally, the Article will provide reasons how and why Congress, the courts, and the EEOC should expand protection to volunteers.<sup>21</sup> If these statutes' protections are expanded, more people will likely continue to volunteer their time and there will be more pleasant work environments; Congress, the courts, and the EEOC will send a message that *no* discrimination will be tolerated, regardless of the victim; and victims of discrimination will have a remedy, even if they are not true employees. In order to further these worthy goals, Congress, the courts, and the EEOC should do what they can to ensure that federal anti-discrimination statutes protect volunteers.

## II. THE RELEVANT STATUTORY PROVISIONS

There are several provisions of Title VII relevant to the issue of who may sue and whom those individuals can sue; these provisions are: (1) the substantive prohibition against discrimination,<sup>22</sup> (2) the definition of "employer,"<sup>23</sup> and (3) the definition of "employee."<sup>24</sup> First, Title VII's substantive prohibition against discrimination provides the following, in pertinent part:

It shall be an unlawful employment practice for an *employer* –

(1) 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.<sup>25</sup>

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20. See *infra* Part IV.

21. See *infra* Part V. The language Congress used to explain the EEOC's power to issue regulations is different under Title VII, the ADA, and the ADEA. See Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *FORDHAM L. REV.* 1937, 1941 (2006) (citing 42 U.S.C. § 2000e-12(a) (2012) (Title VII); 29 U.S.C. § 628 (2012) (ADEA); 42 U.S.C. § 12116 (2012) (ADA)).

22. 42 U.S.C. § 2000e-2 (2012).

23. § 2000e(b).

24. § 2000e(f). The ADA and the ADEA have similar provisions regarding the prohibition against discrimination, and they also have similar definitions of "employee" and "employer." See *infra* note 25.

25. § 2000e-2(a) (emphasis added). This provision from Title VII focuses on intentional discrimination (disparate treatment). Subsection (2) (not provided) addresses employer policies that tend to limit or segregate employment opportunities based on protected

The substance of Title VII's other relevant provisions is the following: (1) "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . [,]"<sup>26</sup> and (2) "[t]he term 'employee' means an individual employed by an employer . . . ."<sup>27</sup> Although Title VII's substantive prohibition against discrimination addresses discrimination against "individuals,"<sup>28</sup> courts have held that "individuals" means only employees (and job applicants, and former employees), and that it does not cover volunteers.<sup>29</sup> One reason for this interpretation is that the statute prohibits "employers" from engaging in discriminatory actions, suggesting that only *employees* are protected.<sup>30</sup> Also, the statute refers to "compensation, terms, conditions, or privileges of

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characteristics (disparate impact). § 2000e-2(a)(2). In the Civil Rights Act of 1991, Congress added a separate statutory provision to address claims of disparate impact. *See* § 2000e-2(k).

The ADA's relevant prohibitions and definitions can be found at § 12112 (providing a substantive prohibition against discrimination), § 12111(5) (defining "employer"), and § 12111(4) (defining "employee").

The ADEA's relevant prohibitions and definitions can be found at 29 U.S.C. § 623(a) (2012) (providing a substantive prohibition against discrimination), § 630(b) (defining "employer"), and § 630(f) (defining "employee"). All three statutes (Title VII, the ADA, and the ADEA) have very similar definitions of the terms "employer" and "employee."

26. 42 U.S.C. § 2000e(b).

27. § 2000e(f). As will be referenced several times in this Article, many courts have commented that Title VII's definition of "employee" is vague and of little value. *See infra* Part IV.

28. § 2000e-2(a). *See, e.g.,* *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1242–43 (11th Cir. 1998), where the court noted that Title VII prohibits discrimination against "individuals," but that just about all courts have limited Title VII protections to employees, former employees, and job applicants. The court relied on the following cases for this proposition: *McClure v. Salvation Army*, 460 F.2d 553, 556 (5th Cir. 1972); *Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997); *Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 491 (7th Cir. 1996); and *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793, 796 (2d Cir. 1986), abrogated by *Clackamas Gastroenterology Assocs., v. Wells*, 538 U.S. 440 (2003).

29. *See supra* note 28.

30. § 2000e-2(a). *See also Llampallas*, 163 F.3d at 1243 (observing that Congress intended to limit Title VII to employment relationships); *Tadros v. Coleman*, 717 F. Supp. 996, 1002 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 10 (2d Cir. 1990) ("Title VII is an *employment* law, available only to employees . . . seeking redress for the unlawful employment practices of their employers."). *But see Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (deciding that Title VII reaches beyond "employees" and allows other "individuals" to pursue discrimination claims).

*employment*,”<sup>31</sup> supporting the position that Title VII protects only employees (and job applicants and former employees).<sup>32</sup>

The ADEA and the ADA have similar provisions, and these statutes have also been interpreted as not applying to volunteers.<sup>33</sup> As a result, a plaintiff must satisfy the definition of “employee” and must also prove that the defendant has the requisite number of employees to be an “employer.” Although the first place courts look when determining an individual’s employment status is the just-discussed statutory language which restricts claims to employees, some courts also look to legislative history and the EEOC’s interpretation of these statutes for guidance.

### III. THE LEGISLATIVE HISTORY AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION’S POSITION

Two places courts sometimes look when interpreting these statutes are the statutes’ legislative history and the EEOC’s position on this issue.<sup>34</sup> The most relevant parts of the statutes’ legislative history involve (1) how Congress wanted the term “employee” interpreted, and (2) the purpose behind these statutes. The EEOC has addressed the volunteer issue in its Compliance Manual in two ways.<sup>35</sup> First, the agency has stated that the determination of employment status should be made by looking at a variety of factors,

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31. § 2000e-2(a)(1) (emphasis added).

32. Based on the language Congress used, courts *could* apply a very expansive interpretation and determine that *all* individuals (including volunteers) can pursue these claims; however, even if a volunteer can sue, that person must demonstrate that the defendant employs at least fifteen employees, and is therefore an “employer” subject to Title VII. *See* § 2000e(b) (defining employer); § 2000e-2(a) (providing examples of unlawful *employer* practices).

33. *See supra* note 25 for citations to the relevant definitions and substantive prohibitions from the ADEA and the ADA. *See also Fichman v. Media Ctr.*, 512 F.3d 1157, 1158–60 (9th Cir. 2008), where the plaintiff brought claims pursuant to both the ADEA and the ADA, and the court engaged in a similar analysis for both claims.

34. Although there is not much legislative history regarding whether federal anti-discrimination statutes protect volunteers, the legislative history does address how courts should interpret the terms “employee” and “employer.” *See, e.g., Graves v. Women’s Prof’l Rodeo Ass’n, Inc.*, 907 F.2d 71, 73 (8th Cir. 1990) (noting that Congress wanted the regular “dictionary definition[s]” to be used when interpreting these terms); *see also infra* this Part.

35. *See* EEOC Compl. Man. § 2-III(A)(1) (U.S. 2000). As noted earlier, Congress used different language when granting rule-making authority to the EEOC under Title VII, the ADA, and the ADEA. *See supra* note 21.

with no one factor being dispositive.<sup>36</sup> Second, the agency has made clear that it believes that volunteers cannot sue under federal anti-discrimination statutes; however, it has created some exceptions to this general rule.<sup>37</sup> The EEOC's positions on this issue will be addressed after the discussion of the statutes' legislative history.

#### *A. The Legislative History*

Although the statutes' legislative history does not *directly* address volunteers and whether they can sue, some courts have relied on the statutes' legislative history when deciding this issue or determining whether the defendant is subject to the statutes' prohibitions.<sup>38</sup> Most courts that look at legislative history rely on the history that instructs courts to look at the dictionary definition of "employee" when

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36. See § 2-III(A)(1). Specifically, the Manual provides the following: "The question of whether an employer-employee relationship exists is fact-specific and depends on whether the employer controls the means and manner of the worker's work performance. This determination requires consideration of all aspects of the worker's relationship with the employer." *Id.* These factors include: (1) "[t]he employer has the right to control when, where, and how the worker performs the job"; (2) "[t]he work does not require a high level of skill or expertise"; (3) "[t]he employer furnishes the tools, materials, and equipment"; (4) "[t]he work is performed on the employer's premises"; (5) "[t]here is a continuing relationship between the worker and the employer" (6) "[t]he employer has the right to assign additional projects to the worker"; (6) "[t]he employer sets the hours of work and the duration of the job"; (7) "[t]he worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job"; (8) "[t]he worker does not hire and pay assistants"; (9) "[t]he work performed by the worker is part of the regular business of the employer"; (10) "[t]he employer is in business"; (11) "[t]he worker is not engaged in his/her own distinct occupation or business"; (12) "[t]he employer provides the worker with benefits such as insurance, leave, or workers' compensation"; (13) "[t]he worker is considered an employee of the employer for tax purposes (i.e., the employer withholds federal, state, and Social Security taxes)"; (14) "[t]he employer can discharge the worker"; and (15) "[t]he worker and the employer believe that they are creating an employer-employee relationship." *Id.*

37. See § 2-III(A)(1)(c). These exceptions will be addressed in Section III.B of the Article. As will be discussed, the EEOC's positions could appear to be inconsistent. On one hand, the EEOC indicates that the determination of employment status evaluates several factors, with no one factor being dispositive. On the other hand, the EEOC seems to acknowledge the validity of the threshold remuneration test when it takes the position that some "volunteers" can be considered employees if they receive sufficient compensation for their services. The inconsistency might, however, be explained away by interpreting the EEOC's position as being that if an individual can satisfy the threshold remuneration test, he can then proceed to the next step of trying to satisfy the EEOC's multi-factor test.

38. See, e.g., *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1243 (11th Cir. 1998); *Haavistola v. Cmty. Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 220 (4th Cir. 1993); *Graves*, 907 F.2d at 73.

deciding employment status;<sup>39</sup> however, some courts dig a bit deeper to try to find the specific meaning of the relevant terms.<sup>40</sup>

One court that addressed this issue is the Eleventh Circuit.<sup>41</sup> One of the issues involved in *Llampallas v. Mini-Circuits, Lab, Inc.*, was whether non-employees could sue under Title VII.<sup>42</sup> The court (1) looked at Congressional intent and Title VII's legislative history,<sup>43</sup> (2) noted that, in enacting Title VII, Congress did not "presume to obliterate all manner of inequality,"<sup>44</sup> and (3) stated what it believed was the answer to this question.<sup>45</sup>

The court then looked at Title VII's 1972 Amendments, which extended Title VII's coverage to federal employment.<sup>46</sup> The court noted that the amendments covered "all personnel actions affecting *employees or applicants for employment* . . . [,]" and that the amendments would make sense only if the original statute applied only to employees.<sup>47</sup> The court concluded that "the amendment[s] support[] the interpretation of 'any individual' . . . as limited to those individuals who are employees."<sup>48</sup>

Another court to address Title VII's legislative history was the Eighth Circuit.<sup>49</sup> In *Graves v. Women's Professional Rodeo Ass'n*, the court used the ordinary, dictionary definitions of "employee," "employer," and "employ."<sup>50</sup> It did so because of Title VII's

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39. See *supra* note 34.

40. See *Llampallas*, 163 F.3d at 1243.

41. *Id.*

42. *Id.* at 1241–45.

43. *Id.* at 1243.

44. *Id.* (quoting *Keyes v. Sec'y of the Navy*, 853 F.2d 1016, 1026 (1st Cir. 1988)).

45. *Id.* ("Congress intended to limit the scope of the Act to specific employment relationships; thus, the statute provides relief only against 'employers' as defined under the statute. We can assume that Congress also meant to limit the pool of potential plaintiffs under Title VII; otherwise, any person could sue an 'employer' under the statute regardless of whether she actually had an employment relationship with that employer. Hence, courts have almost universally held that the scope of the term 'any individual' is limited to employees." (emphasis added)).

46. *Id.*

47. *Id.* (quoting Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 717, 86 Stat. 103, 111 (1972) (codified at 42 U.S.C. § 2000e-16(a) (1994))).

48. *Id.* Although the court in *Llampallas* certainly addressed the meaning of the term "employee," it focused more of its attention on the definition of "individual." *Id.* at 1242–43.

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

50. *Id.* at 72–73.

legislative history, which “explicitly provides that the dictionary definition should govern the interpretation of ‘employer’ under Title VII.”<sup>51</sup> After citing from *Webster’s Third New International Dictionary*, the court concluded:

Central to the meaning of these words is the idea of compensation in exchange for services: an employer is someone who pays, directly or indirectly, wages or a salary or other compensation to the person who provides services—that person being the employee. Compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, but it is an essential condition to the existence of an employer-employee relationship.<sup>52</sup>

As will be addressed later, *Graves* adopted the position the majority of courts use when distinguishing between employees and volunteers, requiring a threshold showing of sufficient remuneration before more details of the relationship can be evaluated.<sup>53</sup>

Another statement regarding Title VII’s legislative history comes from two district courts—the Eastern District of Pennsylvania<sup>54</sup> and the Middle District of North Carolina.<sup>55</sup> Specifically, the court in *Smith v. Berks Cmty. Television* relied on *McBroom v. Western Electric Co.* for the following proposition: “In enacting Title VII, Congress sought to eliminate a pervasive, objectionable history of denying or limiting one’s *livelihood* simply because of one’s race, color, sex, religion or national origin.’ . . . *Unpaid volunteers are not susceptible to the discriminatory practices which the Act was designed to*

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51. *Id.* at 73 (citing 110 CONG. REC. 7216 (1964) (subcommittee response to Sen. Dirksen’s memorandum)).

52. *Id.*

53. *Id.* at 73–74. As will be addressed later, the Fourth Circuit cited to the Eighth Circuit’s use of Title VII’s legislative history. *See Haavistola v. Cmty. Fire Co. of Rising Sun*, 6 F.3d 211, 220 (4th Cir. 1993). The Fourth Circuit also cited *Smith v. Berks Cmty. Television*, 657 F. Supp. 794 (E.D. Pa. 1987), for the following two propositions: (1) “[i]n enacting Title VII, Congress sought to eliminate a pervasive, objectionable history of denying or limiting one’s livelihood simply because of one’s race, color, sex, religion or national origin”; and (2) “[u]npaid volunteers are not susceptible to the discriminatory practices which the Act was designed to eliminate.” *Haavistola*, 6 F.3d at 221 (quoting *Smith*, 657 F. Supp. at 795).

54. *Smith*, 657 F. Supp. at 794.

55. *McBroom*, 429 F. Supp. at 909.

*eliminate.*<sup>56</sup> This statement reflects currently prevailing judicial views toward the interpretation of Title VII and other federal anti-discrimination statutes with respect to protecting volunteers.<sup>57</sup>

Thus, there is support for the position that Title VII applies only to employees (and job applicants and former employees).<sup>58</sup> First, congressional intent suggests that the term “employee” should be given its ordinary dictionary definition, and that dictionary definition would not include volunteers.<sup>59</sup> Second, the 1972 amendments arguably support the proposition that volunteers are not covered.<sup>60</sup> And finally case law interpreting the history behind anti-discrimination statutes suggests that Title VII was intended to protect against discrimination in *employment* opportunities, and that volunteers do not fall within the class Congress intended to protect when it passed Title VII and other federal anti-discrimination statutes.<sup>61</sup> As a result, volunteers must look elsewhere for protection against discrimination in the “workplace.”

### *B. The Equal Employment Opportunity Commission’s Position*

Although the EEOC has not published a regulation regarding this issue, it has addressed the issue in its Compliance Manual.<sup>62</sup> The

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56. *Smith*, 657 F. Supp. at 795 (quoting *McBroom*, 429 F. Supp. at 911) (emphasis added).

57. *See also* *Tawes v. Frankford Volunteer Fire Co.*, No. 03-842-KAJ, 2005 U.S. Dist. LEXIS 786, at \*10 (D. Del. Jan. 13, 2005) (“[T]he purpose of Title VII ‘is plain from the language of the statute. It was to achieve equality of *employment* opportunities and remove barriers that have operated in the past to favor an identifiable group.’” (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (emphasis added)).

58. As noted earlier, courts have interpreted the ADA and the ADEA in a similar manner. *See supra* notes 24, 25.

59. *See* 110 CONG. REC. 7216 (1964) (response of the subcommittee to Sen. Dirksen’s memorandum). Also, as was addressed in *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1243 (11th Cir. 1998), the term “individual” is limited to employees, job applicants, and former employees.

60. *See Llampallas*, 163 F.3d at 1242–44 (addressing Title VII and the 1972 amendments to the statute).

61. *See Smith*, 657 F. Supp. at 795 (quoting *McBroom*, 429 F. Supp. at 911). *See also* *Tadros v. Coleman*, 717 F. Supp. 996, 1002 (S.D.N.Y. 1989), *aff’d*, 898 F.2d 10 (2d Cir. 1990) (“Title VII is an *employment* law, available only to employees . . . seeking redress for the unlawful employment practices of their employers.”)

62. *See* EEOC Compl. Man. § 2-III(A)(1)(c) (U.S. 2000). One possible reason the EEOC has not issued a regulation regarding this issue is that its power to do so is unclear, as

Manual is clear that volunteers cannot sue under federal anti-discrimination statutes.<sup>63</sup> The Manual does, however, provide two exceptions:

Volunteers usually are not protected “employees.” However, an individual may be considered an employee of a particular entity if, as a result of volunteer service, s/he receives benefits such as a pension, group life insurance, workers’ compensation, and access to professional certification, even if the benefits are provided by a third party. The benefits constitute “significant remuneration” rather than merely the “inconsequential incidents of an otherwise gratuitous relationship.”<sup>64</sup>

. . .

A volunteer may also be covered by the EEO statutes if the volunteer work is required for regular employment or regularly leads to regular employment with the same entity. In such situations, discrimination by the respondent operates to deny the charging party an employment opportunity.<sup>65</sup>

Therefore, although the EEOC believes that volunteers are not protected, volunteers might be able to gain protection if they receive sufficient benefits or if their volunteer positions can lead to “regular employment” with the same entity.<sup>66</sup> Thus, while the EEOC believes that volunteers are not protected in most cases, it does provide for some situations in which they could pursue their claims.<sup>67</sup>

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Congress used different language when giving the agency the authority to promulgate regulations under Title VII, the ADA, and the ADEA. *See supra* note 21.

63. EEOC Compl. Man. § 2-III(A)(1)(c) (U.S. 2000).

64. *Id.* The EEOC Compliance Manual cited *Pietras v. Bd. of Fire Comm’rs of the Farmingville Fire Dist.*, 180 F.3d 468 (2d Cir. 1999), and *Haavistola v. Cmty. Fire Co. of Rising Sun*, 6 F.3d 211 (4th Cir. 1993) for these propositions.

65. *Id.* The case upon which the EEOC relied for this proposition was *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 198 n.4 (3d Cir. 1994).

66. *See infra* Part IV.

67. Of course, if the “volunteer” received these significant benefits, that person would most likely no longer be considered a “volunteer”; rather, he or she would be considered an employee. In *Volling v. Antioch Rescue Squad*, No. 11 C 04920, 2012 U.S. Dist. LEXIS 171623, at \*22 (N.D. Ill. Dec. 4, 2012), the Northern District of Illinois cited the Manual when determining whether an individual was an employee. The EEOC suggests using a list of factors when deciding who qualifies as an employee, but it also provides in its Compliance Manual that individuals can be considered employees if they receive sufficient benefits. *See supra* notes 36, 37. *See also infra* Part IV. As noted previously, these two positions taken by the EEOC could appear to be inconsistent. On one hand, the EEOC indicates that the determination of employment status evaluates several factors, with no one factor being

Although the EEOC usually takes pro-plaintiff positions, it does not take a pro-plaintiff approach on the issue of whether volunteers can pursue claims under federal anti-discrimination statutes.<sup>68</sup> Nonetheless, by providing some exceptions to this general rule, the EEOC is giving hope to some individuals who dedicate time and effort to benefit a particular organization.<sup>69</sup> Although not many courts have relied specifically on the EEOC's Compliance Manual when addressing this issue, the Fifth Circuit cited to the Manual in support of its position that while volunteers are generally not protected, in some circumstances certain "volunteers" can pursue their claims.<sup>70</sup> That opinion, along with other opinions that relied on the EEOC's position, will be addressed in the next Part of this Article.<sup>71</sup>

#### IV. THE CIRCUIT SPLIT REGARDING HOW TO DETERMINE EMPLOYMENT STATUS

Although courts agree that volunteers are not covered under federal anti-discrimination statutes, the courts are split regarding

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dispositive. On the other hand, the EEOC seems to acknowledge the validity of the threshold remuneration test when it provides the first exception listed above. The inconsistency might, however, be explained by interpreting the EEOC's position as being that if an individual can fall in to the exception regarding remuneration, he or she can then proceed to the next step of trying to satisfy the EEOC's multi-factor test.

68. As will be addressed later, one interpretation of the EEOC Compliance Manual is that it does take a more pro-plaintiff approach by endorsing the totality-of-the-circumstances test rather than the threshold remuneration test. *But see supra* notes 37, 67.

69. Specifically, according to the EEOC, an individual can lose his "volunteer" status and become an employee if he receives sufficient benefits and/or if his volunteer activities can create a pathway to full-time employment. *See* § 2-III(A)(1)(c).

70. *See Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 439 (5th Cir. 2013). In addition to the Fifth Circuit, the Sixth Circuit also looked at the EEOC's position on this issue. *See Bryson v. Middlefield Volunteer Fire Dep't, Inc.*, 656 F.3d 348, 353 (6th Cir. 2011), where the court noted the EEOC's position that volunteers are typically not employees, but can be considered employees if they receive sufficient benefits. In *Bryson*, the EEOC had determined that the individuals in question were employees because their employer "exercise[d] sufficient control over the actions of the [m]embers" and because the members received compensation despite not being on the defendant's payroll. *Id.* In a different case, the United States District Court for the District of Massachusetts also relied on the EEOC Compliance Manual when it evaluated the status of several individuals the plaintiff claimed were "employees" under the ADA. *See Mahoney v. Morgan*, No. 08-10879-MBB, 2010 U.S. Dist. LEXIS 97224, at \*23-24 (D. Mass. Sept. 16, 2010).

71. *See supra* note 36 for the list of factors the EEOC considers when determining employment status.

how to determine whether someone is a volunteer or an employee.<sup>72</sup> Most courts first evaluate whether the individual receives sufficient remuneration prior to *possibly* being considered an employee.<sup>73</sup> If the individual receives sufficient remuneration, the courts then use common-law agency principles to determine the nature of the relationship; this multi-factor, common-law agency test focuses on the control the “employer” can exercise over the “employee.”<sup>74</sup> Some circuits, however, take a different approach and look at remuneration as only *one factor* used to determine employment status.<sup>75</sup> Irrespective of which test the courts use, the analysis of employment status does not address whether volunteers can sue; it answers only whether the individuals are, in fact, volunteers. By answering only that question, the courts fail to address the more important issue of whether volunteers should be protected from discrimination in the workplace.

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72. See *supra* Part I.

73. The Second, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits follow the majority approach and require a finding of sufficient remuneration before evaluating the other aspects of the relationship. See *infra* this Part. The United States Court of Appeals for the District of Columbia Circuit has not yet directly addressed this issue, but that court did apply a similar two-part inquiry in determining whether auxiliary choristers were employees under the National Labor Relations Act. See *Seattle Opera v. NLRB*, 292 F.3d 757, 761–63 (D.C. Cir. 2002).

74. *Bryson v. Middlefield Volunteer Fire Dep’t, Inc.*, 656 F.3d 348, 356–59 (6th Cir. 2011) (Gibbons, J., concurring in part and dissenting in part). In addition to looking at the “control” issue, some courts look at the “economic realities” of the situation to see if the “employee” is truly dependent on the “employer.” See *Dorr v. Ford Motor Co.*, No. 10-CV-13822, 2011 U.S. Dist. LEXIS 133827, at \*12–13 (E.D. Mich. Sept. 27, 2011), *adopted by*, 2011 U.S. Dist. LEXIS 133776 (E.D. Mich. Nov. 21, 2011).

75. The Sixth Circuit and the Ninth Circuit follow this approach. See *infra* Section IV.B. Also, at least one district court from within the First Circuit has relatively recently utilized the totality-of-the-circumstances test when deciding the employment status of several individuals. See *Mahoney*, 2010 U.S. Dist. LEXIS 97224 at \*17–20 (relying on *Lopez v. Massachusetts*, 588 F.3d 69, 84–85 (1st Cir. 2009)). In that opinion, the court noted that lack of remuneration was not dispositive. See *Mahoney*, 2010 U.S. Dist. LEXIS 97224, at \*23–24. A district court from within the Seventh Circuit also followed this approach, creating a split within the Seventh Circuit. See *Volling v. Antioch Rescue Squad*, No. 11 C 04920, 2012 U.S. Dist. LEXIS 171623 at \*22–28 (N.D. Ill. Dec. 4, 2012).

*A. The Majority Approach*

In determining employment status, most courts require a two-part inquiry. The first part evaluates the individual's remuneration.<sup>76</sup> If there is no remuneration, or if the remuneration is negligible, that individual will not be considered an employee.<sup>77</sup> If, however, there is more than *de minimis* remuneration, the court will then look at common-law agency principles and evaluate factors related to those principles to determine the nature of the relationship.<sup>78</sup> This approach is followed by the Second, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits.<sup>79</sup>

The Second Circuit addressed this issue in *Pietras v. Bd. of Fire Comm'rs of the Farmingville Fire Dist.*, where the plaintiff, a volunteer probationary firefighter, alleged a Title VII violation.<sup>80</sup>

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76. See, e.g., *Bryson*, 656 F.2d at 356 (Gibbons, J., concurring in part and dissenting in part). Although I am using the term "plaintiff" here, this analysis also applies in situations where it is clear that the plaintiff is an employee, but the court has to determine whether the defendant meets the fifteen-employee threshold to be an "employer" under Title VII. Some of the cases described in this Section address whether the plaintiff was an employee; some address whether the other people "working" for the defendant were employees; and some cases address both issues. Nonetheless, courts use the same analysis regardless of whether they are trying to determine the employment status of a plaintiff or the employment status of individuals who might or might not count toward the threshold needed for coverage under federal anti-discrimination statutes.

77. *Id.*

78. *Id.*

79. See cases cited *infra* this Section. The First, Third, Seventh, and D.C. Circuits have not squarely addressed this issue; however, as will be discussed in this Section, district courts from within these jurisdictions have issued opinions regarding this issue. See *infra* this Section.

80. 180 F.3d 468, 470 (2d Cir. 1999). In addition to *Pietras*, the following cases from the Second Circuit and from district courts within the Second Circuit also support the proposition that the first question to evaluate when determining employment status is whether the individual receives adequate remuneration for the work he performs. *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 372 (2d Cir. 2006) (noting that courts should look to the "common-law principles" only in situations that "plausibly approximate an employment relationship," and that there must be some direct or indirect remuneration from the employer. If no remuneration exists, there is no employment relationship); *Knight v. State Univ. of N.Y. at Stony Brook*, No. 13-CV-0481(JS)(GRB), 2013 U.S. Dist. LEXIS 161185, at \*7-8 (E.D.N.Y. Nov. 12, 2013) (noting that when determining the nature of the relationship, the first question to ask is whether the plaintiff has received any type of remuneration from the defendant); *Pastor v. P'ship for Children's Rights*, No. 10-CV-5167(CBA)(LB), 2012 U.S. Dist. LEXIS 140917, at \*3-7 (E.D.N.Y., Sept. 27, 2012), *aff'd*, 538 F. App'x 119 (2d Cir. 2013) ("Volunteers and interns constitute employees under Title VII and the ADA only if they receive some kind of direct or indirect financial benefit or promise thereof from an employer."); *Carcasole-Lacal v. Am. Airlines, Inc.*, No. 02-CV-4359(DGT), 2003 U.S. Dist.

One issue the court addressed was whether the plaintiff was an employee.<sup>81</sup> Recognizing that Title VII's definitions of "employee" and "employer" were not helpful, the court stated that when Congress used the word "employee," it intended "the conventional master-servant relationship as understood by common-law agency doctrine."<sup>82</sup> The court then observed that this question "usually turns on whether [the individual] has received 'direct or indirect remuneration' from the alleged employer."<sup>83</sup> Rejecting the argument that an employee must receive a salary, the court noted that receipt of other types of benefits could result in an employment relationship.<sup>84</sup> The court stated: "[I]t is clear that an employment relationship within the scope of Title VII can exist even when the putative employee receives no salary so long as he or she gets numerous job-related benefits."<sup>85</sup> Here, the plaintiff received a retirement pension, life and disability insurance, death benefits, and some medical benefits.<sup>86</sup> The court concluded that because of these benefits, the district court was not clearly erroneous in deciding that the plaintiff *was* an employee.<sup>87</sup> Thus, although the defendant thought it used *volunteers*, the court concluded that some of those individuals could be considered employees;<sup>88</sup> the court did not,

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LEXIS 11507, at \*19–20 (E.D.N.Y. July 8, 2003), *aff'd*, 2005 U.S. App. LEXIS 13619 (2d Cir. July 7, 2005) (noting that under the ADEA, an employee must be the recipient of "some type of job-related benefits" and meet the common-law agency test); *Tyszka v. Edward McMahon Agency*, 188 F. Supp. 2d 186, 193 (D. Conn. 2001) (noting that a plaintiff must receive direct or indirect benefits to be considered an employee); *Keller v. Niskayuna Consol. Fire Dist. 1*, 51 F. Supp. 2d 223, 231–32 (N.D.N.Y. 1999) (noting that there is no employment relationship without any "hire[.]" which would entail *guaranteed* benefits in exchange for services provided).

81. *Pietras*, 180 F.3d at 472–73.

82. *Id.* at 473 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992)).

83. *Id.* (quoting *O'Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997)).

84. *Id.*

85. *Id.*

86. *Id.* at 471

87. *Pietras v. Bd. of Fire Comm'rs of Farmingville Fire Dist.*, 180 F.3d 468, 473 (2d Cir. 1999).

88. *Id.* Following the majority rule, the court should have next applied common-law agency principles to analyze the relationship. See *United States v. City of New York*, 359 F.3d 83, 91–92 (2d Cir. 2004) (noting that to prove "employee" status, one must show that he was hired by the putative employer and then prevail under the multi-factor, common-law agency test). See also *EEOC v. Inc. Vill. of Valley Stream*, 535 F. Supp. 2d 323, 328–29 (E.D.N.Y.

however, tackle the issue of whether “true” volunteers could sue under Title VII.<sup>89</sup>

A few years after *Pietras*, the Second Circuit again addressed this issue.<sup>90</sup> In *York v. Ass’n of the Bar of the City of New York*, the plaintiff was involved with the Association of the Bar of the City of New York, which provided her with clerical assistance, a workspace, publicity, and reimbursement for out-of-pocket expenses.<sup>91</sup> The plaintiff also used her position to network and to take tax deductions.<sup>92</sup> The plaintiff sued the defendant after she stopped “working,” allegedly because she rebuffed sexual advances and was retaliated against for doing so.<sup>93</sup> Relying on *O’Connor v. Davis* and *Pietras*, the court decided that the plaintiff was not an employee.<sup>94</sup>

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2008), where the court followed *Pietras* and concluded that there was a question of fact regarding whether volunteer firefighters were employees under the ADEA. The court based its conclusion on the fact that volunteer firefighters were entitled to receive several “significant benefits.” *Id.*

89. Even prior to *Pietras*, the Second Circuit had determined that remuneration was a “preliminary question” which can be dispositive of the issue of whether an individual is an employee under Title VII. See *O’Connor v. Davis*, 126 F.3d 112, 115–16 (2d Cir. 1997) (“[O]nly where a ‘hire’ has occurred should the common-law agency analysis be undertaken.”). See also *City of New York*, 359 F.3d at 91–92, where the court observed that to prove “employee” status, one must first show that he was hired by the putative employer (by showing remuneration for work performed); *Pastor v. P’ship for Children’s Rights*, No. 10-CV-5167(CBA)(LB), 2012 U.S. Dist. LEXIS 140917, at \*6 (E.D.N.Y., Sept. 27, 2012), *aff’d*, 538 F. App’x 119 (2d Cir. 2013), (noting that volunteer attorneys were not “employees” despite receiving reimbursement for CLE courses and training relevant to their work). In *Pastor*, the court determined that these benefits were not sufficiently substantial, but were rather “merely incidental” to the work the volunteers performed. *Id.* at \*6–7.

90. *York v. Ass’n of the Bar of N.Y.C.*, 286 F.3d 122 (2d Cir. 2002).

91. *Id.* at 124.

92. *Id.*

93. *Id.*

94. *Id.* at 125–26 (“We have refined the rather elliptical statutory definition to hold that ‘a prerequisite to considering whether an individual is [an employee] is that the individual have been hired in the first instance.’ Furthermore, we 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.’ . . . Where no financial benefit is obtained by the purported employee from the employer, no ‘plausible’ employment relationship of any sort can be said to exist because although ‘compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, . . . it is an essential condition to the existence of an employer-employee relationship.’”) (quoting *O’Connor*, 126 F.3d at 115–16; *Pietras v. Bd. of Fire Comm’rs of the Farmingville Fire Dist.*, 180 F.3d 468, 473 (2d Cir. 1999); *Graves v. Women’s Prof’l Rodeo Ass’n, Inc.*, 907 F.2d 71, 73 (8th Cir. 1990)).

The court then noted the type of benefits that could turn a volunteer relationship into an employment relationship; these benefits included salary, wages, vacation, sick pay, or health insurance.<sup>95</sup> The court indicated that these benefits “must meet a minimum level of ‘significance,’ or substantiality, in order to find an employment relationship in the absence of more traditional compensation.”<sup>96</sup> The court concluded that the benefits the plaintiff received “were merely incidental to the administration of the Association’s programs for the benefit of the bar at large.”<sup>97</sup> The court also noted that “a party claiming to be an employee under Title VII must come forward with substantial benefits not merely incidental to the activity performed in order to satisfy this Circuit’s remuneration test.”<sup>98</sup> The court then concluded that the plaintiff could not meet that standard.<sup>99</sup> As demonstrated by the holdings in *Pietras* and *York*, the Second Circuit follows the majority approach of requiring a preliminary inquiry into remuneration before looking at other aspects of the “employment” relationship.

Although the Third Circuit has not addressed this issue, district courts within the Third Circuit have done so.<sup>100</sup> In *Tawes v. Frankford Volunteer Fire Co.*, the plaintiff was a volunteer firefighter who sued under the ADA; one issue the court addressed was whether the volunteer firefighters were employees.<sup>101</sup> This was relevant because, excluding the firefighters, the department never had more than three employees, making the ADA inapplicable.<sup>102</sup> After noting the ADA’s definition of “employee” was not helpful, the court looked to Title VII precedent by the Supreme Court.<sup>103</sup>

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95. *York*, 286 F.3d at 126 (quoting *Pietras*, 180 F.3d at 473).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *See, e.g.*, *Tawes v. Frankford Volunteer Fire Co.*, No. 03-842-KAJ, 2005 U.S. Dist. LEXIS 786 (D. Del. Jan. 13, 2005).

101. *Id.* at \*1, 8–9.

102. *Id.* at \*8.

103. *Id.* at \*9–11. (“The Supreme Court has stated that the purpose of Title VII ‘is plain from the language of the statute. It was to achieve equality of *employment opportunities* and remove barriers that have operated in the past to favor an identifiable group.’ ‘In enacting Title VII, Congress sought to eliminate a pervasive, objectionable history of denying or limiting one’s livelihood simply because of one’s race, color, sex, religion or national origin.’

The court cited to the Supreme Court for the proposition that 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.”<sup>104</sup> The court continued, “[a]s such, when determining if an individual’s livelihood is denied or limited in an employment discrimination case, ‘one must examine the economic realities underlying the relationship between the individual and the so-called principal.’”<sup>105</sup> Although the court appeared to be applying the “economic realities” test, the court specifically noted that “[c]ompensation is of course of paramount importance to such an inquiry.”<sup>106</sup>

After recognizing how other courts have addressed the status of volunteers, the court analyzed the at-issue benefits.<sup>107</sup> These benefits included “line-of-duty benefits” (secondary automobile insurance, death and disability benefits, funeral expenses, eligibility for workers’ compensation, a tax credit for the purchase of items necessary for the position, training, and uniforms and equipment used to perform the plaintiff’s role as a firefighter), discounts on wireless phones (and phone service), and use of the department’s facilities.<sup>108</sup> The court concluded that the “line-of-duty benefits” were insufficient to establish an employment relationship, as they “ha[d] no benefit outside of one’s role as a firefighter.”<sup>109</sup> The court also concluded

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The same motivation can be seen in the text of the ADA, which states that the statute is applicable in ‘regard to job application procedures, the hiring, advancement, or discharge of *employees*, *employee* compensation, job training, and other terms, conditions, and privileges of *employment*.’” (emphasis added) (internal citations omitted)).

104. *Id.* at \*11 (quoting *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 185 (1970)).

105. *Tawes*, 2005 U.S. Dist. LEXIS 786, at \*11 (quoting *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983), *abrogated by* *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006)).

106. *Id.* (citing *O’Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997)). The “economic realities” test focuses on whether the individual at issue is dependent upon the business or entity for which he “volunteers” his time. *See W.M. Webb, Inc.*, 397 U.S. at 185. If courts adopt this test when deciding employment status of “volunteers,” most volunteers would not be considered employees because they are not relying on their volunteer positions as a means of support.

107. *Tawes*, 2005 U.S. Dist. LEXIS 786, at \*14–17. Specifically, the court looked at *Graves v. Women’s Prof’l. Rodeo Ass’n, Inc.*, 907 F.2d 71 (8th Cir. 1990); *Hall v. Delaware Council on Crime & Justice*, 780 F. Supp. 241, 244 (D. Del. 1992), *aff’d*, 975 F.2d 1549 (3d Cir. 1992); *Smith v. Berks Cmty. Television*, 657 F. Supp. 794, 795–96 (E.D. Pa. 1987), and *Haavistola v. Cmty. Fire Co. of Rising Sun*, 6 F.3d 211 (4th Cir. 1993). *Graves*, *Smith*, and *Haavistola* will be discussed in greater detail later in this Part of the Article.

108. *Tawes*, 2005 U.S. Dist. LEXIS 786, at \*3–4.

109. *Id.* at \*14.

that wireless phone and phone service discounts were insufficient.<sup>110</sup> The issue with which the court had the most trouble was the pension benefit.<sup>111</sup> After analyzing that benefit, the court concluded that such a *de minimis* benefit could not create an employment relationship.<sup>112</sup>

Finally, the court looked at how the parties viewed the relationship.<sup>113</sup> According to the court, the parties viewed the relationship as being of a volunteer nature.<sup>114</sup> The remuneration was no more than *de minimis*, and the plaintiff's work did not "allow[] him . . . to qualify to work in new and desirable fields."<sup>115</sup> Also, the plaintiff admitted that firefighting brought him "pride and intangible benefits."<sup>116</sup> While acknowledging the volunteers' sacrifices, the court noted that the volunteers did not make those sacrifices as employees<sup>117</sup> and concluded that the department was not an employer under the ADA.<sup>118</sup> Therefore, at least one district court within the Third Circuit focused on remuneration as a preliminary inquiry when evaluating the at-issue relationship.<sup>119</sup>

The Fourth Circuit addressed this issue in *Haavistola v. Cmty. Fire Co. of Rising Sun*, where the court had to decide whether a

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110. *Id.* at \*14–15.

111. *Id.* at \*15–16.

112. *Id.* (internal citations omitted) (emphasis added).

113. *Id.* at \*16–17.

114. *Id.* at \*16–17.

115. *Id.* at \*17.

116. *Id.*

117. *Id.*

118. *Id.*; See also *Hall v. Del. Council on Crime & Justice*, 780 F. Supp. 241, 244 (D. Del. 1992), *aff'd*, 975 F.2d 1549 (3d Cir. 1992), where the court concluded that the defendant was not an employer because it did not have the required minimum of fifteen employees. The plaintiff argued that certain volunteers were employees, but the court rejected the plaintiff's argument. *Id.* The only benefits to which the volunteers were entitled were free admission to an annual luncheon and reimbursement for work-related expenses. *Id.* The court cited *Smith v. Berks Cmty. Television*, 657 F. Supp. 794 (E.D. Pa. 1987), for the proposition that volunteers are not covered under Title VII, and that Title VII focuses on "compensation, terms, conditions or privileges of *employment*." *Hall*, 780 F. Supp. at 244 (citing *Smith*, 657 F. Supp. at 794) (emphasis added). Predictably, the court determined that these forms of "compensation" were insufficient to establish an employment relationship. *Id.*

119. See also *Day v. Jeannette Baseball Ass'n*, No. 12-267, 2013 WL 5786457, at \*4 (W.D. Pa. Oct. 28, 2013) (observing that the common-law, multi-factor analysis is not applicable if the individual in question does not meet the threshold requirement of being a "hired party"). *But see* *Houston v. Twp. of Randolph*, 934 F. Supp. 2d 711, 739 n.26 (D.N.J. 2013) (noting that the determination of employee status is based on the amount of control the "employer" has over the manner and means by which the work is completed).

volunteer firefighter could pursue a Title VII claim.<sup>120</sup> This case involved a sexual assault and an indefinite suspension,<sup>121</sup> but the critical issue was whether the plaintiff was an employee.<sup>122</sup> The court started by quoting Title VII's text and then framed the issue as being whether a member of a fire department "who receives no direct remuneration" is protected by Title VII.<sup>123</sup> Citing to cases involving the employee/independent contractor distinction,<sup>124</sup> the court noted the importance of the control the defendant had over the plaintiff, but it then noted that the control "loses some of its significance" when "compensation is not evident."<sup>125</sup> The court then focused on how this issue should be resolved with volunteers.<sup>126</sup> The court relied on the Eighth Circuit's opinion in *Graves*,<sup>127</sup> the Eighth Circuit's use of Title VII's legislative history,<sup>128</sup> and the Eighth Circuit's reliance on the dictionary definitions of the relevant terms and concluded:

[C]entral to the meaning of these words is the idea of compensation in exchange for services: an employer is someone who pays, directly or indirectly, wages or a salary or other compensation to the person who provides the services—that person being the employee. Compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, but it is an *essential* condition to the existence of an employer-employee relationship.<sup>129</sup>

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120. *Haavistola v. Cmty. Fire Co. of Rising Sun*, 6 F.3d 211 (4th Cir. 1993).

121. *Id.* at 213–14.

122. *Id.* at 219.

123. *Id.*

124. *Id.* at 219–20. The cases to which the Fourth Circuit referred were *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979 (4th Cir. 1983), and *Bartels v. Birmingham*, 332 U.S. 126 (1947).

125. *Haavistola*, 6 F.3d at 220.

126. *Id.* at 220–21. Specifically, the court discussed *Graves v. Women's Prof'l Rodeo Ass'n*, 907 F.2d 71 (8th Cir. 1990), and *Smith v. Berks Cmty. Television*, 657 F. Supp. 794 (E.D. Pa. 1987).

127. *Graves*, 907 F.2d at 71. *See infra* this Part.

128. *Haavistola*, 6 F.3d at 220. The legislative history to which the court referred was the portion of the Congressional Register that noted that the "dictionary definitions" of "employee" and "employer" should govern those words' meanings. *See* 110 CONG. REC. 7216 (1964). As noted earlier, the court also cited to *Berks Community Television*, which relied on legislative history for the idea that volunteers are not covered under Title VII. *Haavistola*, 6 F.3d at 221 (quoting *Berks Cmty. Television*, 657 F. Supp. at 795)).

129. *Haavistola*, 6 F.3d at 220 (quoting *Graves*, 907 F.2d at 73) (emphasis added).

After discussing *Graves* and *Smith*, the court concluded that the current case fell somewhere between the two because the plaintiff did not receive any direct compensation, but she did receive some benefits.<sup>130</sup> Specifically, the plaintiff received a disability pension, survivors' benefits, scholarships for dependents in case of disability or death, a state flag in the event of death while serving in the line of duty, group life insurance, tuition reimbursement, workers' compensation coverage, tax benefits, the ability to buy a special registration plate, access to certification to become a paramedic, and some other benefits under federal law.<sup>131</sup> The district court had concluded that the plaintiff was a volunteer, but the Fourth Circuit concluded that this determination could not be made as a matter of law.<sup>132</sup> Rather, the issue of whether the benefits "represent[ed] indirect but significant remuneration as [the plaintiff] contends or inconsequential incidents of an otherwise gratuitous relationship as [the defendant] argues . . ." <sup>133</sup> was a question of fact; if the factfinder determined that the relationship was a gratuitous one, the plaintiff could not pursue her claim.<sup>134</sup>

Thus, this is another example of where, instead of addressing whether volunteers should be able to pursue discrimination claims, the court avoided the issue by focusing on whether the plaintiff was truly a volunteer.<sup>135</sup> And it is another example of a court requiring an initial inquiry into remuneration when evaluating employment status.

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130. *Id.* at 221.

131. *Id.*

132. *Id.* at 221–22.

133. *Id.* at 222. In a district court case from within the Fourth Circuit, the court determined that there was a question of fact regarding whether the "employer's" payment of an intern's tuition "constitute[d] 'indirect but significant remuneration' or 'inconsequential incidents of an otherwise gratuitous relationship.'" *See Wooten v. Epworth United Methodist Church*, No. 1:06-CV-778, 2007 U.S. Dist. LEXIS 50716, at \*15–16 (M.D.N.C. July 11, 2007) (quoting *Haavistola*, 6 F.3d at 222).

134. *Haavistola*, 6 F.3d at 222. On remand, the jury concluded that the plaintiff was not an employee. *Haavistola v. Cmty. Fire Co. of Rising Sun*, 839 F. Supp. 372, 373 (D. Md. 1994).

135. The court was, however, acknowledging that volunteers could not pursue federal discrimination claims; if they could, then the inquiry into the plaintiff's status would not have been necessary. *See also Finkle v. Howard Cty., Md.*, 12 F. Supp. 3d 780, 784–87 (D. Md. 2014) (following *Haavistola* and concluding that a person applying for a volunteer position could pursue a Title VII claim because of the "line-of-duty" benefits available to the plaintiff). *But see Evans v. Wilkinson*, 609 F. Supp. 2d 489 (D. Md. 2009) (deciding that the plaintiff was not an employee despite the existence of a "length of service" benefits program, homeowner's assistance for first-time homeowners, and a scholarship program); *Blankenship v.*

Recently, the Fifth Circuit determined that remuneration was critical to an employment relationship, and that before a court looks to other factors, there must first be a finding of sufficient remuneration.<sup>136</sup> In *Juino v. Livingston Parish Fire Dist. No. 5*, a volunteer firefighter sued under Title VII.<sup>137</sup> The court noted that “the existence of an employment relationship in the volunteer context [was] an issue of first impression,” and provided a thorough analysis of the issue.<sup>138</sup> The court cited the Supreme Court’s observation that Title VII’s definition of “employee” was “completely circular and explain[ed] nothing.”<sup>139</sup>

The court then noted that when a statute provided such an unhelpful definition, Congress intended courts to utilize the “conventional master-servant relationship as understood by common-law agency doctrine.”<sup>140</sup> After discussing the common-law test, the court addressed how to apply the test to the volunteer situation.<sup>141</sup> After analyzing how other courts have handled this issue, the court ultimately sided with the majority approach.<sup>142</sup>

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City of Portsmouth, 372 F. Supp. 2d 496, 500 (E.D. Va. 2005), (noting that the plaintiff, an auxiliary police officer who was bringing suit under the ADEA and under Title VII, was not an employee under either statute because he did not receive compensation or monetary benefits).

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

137. *Id.* at 432.

138. *Id.* at 432–38.

139. *Id.* at 434 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992)). The Fifth Circuit also noted that prior to this opinion, the district courts within the Fifth Circuit had reached different conclusions regarding how to analyze this issue. *Id.* at 435 n.2.

140. *Id.* at 434 (quoting *Arbaugh v. Y&H Corp.*, 380 F.3d 219, 226 (5th Cir. 2004), *rev’d on other grounds*, 546 U.S. 500 (2006)); *see also* *Gulino v. N.Y. State Educ. Dep’t*, 460 F.3d 361, 371 (2d Cir. 2006) (“[T]he Supreme Court has stressed that, ‘when Congress has used the term ‘employee’ without defining it, . . . Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.’”) (quoting *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989)).

141. *Juino*, 717 F.3d at 434. Specifically, the court described the test in the following manner:

The economic-realities portion of the test asks whether putative employees, “as a matter of economic reality, are dependent upon the business to which they render service.” The common law control portion of the test, which courts should emphasize over the economic realities portion, assesses “the extent to which the one for whom the work is being done has the right to control the details and means by which the work is to be performed.”

*Id.* (citations omitted). The court then went on to describe the factors that were relevant to this analysis:

The court concluded that “[l]ike the majority of our sister circuits, we will ‘turn to common-law principles to analyze the character of an economic relationship only in situations that plausibly approximate an employment relationship.’”<sup>143</sup> According to the court, it was Congress’s role to change this situation if Congress felt it was necessary to protect individuals such as the plaintiff.<sup>144</sup> This is one more example of a United States Court of Appeals adopting the majority approach and requiring an inquiry into remuneration before evaluating other aspects of the at-issue relationship.

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(1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the “employer” or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated [,] i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the “employer”[,]; (9) whether the worker accumulates retirement benefits; (10) whether the “employer” pays social security taxes; and (11) the intention of the parties.

*Id.* at 434–35 (quoting *Diggs v. Harris Hosp.-Methodist, Inc.*, 847 F.2d 270, 272–73 (5th Cir. 1988)).

142. *Id.* at 435–39 (“After consideration of both approaches, we adopt the threshold-remuneration test, as we find it uniquely suited to assessing a plausible employment relationship within the volunteer context. In support, we conclude that *O’Connor* is persuasive, i.e., that a volunteer is distinguishable from the employee-independent contractor situation because there is a prerequisite of a ‘hire’ in the latter . . . . *This point is further borne out by the fact that a volunteer is generally not an ‘employee,’ and thus no ‘hire’ has occurred since there is no receipt of remuneration supporting an employer-employee relationship.*”) (emphasis added) (relying on *O’Connor v. Davis*, 126 F.3d 112, 115 (2d Cir. 1997) and on the EEOC Compliance Manual § 2-III(A)(1)(c)).

143. *Id.* at 439 (quoting *O’Connor*, 126 F.3d at 115).

144. *Id.* (citing *O’Connor*, 126 F.3d at 119). The court then analyzed the type of remuneration the plaintiff received (a \$2.00-per-call fee, life insurance, uniform and badge, firefighting gear, and firefighter training) and concluded that these benefits were not sufficient to establish an employment relationship. *Id.* at 439–40. In a pre-*Juino* opinion, the Southern District of Texas concluded that a plaintiff was not an employee despite the fact he would have been able to take certification courses at no cost, make connections with individuals who might have been able to help him obtain permanent employment, and obtain experience that would have made him a more attractive candidate for a full-time position. *See Moran v. Harris Cty.*, No. H-07-582, 2007 U.S. Dist. LEXIS 64673, at \*3–4 (S.D. Tex. Aug. 31, 2007). When distinguishing between employees and volunteers, the court stated the following: “What distinguishes an employee from a volunteer is that in exchange for his labor, an employee is paid—directly or indirectly—money.” *Moran*, 2007 U.S. Dist. LEXIS 64673, at \*3.

The Seventh Circuit has not yet addressed this issue, but district courts within that circuit have done so, with inconsistent results.<sup>145</sup> In *Holder v. Town of Bristol*, the plaintiff was a volunteer reserve police officer who was subjected to sexual harassment and eventually resigned.<sup>146</sup> The court concluded that the plaintiff was not an employee; the defendant was not an employer; and therefore, the plaintiff could not pursue his claim.<sup>147</sup> There were thirteen full-time employees, although there would be as many as twenty-five employees if the reserve police officers were considered employees.<sup>148</sup> When addressing the officers' status, the plaintiff urged the court to use the "economic realities" test.<sup>149</sup> The court noted that this test is more appropriate when distinguishing between employees and independent contractors, and that using the economic realities test in the volunteer context is "like using a screwdriver when the job calls for a wrench."<sup>150</sup>

The court in *Holder* noted that other courts "uniformly held that remuneration in exchange for services is an essential condition to the existence of an employer-employee relationship."<sup>151</sup> The court also recognized that remuneration need not be direct; salaries or an hourly wage are not essential.<sup>152</sup> In fact, the court addressed cases in which one of the benefits was an increase in the chance of being hired on a full-time basis.<sup>153</sup>

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145. See e.g., *Holder v. Town of Bristol*, No. 3:09-CV-32(PPS), 2009 U.S. Dist. LEXIS 85878 (N.D. Ind. Sept. 17, 2009); *Volling v. Antioch Rescue Squad*, No. 11 C 04920, 2012 U.S. Dist. LEXIS 171623 (N.D. Ill. Dec. 4, 2012). More recently, another district court from within the Seventh Circuit acknowledged the circuit split on this topic and the fact that the Seventh Circuit has not yet answered this question. See *Geraty v. Village of Antioch*, No. 09 C 6992, 2014 U.S. Dist. LEXIS 158861, at \*4-19 (N.D. Ill. Nov. 7, 2014).

146. *Holder*, 2009 U.S. Dist. LEXIS 85878, at \*1.

147. *Id.* at \*17-18.

148. *Id.* at \*5.

149. *Id.* at \*5-6.

150. *Id.* at \*6-7.

151. *Id.* at \*7 (relying on *York v. Ass'n of the Bar of N.Y.*, 286 F.3d 122, 126 (2d Cir. 2002); *Daggitt v. United Food & Commercial Workers Int'l Union, Local 304A*, 245 F.3d 981, 987 (8th Cir. 2001); and *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1244 (11th Cir. 1998)).

152. *Holder*, 2009 U.S. Dist. LEXIS 85878, at \*8.

153. *Id.* at \*12. One of the cases to which the court referred was *Rafi v. Thompson*, No. 02-2356 (JR), 2006 U.S. Dist. LEXIS 78696, at \*1 (D.D.C. Oct. 30, 2006), where the plaintiff was able to continue with his Title VII claim after he alleged that his volunteer position provided a "clear pathway to employment."

Eventually, the court analyzed the benefits the plaintiff received.<sup>154</sup> These included the use of police equipment, a uniform, a dry-cleaning allowance, workers' compensation and disability insurance, a life insurance policy if death were to occur in the line of duty, training, and the possibility of future employment with the department.<sup>155</sup> In the court's view, these benefits were insufficient, because some were "incidental to [the plaintiff's] volunteer duties and ha[d] no independent value,"<sup>156</sup> the insurance benefits were not "guaranteed," and the policies benefitted the town as much as they benefitted the plaintiff.<sup>157</sup> Finally, the court concluded that the training and the potential for permanent employment were insufficient to create an employment relationship:<sup>158</sup> "without more . . . training related to the volunteer duties, networking opportunities, and the possibility of future employment aren't appreciable enough to create an employment relationship."<sup>159</sup> The court therefore concluded that the relationship was "more akin to community service than gainful employment."<sup>160</sup> Thus, the plaintiff could not pursue his claim.<sup>161</sup>

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154. *Holder*, 2009 U.S. Dist. LEXIS 85878, at \*13.

155. *Id.*

156. *Id.*

157. *Id.* at \*14.

158. *Id.* at \*15–17.

159. *Id.* at \*15 (relying on *York v. Ass'n of the Bar of N.Y.C.*, 286 F.3d 122, 126 (2d Cir. 2002) and *Moran v. Harris Cnty.*, No. H-07-582, 2007 U.S. Dist. LEXIS 64673, at \*1 (S.D. Tex. Aug. 31, 2007)). Similarly, in *Moran*, the court noted that "[w]hat distinguishes an employee from a volunteer is that in exchange for his labor, an employee is paid—directly or indirectly—money." 2007 U.S. Dist. LEXIS 64673, at \*3. The court concluded that networking opportunities, the ability to take "classes at no cost," and the possibility of "on-the-job experience filling in for actual deputy constables" were not sufficient to establish an employment relationship. *Id.*

160. *Holder*, 2009 U.S. Dist. LEXIS 85878, at \*17.

161. *Id.* at \*17–18. For another district court opinion from within the Seventh Circuit, see *Doe v. Lee*, 943 F. Supp. 2d 870 (N.D. Ill. 2013). In *Doe*, the court acknowledged that although the control test is usually a good way to distinguish between employees and independent contractors, that test is not ideal when distinguishing between employees and volunteers. *Id.* at 875. The plaintiff in *Doe* served in two capacities; on some occasions, she served "as an intern," and on other occasions she assisted the police with sting operations. *Id.* at 876. After reviewing several of the cases cited in this Article, the court determined that while the plaintiff was an intern, she was not an "employee." *Id.* at 876–77. With respect to her role in the sting operations, the plaintiff received a reduction in the balance of her outstanding parking tickets; she signed a document that described these sting operations as "temporary employment"; the plaintiff was covered under workers' compensation insurance;

More recently, another district court from within the Seventh Circuit adopted the *minority* approach and looked at remuneration as only one factor to use when evaluating employment status.<sup>162</sup> In *Volling v. Antioch Rescue Squad*, the court looked at the totality of the circumstances when deciding whether an individual was an employee.<sup>163</sup> Relying on the Supreme Court's opinion in *Cnty. for Creative Non-Violence v. Reid*,<sup>164</sup> the court noted that employee status is determined only by evaluating numerous factors of the at-issue relationship.<sup>165</sup>

The court also referred to the EEOC Compliance Manual and noted that when evaluating this issue, courts should look to all factors of the relationship, and that no one factor is dispositive.<sup>166</sup> The court in *Volling* noted that the Seventh Circuit "has squarely rejected the 'tyranny of labels' advocated by the defendants in brandishing the term 'volunteer' as a shield to ward off liability under Title VII."<sup>167</sup> The court also cited with approval the Sixth Circuit's opinion in *Bryson v. Middlefield Volunteer Fire Dep't, Inc.*:<sup>168</sup>

As the Sixth Circuit noted in *Bryson*, treating remuneration only as one of many factors bearing on the issue of status as an "employee"

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her supervisor controlled if and when the plaintiff would participate in these operations; these characteristics, among other factors, made this relationship appear to be a more typical "employment" relationship. *Id.* As a result, the court determined that there was a fact issue regarding whether the plaintiff was an employee when she participated in the sting operations. *Id.*

162. *Volling v. Antioch Rescue Squad*, No. 11 C 04920, 2012 U.S. Dist. LEXIS 171623, at \*20–35 (N.D. Ill. Dec. 4, 2012). I realize the discussion of this case could be placed in the next Section of this Article, but I placed it in this Section to avoid separating district court opinions from within the same circuit.

163. *Id.* at \*21–24. The district court relied partially on *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 705 (7th Cir. 2002), for the proposition that a court should look at several factors when determining whether an individual is an employee under Title VII. *Volling*, 2012 U.S. Dist. LEXIS 171623, at \*23–24. The court also relied on the Supreme Court's opinion in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992). *Volling*, 2012 U.S. Dist. LEXIS 171623, at \*21–28.

164. 490 U.S. 730 (1989).

165. *Volling*, 2012 U.S. Dist. LEXIS 171623, at \*22 (quoting *Cnty. for Creative Non-Violence*, 490 U.S. at 751–52).

166. *Id.* at \*22. See *supra* note 36 for a list of factors the EEOC considers when determining employee status.

167. *Volling*, 2012 U.S. Dist. LEXIS 171623, at \*23.

168. 656 F.3d 348 (6th Cir. 2011). *Bryson* will be addressed in Section IV.B of this Article.

“comports with *Darden’s* instruction that, when evaluating a particular relationship, ‘all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.’” Based on the Supreme Court’s instructions, the Court agrees with the Sixth Circuit’s view. The question and degree of remuneration are simply factors to be considered, along with many others, in assessing whether a worker is an “employee” for purposes of Title VII.<sup>169</sup>

In addition, the court stated the following regarding the need to look at the totality of the circumstances rather than solely at the remuneration issue:

It is clear that remuneration is an important factor in defining an employment relationship. But the Supreme Court’s instruction to evaluate the question using the common-law principles of agency, and its inclusion of considerations that do not pertain to remuneration on its non-exhaustive list of relevant factors, confirms that it is not the exclusive consideration. Consistent with that instruction, this Court does not draw any bright line requiring an “employee” to be salaried or that she receive substantial pecuniary remuneration. The question is whether the plaintiffs have alleged facts sufficient to make a plausible claim that they meet the requirements for Title VII protection . . . .<sup>170</sup>

After evaluating the various factors, the court decided that the plaintiff’s allegations were sufficient to survive a motion to dismiss.<sup>171</sup> Therefore, this court determined that the totality-of-the-circumstances test was the applicable test, and that remuneration was only one factor in that analysis.<sup>172</sup> Until the Seventh Circuit answers

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169. *Volling*, 2012 U.S. Dist. LEXIS 171628, at \*26 (internal citations omitted) (citing *Bryson*, 656 F.3d at 354).

170. *Id.* at \*33. In reaching the holding, the court noted that the defendants controlled which shifts the plaintiffs worked; the “[p]laintiffs [ ] were required to wear uniforms”; the plaintiffs “had to go through probationary periods”; and there was a “well-defined chain of command.” *Id.* at \*30–31. All of these facts demonstrated a level of control which the defendant had over the plaintiff. *Id.* at \*30–32.

171. *Id.* at \*32–33 (stating that “[a] workplace is not necessarily any different for a non-compensated volunteer than it is for a compensated ‘employee,’ and while both are generally free to quit if they don’t like the conditions (at-will employment being the norm), neither should have to quit to avoid sexual, racial, or other unlawful discrimination and harassment”).

172. *Id.* at \*33. *But see* *Love v. Cmty. Nutrition Network*, No. 09-CV-4937, 2010 U.S. Dist. LEXIS 133011, at \*24–26 (N.D. Ill. Dec. 16, 2010) (prior to the *Volling* opinion, the Northern District of Illinois appeared to endorse the threshold remuneration test).

this question, there will continue to be uncertainty within that jurisdiction.

The Eighth Circuit addressed the status of volunteers when it handed down its often-cited decision in *Graves v. Women's Prof'l Rodeo Ass'n*, where a man sued the Women's Professional Rodeo Association (WPRA), claiming it violated Title VII by not allowing him to participate in WPRA events.<sup>173</sup> The court addressed whether WPRA members were employees; if they were employees, the WPRA would be subject to Title VII's prohibitions.<sup>174</sup> If the members were not employees, the WPRA would be immune from Title VII liability.<sup>175</sup> The district court noted that the "WPRA . . . [did] not pay wages, withhold taxes, or pay insurance."<sup>176</sup> Although the WPRA had rules regarding WPRA events, that level of control was not critical in determining whether the members were employees.<sup>177</sup>

The court also focused on the ordinary usage and dictionary definitions of the relevant terms, including "employee," "employer," and "employ."<sup>178</sup> Relying on the definitions of those terms in *Webster's Third New International Dictionary*,<sup>179</sup> the court concluded the following:

[C]entral to the meaning of these words is the idea of compensation in exchange for services: an employer is someone who pays, directly or indirectly, wages or a salary or other compensation to the person who provides services—that person being the employee. Compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, but it is an essential condition to the existence of an employer-employee relationship.<sup>180</sup>

The court then noted that the WPRA does not compensate its members; the competition winners are paid by event sponsors; and that "[f]or most [WPRA] members, belonging to WPRA and

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173. 907 F.2d 71 (8th Cir. 1990).

174. *Id.* at 72.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 73. Specifically, the Eighth Circuit looked at the definitions of "employee," "employer," and "employ." *Id.*

179. *Id.* (citing *Webster's Third New International Dictionary* 743 (unabridged) (1981)).

180. *Id.*

competing on the professional rodeo circuit is not a remunerative proposition.”<sup>181</sup> In concluding that members of the WPRA are not employees, the court observed the following: “The relationship between WPRA and its members simply bears no resemblance to that between an employer and employee . . . : no compensation is made, only prize money won . . . . In addition, membership in WPRA entails no duty of service to WPRA or anyone else . . . .”<sup>182</sup>

Finally, the court emphasized the importance of the first part of the two-part inquiry regarding employment status.<sup>183</sup> Specifically, the court referred to that inquiry regarding an employment relationship as a “crucial and elementary initial inquiry” that could not be avoided.<sup>184</sup> The court then concluded that the relationship between the WPRA and its members was not even close to an employment relationship.<sup>185</sup> The court stated the following: “[T]he absence of any compensation flowing to WPRA members by reason of their membership, together with the absence of any duty of service owed by members to WPRA . . . , suffices to exclude WPRA from being an ‘employer’ of its members under Title VII . . . .”<sup>186</sup> Thus, this is another court requiring a plaintiff to overcome the remuneration test before even attempting to argue any additional test for establishing employee status. This is the majority approach, with most courts deciding there must be sufficient remuneration before someone can be considered an employee.<sup>187</sup>

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181. *Id.*

182. *Id.* In further rejecting the plaintiff’s argument, the court noted the following:

Courts have turned to analyses such as the “economic realities” test and “right to control” test under Title VII only in situations that plausibly approximate an employment relationship. In the case at hand, WPRA is so unlike an employer to its members that plunging into questions of control or economic realities is on the order of considering whether mitigating circumstances were present during the commission of a crime before determining whether there is a *corpus delicti*. *Id.* at 74.

183. *Id.* at 73.

184. *Id.* The court’s exact language was the following: “Only by skipping this crucial and elementary initial inquiry—whether there exists an employment relationship, according to the ordinary meaning of the words—and jumping straight into verbal manipulation of the case law tests for an employment relationship, can Graves make an implausible argument sound even marginally plausible.” *Id.* at 73.

185. *Id.* at 73–74.

186. *Id.* at 74.

187. *See infra* and *supra* this Part.

The Tenth Circuit also requires sufficient remuneration before an individual can be considered an employee.<sup>188</sup> In *McGuinness v. Univ. of New Mexico Sch. of Med.*, the plaintiff brought several ADA claims against a medical school.<sup>189</sup> The lower court granted summary judgment for the defendant, and the Tenth Circuit affirmed.<sup>190</sup> In its opinion, the Tenth Circuit eventually addressed the plaintiff's "association discrimination" claim.<sup>191</sup> That claim fell under Title I of the ADA, which governs employment.<sup>192</sup> Thus, the student had to establish an employment relationship between him and the medical school.<sup>193</sup> The court concluded that no such relationship existed: "[The plaintiff] has failed to show the existence of such an employment relationship between himself and the medical school. Unless a student receives remuneration for the work he performs, he is not considered an employee."<sup>194</sup>

The court emphasized the lack of remuneration, and it stated that the following facts were irrelevant in determining whether an employment relationship existed: (1) the plaintiff "completed federal employment applications"; (2) the plaintiff "took a federal oath of office"; and (3) the plaintiff "was covered by the New Mexico Tort Claims Act . . . ." The court ended its discussion by noting that a university "may confer certain benefits on an individual and exercise a modicum of control over him without establishing a master-servant relationship."<sup>195</sup> Thus, the plaintiff was not an employee, and his ADA "association discrimination" claim failed.<sup>196</sup> The Tenth Circuit

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188. *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974 (10th Cir. 1998). But see *Scott v. City of Minco*, 393 F. Supp. 2d 1180, 1190 (W.D. Okla. 2005), where a district court within the Tenth Circuit stated that when determining employment status, a "[c]ourt must consider the totality of the circumstances." The court in *Scott* then noted that courts use a "hybrid test," which looks at both remuneration and the level of control the putative employer exercises over the putative employee. *Id.*

189. *McGuinness*, 170 F.3d at 976–77.

190. *Id.* at 977.

191. *Id.* at 977–80.

192. *Id.* at 979.

193. *Id.*

194. *Id.* (relying on *O'Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997) and 5 U.S.C. § 5351(2) (2012)).

195. *Id.* (relying on *Graves v. Women's Prof'l Rodeo Ass'n, Inc.*, 907 F.2d 71, 72–73 (8th Cir. 1990)).

196. *McGuinness*, 170 F.3d at 979. The court also noted that the plaintiff failed to establish that the medical school discriminated against him. *Id.* at 980.

therefore appears to be another court that requires a preliminary inquiry into remuneration before looking at other aspects of the “employment” relationship.

The Eleventh Circuit has also decided that whether an individual qualifies as an employee hinges on remuneration.<sup>197</sup> In *Llampallas v. Mini-Circuits, Lab, Inc.*, the court addressed whether the plaintiff was an employee of a condominium association.<sup>198</sup> The plaintiff served as a member and vice president of the association.<sup>199</sup> When the other board members ousted her, she sued both the condominium association and her true “employer” under Title VII.<sup>200</sup> The lower court ruled in favor of the plaintiff, but the Eleventh Circuit reversed.<sup>201</sup>

Before addressing the merits of the Title VII claim, the court determined whether the plaintiff was an employee of the condominium association.<sup>202</sup> The court noted that Title VII prohibits discrimination against “any individual,” and that the plaintiff could have *tried* to argue that because of this language, she was protected under the statute.<sup>203</sup> The court then dismissed the argument, relying on precedent which had determined that only employees could sue under Title VII.<sup>204</sup> Also, relying on Congressional intent, the court observed that “Congress intended to limit the scope of the Act to specific employment relationships; thus, the statute provides relief only against ‘employers’ as defined under the statute . . . . Hence, courts have almost universally held that the scope of the term ‘any individual’ is limited to employees.”<sup>205</sup>

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197. *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1998).

198. *Id.* at 1242–44.

199. *Id.* at 1241.

200. *Id.*

201. *Id.* at 1239.

202. *Id.* at 1242–44.

203. *Id.* at 1242–43.

204. *Id.* (relying on *McClure v. Salvation Army*, 460 F.2d 553, 556 (5th Cir. 1972); *Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997); *Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 491 (7th Cir. 1996); and *Hyland v. New Haven Radiology Assocs., P.C.*, 794 F.2d 793, 796 (2d Cir. 1986), *abrogated by* *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003)). *But see id.* at 1243 (citing *Sibley Mem’l Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (providing a broad interpretation of Title VII and not limiting the term “individual” to “employees”).

205. *Llampallas*, 163 F.3d at 1243.

The court also concluded that Title VII's forms of relief provided evidence that only employees were protected.<sup>206</sup> To reach this conclusion, the court also focused on Title VII's 1972 amendments, which used the phrase "*employees* or applicants for *employment*."<sup>207</sup>

The court then turned to Title VII's definition of "employee."<sup>208</sup> Noting that the definition was not useful, the court stated that "only individuals who receive compensation from an employer can be deemed 'employees' under the statute."<sup>209</sup> Relying on *O'Connor*, the court observed: "Where no financial benefit is obtained by the purported employee from the employer, no plausible employment relationship of any sort can be said to exist because . . . compensation . . . is an essential condition to the existence of an employer-employee relationship."<sup>210</sup> Because the plaintiff did not receive compensation from the condominium association, she was not an employee.<sup>211</sup> Thus, the Eleventh Circuit is yet another court to follow the majority approach and require remuneration before the court engages in further analysis of the employment relationship.

Finally, although the D.C. Circuit has not directly addressed this issue, a district court within the D.C. Circuit focused on the benefits the plaintiff received in order to determine employment status.<sup>212</sup> In *Rafi v. Thompson*, the court addressed whether the volunteer positions the plaintiff sought at the National Human Genome Research Institute and the National Institutes of Health constituted

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206. *Id.* (observing that Title VII allows for reinstatement, hiring, and back pay, which are remedies that would not be applicable to volunteers).

207. *Id.* (emphasis added) (citing Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 717, 86 Stat. 103, 111 (1972) (codified at 42 U.S.C. § 2000e-16(a) (1994)); and H.R. REP. NO. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2159-60).

208. *Llampallas*, 163 F.3d at 1243.

209. *Id.* (relying on *O'Connor v. Davis*, 126 F.3d 112, 115-16 (2d Cir. 1997)).

210. *Id.* at 1243 (quoting *O'Connor*, 126 F.3d at 115-16).

211. *Id.* at 1244. For a more recent case from a district court within the Eleventh Circuit, see *Vazquez v. Orange Cty. Service Unit*, No. 6:12-CV-1595-Orl-37(DAB), 2014 U.S. Dist. LEXIS 32728, at \*5-78 (M.D. Fla. Mar. 13, 2014), where the court noted that an employment relationship is most often indicated by whether the individual is on the employer's payroll, that one must receive compensation to be considered an employee, and that compensation was the equivalent of salary or wages.

212. *Rafi v. Thompson*, No. 02-2356 (JR), 2006 U.S. Dist. LEXIS 78696 (D.D.C. Oct. 30, 2006).

“employment.”<sup>213</sup> The court had previously addressed this issue and asked the parties to conduct additional discovery.<sup>214</sup> The court did so because it had earlier decided that one of the benefits, “a clear pathway to employment . . . might constitute sufficient compensation to bring [National Institutes of Health] volunteers under Title VII.”<sup>215</sup> The plaintiff identified several former volunteers who were hired as full-time employees.<sup>216</sup> Additionally, the plaintiff argued that the volunteer position would have provided him with an “increased opportunity to participate in [National Institutes of Health’s]” genetics program, which would have provided him with training in his fields of expertise.<sup>217</sup> Relying on *Haavistola*, the court concluded that the plaintiff “made a plausible showing that the volunteer positions for which he applied would qualify as ‘employment’ under Title VII and the ADEA.”<sup>218</sup> Thus, it appeared that the court was looking at remuneration (albeit a different type of remuneration) as a threshold issue to evaluate when determining employment status.<sup>219</sup>

When determining employment status, most courts look at the issue of remuneration before evaluating other factors. Although this is the majority approach, some courts ignore the threshold remuneration issue and look to the totality of the circumstances when making this determination; the courts that take this approach do so based, in part, on the Supreme Court’s instructions on this

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213. *Id.* at \*1.

214. *Id.* at \*1–2.

215. *Id.* at \*1.

216. *Id.* at \*2.

217. *Id.* at \*3.

218. *Id.* at \*3. Although the court ruled in favor of the plaintiff on this issue, it also noted that more evidence from the plaintiff would be required in order for him to “establish his prima facie case of disparate treatment in hiring.” *Id.* at \*4–5.

219. See also *Dean v. Am. Fed’n of Gov’t Emp.*, 509 F. Supp. 2d 39, 52–56 (D.D.C. 2007), where the court seemed to rely on the threshold remuneration test but also engaged in a multi-factor analysis.

issue,<sup>220</sup> and on a provision of the EEOC Compliance Manual, which also requires a totality-of-the-circumstances approach.<sup>221</sup>

### *B. The Minority Approach*

Although most courts require an initial inquiry into remuneration before looking at other aspects of the parties' relationship, the Sixth and Ninth Circuits take a different approach.<sup>222</sup> Specifically, those courts look at remuneration simply as one factor when deciding the nature of the relationship.<sup>223</sup> Cases from the Sixth and Ninth Circuits will be addressed in this Section of the Article, immediately following a discussion of a district court opinion from within the First Circuit, which took a similar approach.

The District of Massachusetts addressed this issue in *Mahoney v. Morgan* when it had to decide whether a volunteer could count toward the fifteen-employee threshold under the ADA.<sup>224</sup> The court addressed the employment status of several individuals (and repeatedly referred to the multi-factor analysis while evaluating the individuals' employment status). One of the individuals, the husband of the owner of a veterinary clinic, performed some "work" but was not paid.<sup>225</sup> The court had to decide whether this individual qualified as an employee and referred to *Reid*, *Clackamas*, *Darden*, and the EEOC's position regarding the need to look at the totality of the circumstances, not simply at remuneration.<sup>226</sup> In fact, the court

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220. See *supra* note 7 and accompanying text. Also, some of the courts that have adopted the threshold remuneration test have argued that because there was an obvious payment in all three Supreme Court cases, the Court bypassed its analysis of the threshold remuneration test.

221. See EEOC Compl. Man. § 2-III(A)(1). See also *supra* notes 36, 37, 67 and accompanying text.

222. See *infra* Section IV.B. Although the First Circuit has not directly addressed this issue, a district court from within the First Circuit relied on a First Circuit case and adopted a totality-of-the-circumstances approach. *Mahoney v. Morgan*, No. 08-10879-MBB, 2010 U.S. Dist. LEXIS 97224 (D. Mass. Sept. 16, 2010) (relying on *Lopez v. Massachusetts*, 588 F.3d 69 (1st Cir. 2009)). In *Mahoney*, the court noted that lack of remuneration was not solely determinative of employee status. 2010 U.S. Dist. LEXIS 97224, at \*23-24.

223. See *infra* Section IV.B.

224. *Mahoney*, 2010 U.S. Dist. LEXIS 97224, at \*16-17.

225. *Id.* at \*23-24.

226. *Id.* at \*17-20. Admittedly, although the court identified several factors to evaluate when determining employment status, the court focused on the type of "payment" the owner's husband received, which could come in the form of "benefits." *Id.* at \*23-24.

started its discussion of employment status by apparently rejecting the threshold remuneration test and noting that the husband did not receive payment but that “[t]he lack of evidence of payment . . . is not necessarily a bar to a determination of employee status because some volunteers are covered by the ADA.”<sup>227</sup>

Relying on the EEOC’s Compliance Manual, the court observed that an individual can be an employee if he receives benefits in exchange for services.<sup>228</sup> Here, the individual was covered under his wife’s health insurance plan, and the court believed that this was one factor that weighed in favor of finding employee status.<sup>229</sup> In concluding this issue, the court stated: “[A] reasonable jury could find that [the husband] qualifies as an employee.”<sup>230</sup> In reaching this conclusion, the court relied on a case from the First Circuit that appeared to adopt the minority multi-factor test, but emphasized the issue of control.<sup>231</sup> Therefore, although the First Circuit has not yet definitively adopted a position regarding how to determine the employment status of a “volunteer,” at least one district court from within that jurisdiction has appeared to adopt the totality-of-the-circumstances test.<sup>232</sup>

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However, the court used all factors when evaluating other individuals’ employment status. *Id.* at \*21–24.

227. *Id.* at \*23. Although some courts have determined that some “volunteers” are covered under federal anti-discrimination statutes, those courts actually decided that those individuals were not truly volunteers, but employees; true volunteers are not covered by federal anti-discrimination statutes under current precedent.

228. *Id.* at \*24. In addition to relying on the EEOC Compliance Manual, the court also relied on the previously discussed Supreme Court *Clackamas* opinion, in which the Court looked at several factors (and focused on the level of control), and on the First Circuit opinion in *Lopez*, which similarly focused on control, but evaluated the totality of the circumstances. *Mahoney*, 2010 U.S. Dist. LEXIS 97224, at \*18–19. Admittedly, the *Mahoney* court focused on the benefits the individual received, but it is clear that the court evaluated all factors, not simply remuneration, throughout its analyses of the employment status of the various at-issue individuals.

229. *Mahoney*, 2010 U.S. Dist. LEXIS 97224, at \*23–24.

230. *Id.* at \*24.

231. *See id.* at \*17–28. Specifically, the court relied on *Lopez v. Massachusetts*, 588 F.3d 69, 84–85 (1st Cir. 2009) (utilizing the multi-factor test articulated in the EEOC Compliance Manual, and focusing on the issue of control). *Lopez* did not, however, involve volunteers. *Id.* at 72–73. The *Mahoney* court also cited to the Supreme Court’s opinions in *Clackamas*, *Reid*, and *Darden*. *Mahoney*, 2010 U.S. Dist. LEXIS 97224, at \*18–20. *See also supra* note 228 and accompanying text.

232. As noted previously, the First Circuit has applied the totality-of-the-circumstances test, although that case did not involve volunteers. *Lopez*, 588 F.3d at 72–73.

One of the few courts of appeals to avoid initially analyzing remuneration when evaluating an “employment” relationship is the Sixth Circuit.<sup>233</sup> In *Bryson v. Middlefield Volunteer Fire Dep’t, Inc.*, the plaintiff sued under Title VII.<sup>234</sup> The court had to answer whether volunteer firefighters were employees; if they were, the fire department would have been subject to Title VII’s prohibitions.<sup>235</sup> If they were not employees, the fire department would not have reached the fifteen-employee minimum, and the district court would have had to dismiss the case.<sup>236</sup> Although the EEOC determined that the fire department was a covered employer, the district court disagreed.<sup>237</sup> The district court decided that the “compensation analysis is an antecedent inquiry that must be examined prior to application of the economic realities or common-law agency tests.”<sup>238</sup> After the parties conducted additional discovery, the district court determined that the benefits were insufficient to create an issue of fact.<sup>239</sup>

On appeal, the Sixth Circuit acknowledged that, in some cases, this is a mixed question of law and fact, which must be answered by the factfinder.<sup>240</sup> The court then addressed Title VII’s relevant, but unhelpful, definitions and how courts have determined employment status.<sup>241</sup> The Sixth Circuit noted that the definition of “employee” was not helpful, and that common law agency principles were appropriate to apply.<sup>242</sup> The court then cited the Supreme Court’s opinion in *Darden* and explained the factors that go into determining whether an employment relationship exists; these factors set out the specific “rules” for the relationship.<sup>243</sup>

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233. *Bryson v. Middlefield Volunteer Fire Dep’t, Inc.*, 656 F.3d 348 (6th Cir. 2011).

234. *Id.* at 350.

235. *Id.* at 350–51.

236. *Id.*

237. *Id.* The EEOC concluded that the firefighters were employees because the department exercised sufficient control over the firefighters and because the firefighters were compensated for their services despite not being on the department’s payroll. *Id.* at 350.

238. *Id.* at 351 (quoting *Bryson v. Middlefield Volunteer Fire Dep’t, Inc.*, 546 F. Supp. 2d 527, 530 (N.D. Ohio 2008)).

239. *Bryson*, 656 F.3d at 351.

240. *Id.* at 352.

241. *Id.* at 352–55.

242. *Id.* at 352.

243. *Id.* (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992)).

As previously noted, these factors are typically used in the employee/independent contractor context,<sup>244</sup> and the court acknowledged that it had not used this analysis to distinguish between employees and volunteers.<sup>245</sup> The court first observed that other courts had included remuneration as a factor in their analyses.<sup>246</sup> Strangely, the courts to which the Sixth Circuit cited actually used remuneration as a *threshold inquiry*.<sup>247</sup> In fact, several of the opinions to which the Sixth Circuit cited were addressed in Section IV.A of this Article.<sup>248</sup> The court then addressed the EEOC's position that volunteers are not usually protected, but that an individual could be a protected employee if he receives sufficient benefits.<sup>249</sup> And, as was noted, in this case, the EEOC had decided that the firefighters were employees, in part because they were compensated despite not being on the payroll.<sup>250</sup>

The Sixth Circuit then decided that remuneration was not an independent, antecedent inquiry.<sup>251</sup> Criticizing the district court's decision to adopt the Second Circuit's test from *United States v. City of New York*,<sup>252</sup> "which requires a plaintiff to establish first that she is a 'hired party' by showing that she received 'substantial benefits not merely incidental to the activity performed,' before the district court may consider the common-law agency test," the court observed the following:

In this case, each individual firefighter-member is a "hired party" in that each has a contractual relationship with the Department—the

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244. *Id.* at 352.

245. *Id.* at 352–53.

246. *Id.* at 353.

247. Specifically, some of the cases the court cited for the proposition that remuneration was a "factor" in this analysis include: *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1243–44 (11th Cir. 1998); *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974, 979 (10th Cir. 1998); *Haavistola v. Cmty. Fire Co. of Rising Sun*, 6 F.3d 211, 220–21 (4th Cir. 1993); and *Graves v. Women's Prof'l Rodeo Ass'n*, 907 F.2d 71, 73–74 (8th Cir. 1990). As was discussed previously, the courts in these cases required remuneration as a *threshold inquiry* before progressing to any other type of test to determine employment status. *See supra* Section IV.A.

248. *See supra* Section IV.A.

249. *Bryson*, 656 F.3d at 353.

250. *Id.*

251. *Id.* at 353–55.

252. 359 F.3d 83, 91–92 (2d Cir. 2004).

firefighter-member provides firefighting services to the Department in exchange for benefits from the Department, including worker's compensation coverage, insurance coverage, gift cards, personal use of the Department's facilities and assets, training, and access to an emergency fund. . . . But we decline to adopt the Second Circuit's view that, to be a "hired party," a plaintiff must demonstrate that she received significant remuneration.<sup>253</sup>

The court then explained its conclusion, which was based on the court's belief that the cases upon which the Second Circuit relied did not require an independent inquiry regarding remuneration.<sup>254</sup> The court also noted that its approach was consistent with the Supreme Court's *Darden* opinion in that "no one factor" (including remuneration) was dispositive.<sup>255</sup> Specifically, the court stated that "no one factor, including remuneration, is decisive, and therefore no one factor is an independent antecedent requirement."<sup>256</sup> The court also commented that the multi-factor test was appropriate because "alleged employee-employer relationships can be complex and may not fit neatly into one particular categorization."<sup>257</sup>

Applying its interpretation to the facts of the case, the court in *Bryson* noted that the firefighters received workers' compensation coverage; they received insurance coverage; they received gift cards; they were authorized to use the fire department's facilities; and they also had access to an emergency fund.<sup>258</sup> Also, some firefighters received a lump-sum retirement payment while others received hourly wages.<sup>259</sup> Because the district court failed to consider aspects of the relationship other than remuneration, the Sixth Circuit remanded the case back to the district court.<sup>260</sup>

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253. *Bryson*, 656 F.3d at 354.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 355.

258. *Id.*

259. *Id.*

260. *Id.* at 355–56. For a more recent opinion from a district court within the Sixth Circuit, see *Crim v. Village of Bellville*, No. 1:12-CV-3065, 2013 U.S. Dist. LEXIS 98367 (N.D. Ohio July 12, 2013). In *Crim*, the court followed *Bryson* and noted that in determining whether an employment relationship exists, the court must apply the common-law agency test, which looks at all aspects of the relationship, including remuneration. 2013 U.S. Dist. LEXIS 98367, at \*10. But see *Neff v. Civil Air Patrol*, 916 F. Supp. 710 (S.D. Ohio 1996), where

Judge Gibbons concurred in part and dissented in part.<sup>261</sup> She believed that a remand was necessary but “disagree[d] with the majority’s conclusion that, when evaluating whether an individual is an ‘employee’ . . . the court must weigh remuneration as merely one factor.”<sup>262</sup> Relying on *Haavistola*, *Pietras*, and *Graves*,<sup>263</sup> she noted that a threshold showing of “indirect but significant remuneration” or “significant benefits” was required to establish employee status.<sup>264</sup> Also, relying on *United States v. City of New York*, she observed:

First, the plaintiff must show she was hired by the putative employer. To prove that she was hired, she must establish that she received remuneration in some form from her work. This remuneration need not be a salary, but must consist of substantial benefits not merely incidental to the activity performed. Once plaintiff furnishes proof that her putative employer remunerated her for services she performed, we look to the thirteen factors articulated by the Supreme Court in . . . *Reid* . . . , to determine whether an employment relationship exists.<sup>265</sup>

Relying on the majority approach, Judge Gibbons reiterated that an application of a common-law agency test was appropriate only *after* a finding that the relationship could “plausibly approximate an employment relationship.”<sup>266</sup> And when there is no financial benefit from the purported employer, there could be no “‘plausible’

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the court rejected the plaintiff’s contention that she was an employee. The court applied the economic realities test and decided that the “compensation” the plaintiff received (“emotional benefit,” in-kind services, and death benefits if she was killed while working for the defendant) was insufficient to confer employee status. *Id.* at 713–15. In reaching its conclusion, the court noted that “[o]rordinarily, unpaid volunteers, whose livelihood does not depend upon their volunteer position, are not susceptible to the same types of economic pressures as are paid employees.” *Id.* at 712.

261. *Bryson*, 656 F.3d at 356–59 (Gibbons, J., concurring in part and dissenting in part).

262. *Id.* at 356.

263. *Id.* at 358. *See also supra* Section IV.A. Judge Gibbons also relied on the Tenth Circuit’s opinion in *McGuinness v. University of New Mexico School of Medicine*, 170 F.3d 974 (10th Cir. 1998).

264. *Bryson*, 656 F.3d at 357 (Gibbons, J., concurring in part and dissenting in part) (quoting *Pietras v. Bd. of Fire Comm’rs of Farmingville Fire Dist.*, 180 F.3d 468, 473 (2d Cir. 1999)).

265. *Id.* at 358 (quoting *United States v. City of New York*, 359 F.3d 83, 91–92 (2d Cir. 2004)) (citations omitted).

266. *Id.* (quoting *O’Connor v. Davis*, 126 F.3d 112, 115 (2d Cir. 1997)).

employment relationship.”<sup>267</sup> Concluding, she stated that she would have

... adopt[ed] the two-step test applied by other circuit courts: first, the plaintiff must show that she was hired by the putative employer by “establish[ing] that she received remuneration in some form from her work,” and, second, after the plaintiff establishes remuneration, the court will apply the common-law agency test set forth in *Darden* and *Reid* “to determine whether an employment relationship exists.”<sup>268</sup>

Applying that test to the facts in *Bryson*, Judge Gibbons determined that the appropriate result was a remand to allow a jury to decide whether the benefits were “indirect but significant remuneration . . . or inconsequential incidents of an otherwise gratuitous relationship.”<sup>269</sup> Despite Judge Gibbons’ dissent, the Sixth Circuit has adopted the totality-of-the-circumstances test, and does not require courts to evaluate remuneration as a prerequisite to establishing an employment relationship.<sup>270</sup>

The Ninth Circuit also appears not to look at remuneration as a threshold inquiry when determining employment status.<sup>271</sup> In *Fichman v. Media Ctr.*, the court addressed whether two groups of individuals were employees under the ADEA and/or the ADA after the plaintiff brought suit under both statutes.<sup>272</sup> The two groups of individuals were (1) members of the defendant’s board of directors; and (2) volunteer producers who created television shows for the defendant’s public access channels.<sup>273</sup> The court noted that if the members of either of these groups were employees, the defendant would be subject to both statutes’ requirements.<sup>274</sup> If none of these

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267. *Id.* (relying on *Davis*, 126 F.3d at 115–16).

268. *Id.* at 358–59 (quoting *City of New York*, 359 F.3d at 91–92).

269. *Id.* at 359 (quoting *Haavistola v. Cmty. Fire Co. of Rising Sun*, 6 F.3d 211, 222 (4th Cir. 1993)).

270. For a more recent pronouncement from the Sixth Circuit, see *Marie v. American Red Cross*, 771 F.3d 344, 353 (6th Cir. 2014) (“[T]hus, in this circuit, remuneration is not an independent antecedent requirement, but rather it is a non[-]dispositive factor that should be assessed in conjunction with the other *Darden* factors to determine if a volunteer is an employee.”).

271. *Fichman v. Media Ctr.*, 512 F.3d 1157 (9th Cir. 2008).

272. *Id.* at 1158.

273. *Id.* at 1160.

274. *Id.*

individuals was an employee, the defendant would have been immune from ADEA and ADA liability.<sup>275</sup> The district court granted summary judgment in favor of the defendant, and the Ninth Circuit affirmed.<sup>276</sup>

The Ninth Circuit first addressed the members of the board of directors.<sup>277</sup> The court used the analysis the Supreme Court used in *Clackamas*,<sup>278</sup> in which the Court had to decide whether physician shareholders of a medical group were employees under the ADA.<sup>279</sup> In *Clackamas*, the Court noted that the word “employee” was “intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”<sup>280</sup> The Court listed factors to evaluate when making that decision, and did not conduct an independent inquiry regarding remuneration.<sup>281</sup> In applying *Clackamas* and concluding that the members of the board of directors were not employees, the court observed:

Under *Clackamas*, the district court properly concluded that the members of the Board of Directors were not . . . employees. [The defendant] does not hire or fire its directors: the Board selects its own members. The directors each have full-time jobs independent of [the defendant], *and are not compensated by [the defendant]*. Neither the travel reimbursement nor the food supplied at Board meetings rises to the level of compensation. The personal satisfaction and professional status several directors reported

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275. *Id.*

276. *Id.* at 1159.

277. *Id.* at 1160.

278. *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003). As noted earlier, the Court has, on previous occasions, addressed the issue of an individual’s employment status. *See supra* note 7.

279. *Id.* at 442.

280. *Id.* at 445 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992)).

281. *Id.* at 449. Those factors were the following: “Whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work; [w]hether and, if so, to what extent the organization supervises the individual’s work; [w]hether the individual reports to someone higher in the organization; [w]hether and, if so, to what extent the individual is able to influence the organization; [w]hether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and [w]hether the individual shares in the profits, losses, and liabilities of the organization.” *Id.*

gaining from their positions with [the defendant] are typical benefits of volunteer work.<sup>282</sup>

The court continued to analyze additional *Clackamas* factors and concluded that the board members were not employees.<sup>283</sup> The only benefit the board members received was officers' and directors' liability insurance, and the court concluded that this was not sufficient to convert them into employees.<sup>284</sup> Finally, reasoning that the term "employee" is interpreted uniformly under federal employment laws, the court concluded that its ADA analysis was also applicable to the ADEA claim.<sup>285</sup>

Next, the court addressed whether the television show producers were employees.<sup>286</sup> Once again, the court used *Clackamas*, and did not look at remuneration as a separate inquiry; it simply looked at remuneration as one factor.<sup>287</sup> In its analysis, the court noted the following: "[The defendant] does not have the power to hire or fire producers. It does not supervise them in a traditional employer-employee manner. *The producers are not paid a salary*, nor are they entitled to employee benefits."<sup>288</sup> By listing the pay issue with the other factors, the court was not using remuneration as a *threshold* inquiry; rather, it was looking at all factors and deciding whether the producers were employees under *Clackamas*.<sup>289</sup> Unfortunately for the plaintiff, the court decided these individuals were not employees and that the plaintiff could not pursue his claims.<sup>290</sup> Although the plaintiff lost this case, the opinion does provide some hope for plaintiffs because it demonstrates that the Ninth Circuit has adopted the minority position, which makes it slightly easier for plaintiffs to

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282. *Fichman v. Media Ctr.*, 512 F.3d 1157, 1160 (9th Cir. 2008) (emphasis added).

283. *Id.* at 1160–61.

284. *Id.* at 1161.

285. *Id.*

286. *Id.* at 1161–62.

287. *Id.* at 1162.

288. *Id.* (emphasis added).

289. *Id.*

290. *Id.* More recently, the Ninth Circuit relied on *Fichman* for the proposition that remuneration is not a dispositive issue. *Waisgerber v. City of Los Angeles*, 406 F. App'x 150 (9th Cir. 2010). In *Waisgerber*, the court cited *Fichman* and observed the following: "As evidenced by our discussion in *Fichman*, the fact that a person is not paid a salary does not necessarily foreclose the possibility that the person is an 'employee' for purposes of federal statutes, including Title VII." *Waisgerber*, 406 F. App'x at 152 (relying on *Fichman*, 512 F.3d at 1161).

prove employee status, regardless of whether that determination is necessary to decide whether the plaintiff can sue, whether the defendant is covered under federal anti-discrimination statutes, or which statutory damage cap applies.

As this Section of this Article has demonstrated, there is a split among the circuits regarding how courts decide employment status under federal anti-discrimination laws. Most courts require a threshold inquiry into remuneration, concluding that if there is insufficient remuneration, there is no possibility of an employment relationship. If, however, sufficient remuneration exists, the court will then look at other aspects of the relationship. The minority of courts look at remuneration simply as one factor when determining whether an employment relationship exists. Regardless of which approach the courts take, the end result is the same—individuals whom courts determine to be “true” volunteers are left unprotected by federal anti-discrimination statutes.

#### V. HOW CONGRESS, THE COURTS, AND THE EEOC CAN START PROTECTING VOLUNTEERS

Assuming Congress, the courts, and the EEOC believe that federal anti-discrimination statutes should protect volunteers, there are several options to consider.<sup>291</sup> The first option is for Congress to follow the Second and Fifth Circuits’ statements that Congress could amend the statutes to cover volunteers. The second option is for the courts to act. Specifically, the courts could do the following: (1) give expansive interpretations to the relevant statutory terms; (2) adopt the EEOC’s and the Supreme Court’s multi-factor test for distinguishing between employees and independent contractors rather than continuing the current practice (majority approach) of requiring remuneration as a threshold inquiry before evaluating any other factors;<sup>292</sup> (3) utilize previous Supreme Court precedent and

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291. Although this Article argues that federal anti-discrimination statutes should apply to volunteers, I do understand that one policy reason for keeping these statutes inapplicable to volunteers is that if these statutes’ protections are expanded, entities might be less willing to utilize volunteers and would therefore be forced to expend valuable resources and perhaps cut services to the constituencies they serve.

292. *See supra* note 7 (referencing Supreme Court cases that addressed how to determine employment status) and note 36 (listing factors from EEOC’s multi-factor test used

allow anti-discrimination statutes to protect against “evils” that might not have been the primary motivation behind the passage of those statutes; and/or (4) similar to (1) above, follow the Supreme Court’s and other courts’ pronouncements that anti-discrimination statutes should be interpreted broadly. The third option is for the EEOC to act. Specifically, the EEOC could change its position and provide volunteers with protection against discrimination; however, even if the EEOC does change its position, the courts will not be bound to follow the new position if they believe it is not persuasive. Regardless of which of these options (if any) occurs, individuals who selflessly devote their time and effort to various causes should be protected from discrimination. Similarly, entities that discriminate against volunteers should not be able to reap the rewards of these individuals’ work and then escape potential liability if they discriminate against them.

*A. Congress Can, and Should, Amend the Relevant Statutes*

When courts issue rulings with which Congress disagrees, Congress can amend the relevant statutes to ensure that the courts will interpret them consistently with Congress’s intent. This has happened on numerous occasions in the employment discrimination context; for example, (1) Congress passed the Civil Rights Act of 1991 in response to several Supreme Court opinions that weakened Title VII;<sup>293</sup> and (2) Congress amended the ADA in response to several Supreme Court opinions that weakened that statute.<sup>294</sup> As courts narrowly interpret the relevant statutory terms, Congress can take the opportunity to protect from discrimination those individuals who are willing to give up their time to help entities that benefit from these individuals’ commitment.<sup>295</sup> In fact, some courts have

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to determine employment status); *see also infra* note 336 (addressing some courts’ interpretations of Supreme Court cases regarding this issue).

293. *See* The Civil Rights Act of 1991, EEOC Website, <http://www.eeoc.gov/laws/statutes/cra-1991.cfm>, last visited October 28, 2015.

294. *See Office of Federal Contract Compliance Programs (OFCCP)*, Department of Labor Website, <http://www.dol.gov/ofccp/regs/compliance/faqs/ADAFaqs.htm> (last visited Nov. 15, 2014).

295. This possibility was raised by both the Second and Fifth Circuits. *See O’Connor v. Davis*, 126 F.3d 112, 119 (2d Cir. 1997); *Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 439 (5th Cir. 2013).

suggested that Congress could, or perhaps should, act and protect these individuals under these statutes.

For example, in *O'Connor*, the plaintiff was a student who had to complete “field work” at one of the entities approved by her college.<sup>296</sup> While there, the plaintiff was sexually harassed and sued the state and the hospital under Titles VII and IX.<sup>297</sup> The district court concluded that the plaintiff was not an “employee” and that the entity where she volunteered was not an “educational institution” under Title IX.<sup>298</sup> After next concluding that the plaintiff was not an employee because of a lack of remuneration, the Second Circuit ruled that the plaintiff’s Title VII claim was without merit.<sup>299</sup> The court was not, however, entirely enthusiastic about this result; specifically, the court appeared to sympathize with the plaintiff and suggested that Congress might want to act regarding this issue.<sup>300</sup>

The Second Circuit was not the only court to be sympathetic to volunteers who find themselves the victims of discrimination.<sup>301</sup> For example, in *Juino*, the Fifth Circuit cited *O'Connor* and stated the following after ruling that a volunteer firefighter was not an employee under Title VII: “Lastly, we conclude that it is within the province of Congress, and not this court, to provide a remedy under Title VII for plaintiffs in [the plaintiff’s] position.”<sup>302</sup>

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296. 126 F.3d at 113.

297. *Id.* at 114.

298. *Id.*

299. *Id.* at 116.

300. *See id.* at 119 (“[W]e conclude by saying only that we are not unsympathetic to O’Connor’s situation. We recognize, for example, that from her perspective, her success at Marymount was dependent to some degree on successfully completing her internship with Rockland, and that her dependency on Rockland made her vulnerable to continued harassment much as an employee dependent on a regular wage can be vulnerable to ongoing misconduct. In a similar vein, we recognize that O’Connor was not in quite the same position to simply walk away from the alleged harassment as are many other volunteers. *However, it is for Congress, if it should choose to do so, and not this court, to provide a remedy under either Title VII or Title IX for plaintiffs in O’Connor’s position.* We therefore affirm the judgment of the district court.” (emphasis added)).

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

302. *Id.* at 439 (quoting *O’Connor*, 126 F.3d at 119); *see also Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1061–62 (6th Cir. 2014) (citing *Demski v. U.S. Dep’t of Labor*, 419 F.3d 488, 492 (6th Cir. 2005), where the court noted that under the Energy Reorganization Act, Congress could expand the definition of a term it believes the courts are interpreting too narrowly).

Because volunteers are not covered under federal anti-discrimination statutes, and because most courts are making it difficult for individuals to prove employee status, it is time for Congress to listen to the Second and Fifth Circuits and step in and correct this problem. While eliminating discrimination against *volunteers* was not Congress's objective in drafting these statutes, this is a worthy goal that warrants changes to protect people upon whose services many entities rely to function effectively. Also, as discussed later, courts often broadly interpret anti-discrimination statutes and extend their protections beyond the principal evils the statutes were meant to address.<sup>303</sup>

*B. Courts Could Use an Expansive Interpretation of the Relevant Statutory Definitions to Cover Volunteers, and They Could Follow Supreme Court Precedent That Does Not Use the Threshold Remuneration Test*

Although courts have rejected a broad interpretation of the term “individual,”<sup>304</sup> applying a broad interpretation to that term is one approach courts *could* use to protect volunteers from discrimination. Specifically, Title VII's prohibition against discrimination provides the following:

It shall be an unlawful employment practice for an employer –

- (1) 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; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive

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303. See, e.g., *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 608 (2004) (Thomas, J., dissenting) (arguing that although the ADEA was intended to protect older workers from younger workers, the statute also protects younger workers who are within the class protected by the ADEA); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78–79, 82 (1998) (observing that although the impetus behind Title VII was not to prevent same-sex sexual harassment, same-sex sexual harassment can be actionable under Title VII); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296 (1976) (holding that although Title VII was intended to protect minorities, it also protects non-minorities).

304. See *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1242–43 (11th Cir. 1998) and cases cited therein.

*any individual* of employment opportunities or otherwise adversely affect his status as an employee, because of such *individual's* race, color, religion, sex, or national origin.<sup>305</sup>

Clearly, Title VII's language prohibits discrimination against "individuals."<sup>306</sup> The language does *not* limit its protections to "employees."<sup>307</sup> One possible reason for this is that the term "individual" covers job applicants and former employees.<sup>308</sup> Also, Title VII's language indicates that *employers* are prohibited from discriminating, suggesting that only *employees* are the intended beneficiaries of these statutes.<sup>309</sup> Although some courts have addressed the "individuals" argument, just about all of them decided that the term "individuals" is limited to employees, former employees, and job applicants.<sup>310</sup>

This approach, however, has not always been followed,<sup>311</sup> and perhaps a pro-plaintiff court could return to the D.C. Circuit's reasoning in *Sibley Mem'l Hosp. v. Wilson*, which, many years ago, gave an expansive interpretation to the word "individual."<sup>312</sup> In

305. 42 U.S.C. § 2000e-2(a) (2012) (emphasis added). One possible way to address the issue raised in this Article is to provide protection for volunteers who are the victims of discrimination, but not to count volunteers when determining whether an entity has enough employees to satisfy the statutory definition of "employer." This is a valid option as it protects volunteers because they are "individuals" and thus protected under the substantive prohibitions against discrimination, yet it also respects the definition of "employer" because that definition focuses on "employees."

306. *Id.* Even with a broad interpretation of the term "individual," this would help volunteers only if the entities for which they "worked" employed at least fifteen employees, as only "employers" with a minimum number of employees are subject to federal anti-discrimination statutes. *See supra* note 5.

307. 42 U.S.C. § 2000e-2(a) (2012).

308. *See supra* note 4.

309. 42 U.S.C. § 2000e-2(a)(1) (2012). One other problem for plaintiffs is that the substantive prohibition against discrimination covers "compensation, terms, conditions, or privileges of *employment*," which highlights Congress's concern regarding the *employment* relationship. *Id.* (emphasis added).

310. *See* *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1242–43 (11th Cir. 1998) and numerous cases cited therein. *See also* *Birch v. Cuyahoga Cty. Probate Court*, 392 F.3d 151, 157 (6th Cir. 2004) (noting that Title VII's language prohibits discrimination against "individuals" but deciding that the statute covers only employees); *Chatmon v. Vision Hospitality, LLC.*, No. 2:10-CV-485(MHT), 2011 U.S. Dist. LEXIS 89242, at \*10 (M.D. Ala. July 11, 2011), *adopted by* 2011 U.S. Dist. LEXIS 85761 (M.D. Ala. Aug. 3, 2011) (same).

311. *See, e.g.*, *Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973).

312. *Id.* at 1341–42.

*Wilson*, a “private duty nurse” sued a hospital, claiming discrimination.<sup>313</sup> The plaintiff appeared to work as an independent contractor, as his name was on a registry that matched patients with the nurses.<sup>314</sup> After the defendant rejected the plaintiff when he reported for an assignment, the plaintiff sued.<sup>315</sup> The court addressed whether the plaintiff was able to pursue a Title VII claim against the hospital as the plaintiff was not truly a hospital employee.<sup>316</sup> Although the hospital agreed that it was an “employer,” it argued that it was not the *plaintiff’s* employer.<sup>317</sup> The hospital then argued that the plaintiff could not sue it.<sup>318</sup> The court disagreed, concluding that Title VII allowed the plaintiff to pursue his claim.<sup>319</sup> The court focused on the Act’s use of the phrase “any individual.”<sup>320</sup>

The court also noted that the EEOC charge form did not use the term “employee,” but rather it used the term “person aggrieved.”<sup>321</sup> This, according to the court, supported its position that even “non-employees” could pursue Title VII claims.<sup>322</sup>

The hospital then tried to use Title VII’s remedies provision as proof that only employees could sue.<sup>323</sup> Specifically, the hospital argued that the statute’s remedies would make sense only if Title VII

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313. *Id.* at 1339–40.

314. *Id.* at 1339. Admittedly, this case involved the distinction between *independent contractors* and employees, not the distinction between *volunteers* and employees.

315. *Id.* at 1339–40.

316. *Id.* at 1340–42.

317. *Id.* at 1340.

318. *Id.*

319. *Id.* at 1342.

320. *Id.* at 1341 (“The Act defines ‘employee’ as ‘an individual employed by an employer,’ but nowhere are there words of limitation that restrict references in the Act to ‘any individual’ as comprehending only an employee of an employer. Nor is there any good reason to confine the meaning of ‘any individual’ to include only former employees and applicants for employment, in addition to present employees. Those words should, therefore, be given their ordinary meaning so long as that meaning does not conflict with the manifest policy of the Act.”).

321. *See id.* The current EEOC charge form uses the terms “complainant” and “charging party.” *See* EEOC, *Charge of Discrimination*, [http://www.eeoc.gov/eeoc/foia/forms/upload/form\\_5.pdf](http://www.eeoc.gov/eeoc/foia/forms/upload/form_5.pdf) (last visited Nov. 15, 2014).

322. *Wilson*, 488 F.2d at 1341. (explaining the defendant’s argument that because Title VII’s remedies provision allows for hiring and reinstatement, it is inapplicable to volunteers, for whom those remedies would not be applicable).

323. *Id.* at 1342.

were limited to employment relationships.<sup>324</sup> The hospital argued that the remedies provision “concerns relief that only an employer can give to its employees.”<sup>325</sup> The court rejected this argument, observing that the list of remedies was not an exhaustive list, but rather it was merely “illustrative.”<sup>326</sup>

The court therefore rejected the argument that only employees could sue under Title VII.<sup>327</sup> Even prior to its analysis of the statutory language, the court hinted that it was leaning in a pro-plaintiff direction.<sup>328</sup> Specifically, the court noted earlier in the opinion that one of Title VII’s main purposes was “to achieve *equality of employment opportunities*.”<sup>329</sup> It also noted that another purpose was to “provide equal access to the job market for both men and women.”<sup>330</sup> After noting that employers can exert “[c]ontrol over access to the job market,”<sup>331</sup> the court stated that “it would appear that Congress has determined to prohibit [employers] from exerting any power [they] may have to foreclose, on invidious [sic] grounds, access by any individual to employment opportunities otherwise available to him.”<sup>332</sup> The court concluded that the hospital’s reading of the statute would yield the anomalous result of condoning behavior that would interfere with the individual rights Congress sought to protect.<sup>333</sup>

Although *Wilson* gave an expansive interpretation to Title VII, most courts since then have rejected *Wilson* and have concluded that “any individual” is restricted to employees, job applicants, and

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324. *Id.*

325. *Id.*

326. *Id.* (“While neither hiring nor reinstatement may be relevant outside the context of direct employment, both injunctive and back pay relief (in the sense of monetary damages for lost employment opportunities) may be available, in an appropriate case, against respondents who are neither actual nor potential direct employers of particular complainants, but who control access to such employment and who deny such access by reference to invidious criteria.”).

327. *Id.* at 1342.

328. *See id.* at 1340–41.

329. *Id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971)) (emphasis supplied by D.C. Circuit).

330. *Id.* at 1341 (quoting *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971)).

331. *Id.*

332. *Id.*

333. *Id.*

former employees.<sup>334</sup> Thus, unless Congress or the Supreme Court instructs them to do so, lower courts will most likely not apply *Wilson* to future cases.

Another way the courts could give a more broad interpretation to these anti-discrimination statutes is by utilizing the common-law agency test the Supreme Court used in *Clackamas*, *Reid*, and *Darden* when analyzing who qualifies as an employee.<sup>335</sup> That test

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334. See, e.g., *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1242–43 (11th Cir. 1998) and numerous cases cited therein. The court in *Llampallas* noted the following:

This limitation is necessary to further Congress' intent in enacting Title VII. "Title VII does not presume to obliterate all manner of inequity." Instead, Congress intended to limit the scope of the Act to specific employment relationships; thus, the statute provides relief only against "employers" as defined under the statute. We can assume that Congress also meant to limit the pool of potential plaintiffs under Title VII; otherwise, any person could sue an "employer" under the statute regardless of whether she actually had an employment relationship with that employer. Hence, courts have almost universally held that the scope of the term "any individual" is limited to employees.

Title VII's remedial scheme also supports this interpretation; the statute authorizes remedies such as reinstatement, hiring, and back pay that could not make a non-employee plaintiff whole. Moreover, in 1972, Congress extended the reach of Title VII to the federal workplace, amending the Act to cover "all personnel actions affecting employees or applicants for employment . . ." Because Congress intended, by this amendment, to make Title VII applicable in the federal workplace to the same extent that it was already applicable in the non-federal workplace . . . the amendment supports the interpretation of "any individual" in the original Act as limited to those individuals who are employees.

*Id.* at 1243 (internal citations and emphasis omitted). Also, in *Blankenship v. City of Portsmouth*, 372 F. Supp. 2d 496, 500 (E.D. Va. 2005), the district court concluded that the term "individual" is limited to employees. Many other courts have stated that Title VII and other remedial statutes should be given a broad construction, but those courts have still concluded that volunteers are not "employees" under the statute. See, e.g., *Scott v. City of Minco*, 393 F. Supp. 2d 1180, 1189–91 (W.D. Okla. 2005).

335. As noted earlier, the Supreme Court has addressed the issue of who is an employee under various federal statutes; however, in those cases, the issue did not involve the distinction between employees and volunteers. See *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440 (2003) (applying a multi-factor, common-law agency test focusing on control when deciding whether physician-shareholders in a medical practice group were "employees" under the ADA); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (applying a multi-factor, common-law agency test for determining who qualifies as an "employee" under ERISA); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739–40 (1989) (applying a common-law agency test focusing on control to determine whether an individual was an "employee" under the Copyright Act). Some of the courts that have adopted the threshold remuneration test have argued that because there was an obvious payment in all three of these Supreme Court cases, the Court did not have to address threshold remuneration; payment was unquestionably present, so the Court did not have to engage in that preliminary analysis. See *supra* cases cited in Part IV.

provides a list of several factors, with no one factor (including the issue of payment) being dispositive.<sup>336</sup> The test focuses mostly on the issue of control, but it does address other issues for courts to evaluate.<sup>337</sup> If the courts adopt this test, plaintiffs would be able to get past the threshold remuneration test, a test which defeats many plaintiffs' claims.<sup>338</sup> If the courts were to look at the non-exhaustive list of factors from the Supreme Court and the EEOC's Compliance Manual, more plaintiffs would be considered "employees" and more defendants would be considered "employers." Both of these outcomes would allow more "volunteers" to pursue discrimination claims. This, of course, does not change the courts' current position that volunteers are not entitled to pursue discrimination claims; it does, however, allow for a broader definition of "employee" and "employer," which would allow more people to seek relief under federal (and state) anti-discrimination statutes.

With just about all courts rejecting the argument that all "individuals," including volunteers, can sue under federal anti-discrimination statutes,<sup>339</sup> the more productive path plaintiffs could pursue is to try to convince courts to adopt the Supreme Court's test for determining employment status. Although that test focuses more on the distinction between employees and *independent contractors* than it does on the distinction between employees and *volunteers*, if courts were to apply that test to cases involving the issue of whether someone is an employee rather than a volunteer, more "volunteers" would be able to prove employee status and therefore be protected from discrimination. In light of the service these individuals provide to various entities and to the public, they should be entitled to this protection.

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336. See EEOC, Comp. Man. § 2-III(A)(1) (2013), <http://www.eeoc.gov/policy/docs/threshold.html>; see also *supra* notes 36, 37.

337. See *supra* note 36.

338. See *supra* Section IV.A.

339. See *Llampallas*, 163 F.3d 1236 and cases cited therein.

*C. Although Discrimination Against Volunteers Was Not the Principal Evil Motivating the Passage of these Statutes, the Courts Could Still Apply the Statutes to Volunteers, and the Courts Could Also Follow the Policy of Broadly Interpreting Anti-Discrimination Statutes*

When Congress passed Title VII, the ADEA, and the ADA, discrimination against volunteers was not the principal evil it sought to eradicate.<sup>340</sup> The Supreme Court has, however, on occasion noted that anti-discrimination statutes often go beyond the principal evils they were meant to address; specifically, in one of the most notable examples of this, *Oncale v. Sundowner Offshore Servs., Inc.*,<sup>341</sup> Justice Scalia acknowledged that although same-sex sexual harassment was not the principal evil Congress was addressing when it passed Title VII, the law did, in fact, protect victims of same-sex sexual harassment.<sup>342</sup> Justice Scalia observed:

As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. *But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.*<sup>343</sup>

Justice Thomas echoed that sentiment when addressing the ADEA; specifically, in his dissenting opinion in *General Dynamics Land Sys., Inc. v. Cline*, Justice Thomas concluded that although the ADEA was intended to protect older workers, the ADEA should also protect younger workers, as long as they were members of the ADEA's protected class.<sup>344</sup> Justice Thomas relied on *Oncale*'s "principal evil" argument and stated:

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340. The principal reason for passing Title VII was the elimination of racial discrimination in employment. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278–80 (1976). The evil Congress sought to eradicate when passing the ADEA was discrimination against older individuals. 29 U.S.C. § 621(b) (2012). The evil Congress sought to eradicate when passing the ADA was "discrimination against individuals with disabilities." 42 U.S.C. § 12101(b) (2012).

341. 523 U.S. 75 (1998).

342. *Id.* at 79–80.

343. *Id.* at 79 (emphasis added).

344. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 613 (2004) (Thomas, J., dissenting).

Hence, the Court apparently concludes that if Congress has in mind a particular, principal, or primary form of discrimination when it passes an antidiscrimination provision prohibiting persons from “discriminating because of [some personal quality],” then the phrase “discriminate because of [some personal quality]” only covers the principal or most common form of discrimination relating to this personal quality.

The Court, however, has not typically interpreted nondiscrimination statutes in this odd manner. “[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”<sup>345</sup>

Applying this “principal evil” argument here, one could certainly argue that even though discrimination against volunteers was not the principal evil Congress sought to eradicate when passing these statutes, volunteers should still be protected by this legislation. Unlike *Oncale* and *Cline*, however, where a plain reading of the relevant statutory language certainly could have been interpreted in the way Justices Scalia and Thomas argued it should have been interpreted, the statutory language involved with the issue of whether volunteers are covered under federal anti-discrimination statutes more likely than not favors a result where the individuals are *not* protected, as those anti-discrimination laws focus on *employment* relationships, not volunteer relationships.<sup>346</sup> As a result, courts will be less likely to use the “principal evil” argument and adopt a pro-plaintiff approach.

In addition to the “principal evil” argument, there is another argument courts could use to conclude that Title VII should protect volunteers; specifically, since Title VII’s enactment, many courts have

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345. *Id.* at 608 (2004) (Thomas, J., dissenting) (quoting *Oncale*, 523 U.S. at 79). See also *McDonald*, 427 U.S. at 279, where the Court held that although Title VII was intended to protect minorities, it also protected non-minorities.

346. See *Tadros v. Coleman*, 717 F. Supp. 996, 1003 (S.D.N.Y. 1989), *aff’d*, 898 F.2d 10 (2d Cir. 1990) (“Title VII is an *employment law*, available only to employees . . . seeking redress for the unlawful employment practices of their employers.”). See also *Fantini v. Salem State Coll.*, 557 F.3d 22, 30 (1st Cir. 2009) (“The employment discrimination statutes have broad remedial purposes and should be interpreted liberally, but that cannot trump the narrow, focused conclusion we draw from the structure and logic of the statutes.”) (quoting *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995)).

observed that anti-discrimination statutes should be interpreted broadly.<sup>347</sup> For example, in 1971, the Supreme Court commented that Title VII should be interpreted broadly when it handed down its decision in *Griggs v. Duke Power Co.*<sup>348</sup> More recently, the Court has interpreted anti-discrimination statutes broadly and in favor of plaintiffs in order to further those statutes' purposes.<sup>349</sup> For example, in *Crawford*, the Court provided a broad interpretation of Title VII's anti-retaliation provision's opposition clause.<sup>350</sup> Also, the Court in *Thompson v. N. Am. Stainless, LP* adopted a broad interpretation of Title VII and determined that Title VII prohibits third-party retaliation.<sup>351</sup> Therefore, although the Court has in some instances taken a restrictive view of these statutes, it has routinely mentioned that these statutes should be interpreted broadly.

As a result of these statements from the Court, many United States Courts of Appeals and United States District Courts have followed that guidance and have given a broad interpretation to these statutes.<sup>352</sup> As just noted, several United States Courts of Appeals have recognized that remedial statutes such as Title VII, the ADEA, and the ADA should be interpreted broadly. For example, in *Germer v. Cty. of Chesterfield*, the Fourth Circuit reversed a lower court's granting of the defendant's motion to dismiss the plaintiff's Title VII claim, which was based on sex discrimination.<sup>353</sup> In reaching its conclusion that the district court incorrectly granted the motion to dismiss, the Fourth Circuit referred to the text of Title VII and observed that "[c]ourts have consistently interpreted this

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347. As addressed in this Section of the Article, this is true in cases from the United States Supreme Court, the United States Courts of Appeals, and the United States District Courts.

348. 401 U.S. 424, 430–31 (1971).

349. See *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271 (2009) (providing a broad, pro-plaintiff interpretation of Title VII's anti-retaliation provision); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011) (adopting a pro-plaintiff position and allowing third-party retaliation claims under Title VII); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (adopting a somewhat liberal definition of "adverse employment action" and also deciding that employers can be held liable for retaliatory conduct that occurs off-site). Also, the Court took a pro-plaintiff approach in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), when it decided that Title VII covered former employees.

350. See *Crawford*, 555 U.S. at 276–80.

351. 562 U.S. 170 (2011).

352. Some of these cases are addressed now.

353. 674 F.3d 264, 269 (4th Cir. 2012).

intentionally broad language to apply to potential, current, and *past* employees.”<sup>354</sup> The court noted that the statute protected “any individual,” and that this language clearly protects former employees.<sup>355</sup>

Similar to the Fourth Circuit, the Seventh Circuit has also recently emphasized that federal anti-discrimination statutes should be interpreted broadly.<sup>356</sup> In reversing the district court’s granting of summary judgment in favor of the defendant in a religious discrimination claim, the court in *Adeyeye v. Heartland Sweeteners, LLC*, noted that “Title VII is a remedial statute that we construe liberally in favor of employee protection.”<sup>357</sup>

United States District Courts have also agreed that remedial statutes such as Title VII, the ADA, and the ADEA should be interpreted broadly; in fact, some of these district court opinions involved the particular topic of this Article.<sup>358</sup> Specifically, in *EEOC v. Pettegrove Truck Serv., Inc.*, the court had to decide whether two family members who did not draw a salary were employees.<sup>359</sup> If they were employees, the company would have met the fifteen-employee threshold to be covered under Title VII.<sup>360</sup> In concluding that these individuals were employees, the court noted that “a broad interpretation of the term employee is necessary to effectuate the purposes of Title VII.”<sup>361</sup> Thus, the court gave a broad interpretation to the term “employee,” and if other courts are willing to use the “broad interpretation” analysis when addressing the employee/volunteer issue, more individuals will be protected.

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354. *Id.* at 268 (emphasis in original).

355. *Id.* Although the court adopted a broad interpretation of “any individual,” it was referring to a former employee, not a volunteer. *Id.* Courts, including the Supreme Court, have been much more receptive to the issue of whether federal anti-discrimination laws protect former employees than they have been to the issue of whether those statutes protect volunteers. *See* *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (deciding that former employees are protected under Title VII).

356. *See* *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 450 (7th Cir. 2013).

357. *Id.*

358. *See, e.g.*, *EEOC v. Pettegrove Truck Serv.*, 716 F. Supp. 1430 (S.D. Fla. 1989); *Volling v. Antioch Rescue Squad*, No. 11 C 04920, 2012 U.S. Dist. LEXIS 171623 (N.D. Ill. Dec. 4, 2012).

359. 716 F. Supp. at 1432–33.

360. *Id.* at 1432.

361. *Id.* at 1433.

Other district courts have also observed that Title VII should be interpreted broadly; specifically, the court in *Volling* relied on Seventh Circuit precedent and observed that courts are required to construe Title VII broadly and that the term “employee” should be given a “generous construction.”<sup>362</sup> If more courts applied this approach, more volunteers would be covered, and many “workplaces” would be more inviting places for people to volunteer their time.<sup>363</sup>

Following such an approach would encourage volunteers who are facing discrimination to continue providing services to the entities for which they volunteer. This is something Congress and the courts should want, but is only likely to happen by changing the way of analyzing the volunteer issue.

*D. The EEOC Could Change Its Position and Interpret Federal Anti-Discrimination Statutes to Protect Volunteers*

The EEOC has not issued a regulation regarding whether these statutes should apply to volunteers.<sup>364</sup> It has, however, addressed this issue in section 2-III(A)(1)(c) of its Compliance Manual. There, the EEOC is quite clear that volunteers cannot pursue these claims; however, the agency does provide exceptions to this general rule.<sup>365</sup> Specifically, according to the Manual:

Volunteers usually are not protected “employees.” However, an individual may be considered an employee of a particular entity if, as a result of volunteer service, s/he receives benefits such as a pension, group life insurance, workers’ compensation, and access to professional certification, even if the benefits are provided by a third party. The benefits constitute “significant remuneration”

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362. *Volling*, 2012 U.S. Dist. LEXIS 171623, at \*32 (relying on *Smith v. Castaways Family Diner*, 453 F.3d 971, 985–86 (7th Cir. 2006) and on *Veprinsky v. Fluor Daniel, Inc.*, 87 F.3d 881, 889 (7th Cir. 1996)).

363. *See Volling*, 2012 U.S. Dist. LEXIS 171623, at \*32–33 (“A workplace is not necessarily any different for a non-compensated volunteer than it is for a compensated ‘employee,’ and while both are generally free to quit if they don’t like the conditions (at-will employment being the norm), neither should have to quit to avoid sexual, racial, or other unlawful discrimination and harassment.”).

364. *See supra* note 21.

365. *See* EEOC COMPL. MAN., § 2-III(A)(1)(c) (2013), <http://www.eeoc.gov/policy/docs/threshold.html>.

rather than merely the “inconsequential incidents of an otherwise gratuitous relationship.”<sup>366</sup>

The EEOC also has the following exception listed in its Manual: “A volunteer may also be covered by the EEO statutes if the volunteer work is required for regular employment or regularly leads to regular employment with the same entity. In such situations, discrimination by the respondent operates to deny the charging party an employment opportunity.”<sup>367</sup> Although many courts agree with the EEOC’s positions on when “volunteers” can sue under federal anti-discrimination statutes, the EEOC Compliance Manual does not have the force of law, and the Supreme Court has determined that the positions the agency has articulated in the Compliance Manual are “entitled to respect” only to the extent that they have the “power to persuade.”<sup>368</sup> As a result, even if the EEOC changes the position it articulated in the Compliance Manual with respect to whether volunteers can pursue federal anti-discrimination claims, it is uncertain, at best, whether courts would defer to that position.

Even if the EEOC does not change its position on this issue, at the very least, courts could follow the EEOC’s multi-factor approach to determine employee status.<sup>369</sup> Although this change would not guarantee success for all plaintiffs, it would at least give them stronger footing on which to stand when pursuing these discrimination claims. By changing its position with respect to volunteers and their status under federal anti-discrimination statutes, the EEOC can attempt to make it easier for volunteers to pursue their claims.

## VI. CONCLUSION

Despite the time and effort volunteers devote to their endeavors, they are typically left without a federal remedy if they are discriminated against based upon membership in a protected class.

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366. *Id.*

367. *Id.*

368. See *McMenemy v. City of Rochester*, 241 F.3d 279, 284 (2d Cir. 2001) (relying on *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); see also *supra* note 21.

369. See *supra* notes 37 and 67 regarding a possible inconsistency between the two positions the EEOC has taken on this issue.

Because the relevant statutes focus on protecting *employment* relationships, volunteers must demonstrate that they are actually employees who are mislabeled as volunteers.

Although the courts unanimously agree that volunteers are not covered under federal anti-discrimination statutes, the courts disagree regarding how to determine employment status. Most courts first evaluate whether the individual in question receives sufficient remuneration; if the individual does not receive sufficient remuneration, the inquiry is over, and the individual will not be protected. If there is sufficient remuneration, the courts then apply common-law agency principles to complete the analysis. Other courts look at remuneration simply as one factor in making this determination.

To protect volunteers and to encourage volunteerism, Congress, the courts, and the EEOC should act. Congress could do so rather easily, as it has previously amended several anti-discrimination statutes to broaden their protections. Without Congressional action, the courts would have a difficult time protecting volunteers; however, there are ways in which the courts could try to do so. Courts could give broad interpretations to the relevant statutory terms; they could adopt the Supreme Court's multi-factor test for determining employment status rather than continuing the current majority approach of requiring remuneration as a threshold inquiry before evaluating any other factors; they could utilize previous alternative Supreme Court precedent that allow statutes to protect against "evils" that might not have been the primary motivation behind the passage of anti-discrimination statutes; or they could follow the Supreme Court's and other courts' pronouncements that anti-discrimination statutes should be interpreted broadly. Finally, although it is likely the least effective way of protecting volunteers, the EEOC could change its position on this issue. Even if the EEOC was able to make this change, however, it is questionable whether courts would defer to the EEOC's new position.

Volunteers serve a valuable role for many types of entities. As this Article demonstrates, many entities responsible for the health and safety of individuals rely on volunteers to provide essential services, and although these selfless individuals typically do not rely on their volunteer activities for their livelihood, they should not be forced to endure discrimination. To prevent this, Congress, the courts, and the EEOC should all take active roles in expanding federal anti-

discrimination statutes to protect those individuals who have little or no protection against discrimination at the “workplace.” By doing so, more individuals would continue volunteering their time, and more “employers” would be required to treat those who provide invaluable service to them more favorably.

