Volunteer Protection under Title VII: Is Remuneration Required?

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INTRODUCTION

Volunteering is a respected and common activity in the United States. A recent survey by the US Department of Labor revealed that an estimated 62.6 million Americans volunteer, spending a median of 50 hours a year supporting causes and institutions that matter to them.¹ Some citizens volunteer to fulfill school requirements,² and others volunteer to develop skills and contacts for future employment.³ In addition to the volunteers, the organizations that retain volunteers benefit from the relationship. Countless nonprofits and government entities rely heavily on volunteers, who often work alongside salaried employees and do similar work.⁴ Volunteers are particularly

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⁴ See, for example, American Red Cross, Ways to Volunteer, online at http://www.redcross.org/support/volunteer (visited Oct 18, 2013) (“Volunteers constitute 94% of the total workforce to carry out our humanitarian work.”); Chicago Public
important during periods of economic instability, as organizations become unable to pay for new workers.\(^5\)

Additionally, the US government explicitly sponsors volunteerism. Congress passed the Edward M. Kennedy Service America Act\(^6\) in 2009 to “encourage citizens of the United States, regardless of age, income, geographic location, or disability, to engage in full-time or part-time national service.”\(^7\) The Corporation for National & Community Service, a federal agency, fulfills its primary purpose to support “the American culture of citizenship, service and responsibility” by providing information on volunteer opportunities and publishing reports on the benefits of volunteering.\(^8\) Several presidents throughout history have encouraged Americans to volunteer.\(^9\) For example, after the 2012 presidential election, President Obama attributed his success in large part to the volunteers who worked on his campaign.\(^10\) More recently in October 2013, he publicly thanked
furloughed federal employees for volunteering for charities and nonprofits during the government shutdown.\footnote{Nathaniel Lubin, \textit{President Obama Visits Martha's Table to Thank Furloughed Workers} (The White House Blog Oct 15, 2013), online at \url{http://www.whitehouse.gov/blog/2013/10/15/president-obama-visits-martha-s-table-thank-furloughed-workers} (visited Oct 18, 2014).}

Though volunteerism is celebrated and encouraged in this country, volunteers are not adequately protected from discrimination at their place of service. Title VII of the Civil Rights Act of 1964\footnote{Pub L No 88-352, 78 Stat 241 (1964), codified at 42 USC § 2000a et seq.} was enacted to comprehensively combat discrimination in the workplace,\footnote{See Craig J. Ortner, \textit{Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern}, 66 Fordham L Rev 2613, 2622-23 (1998).} yet it does not apply explicitly to volunteers. While Title VII prevents employers from discriminating against employees based on race, color, religion, sex, or national origin, the statutory language of Title VII does not provide a complete definition of “employee.”\footnote{See 42 USC §§ 2000e(f), 2000e-2(a) (defining an employee as “an individual employed by an employer”).} As a result, the line dividing those volunteers who are entitled to Title VII protection and those who are not shielded from employment discrimination is unclear.

Individuals working as volunteers generally do not receive Title VII protection, but, under certain circumstances, volunteers have been granted Title VII “employee” status.\footnote{See, for example, \textit{Juino v Livingston Parish Fire District No 5}, 717 F3d 431, 439 (5th Cir 2013).} The federal circuit courts are split regarding the standard used when determining whether Title VII protection extends to a plaintiff volunteer.\footnote{See id at 435.} A minority of circuits use the common law agency test, looking at various factors to determine whether the plaintiff volunteer’s relationship with the defendant organization resembles an employee-employer relationship.\footnote{See, for example, \textit{Bryson v Middlefield Volunteer Fire Department, Inc}, 656 F3d 348, 354 (6th Cir 2011).} The majority of circuits use a threshold-remuneration test, requiring that the plaintiff volunteer first prove that he or she received remuneration from the defendant organization before engaging in the common law agency analysis.\footnote{See, for example, \textit{O'Connor v Davis}, 126 F3d 112, 115–16 (2d Cir 1997).}
This Comment discusses the test that should be used by courts to determine whether a volunteer is an "employee" under Title VII. Part I provides background information by summarizing Title VII and related Supreme Court cases. Part II describes the circuit split and the reasoning used by the majority and minority circuits. Part III proposes that the circuit split be resolved in favor of the minority circuits' common law agency test, rather than the majority circuits' threshold-remuneration test. This Comment argues that the majority circuits' threshold-remuneration test is inappropriate because it conflicts with the Restatement of Agency, which the Supreme Court has used to shape its analysis in relevant cases involving Title VII and other areas of employment law. Part IV concludes that the minority circuits' common law agency test and the corresponding Restatement of Agency mean that volunteers do not need to be closed off from Title VII protection by a remuneration requirement.

I. BACKGROUND

A. Title VII

Volunteers who have experienced discrimination at their place of service have often turned to Title VII of the Civil Rights Act of 1964,\(^\text{19}\) which may be “the most important civil rights statute that Congress has enacted in the past fifty years.”\(^\text{20}\) The Act was passed “in response to mounting popular demand to extend constitutional equality protections to African Americans.”\(^\text{21}\) Congress enacted Title VII to end discrimination in the workplace and to declare “the right of persons to be free from [ ] discrimination.”\(^\text{22}\)

Under Title VII, it is illegal “for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,

\(^{19}\) See, for example, Bryson, 656 F3d at 349–50.


\(^{22}\) Civil Rights Act of 1964, HR Rep No 914, 88th Cong, 2d Sess 2401 (1964), reprinted in 1964 USCCAN 2391.
because of such individual’s race, color, religion, sex, or national origin.” Courts have held that the phrase “any individual” refers to employees. It is also unlawful for an employer “to discriminate against any of his employees ... because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or ... participated in any manner in an investigation, proceeding, or hearing under [Title VII].” Title VII “prohibits discrimination with respect to employment decisions that have direct economic consequences, such as termination, demotion, and pay cuts,” and it also “reaches the creation or perpetuation of a discriminatory work environment.”

Title VII defines “employer” as “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.” The statute’s definition of the term “employee” is “an individual employed by an employer.” Many other employment laws use the same definition for “employee,” including the Fair Labor Standards Act, the Family and Medical Leave Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Employee Retirement Income Security Act.

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24 See, for example, Llampallas v Mini-Circuits, Lab, Inc, 163 F3d 1236, 1242 (11th Cir 1998) (“Title VII does not define ‘any individual,’ and although we could read the term literally, we have held that only those plaintiffs who are ‘employees’ may bring a Title VII suit.”); Serapion v Martinez, 119 F3d 982, 985 (1st Cir 1997) (“Although the language [of Title VII] speaks of ‘any individual,’ courts long ago concluded that Title VII is directed at, and only protects, employees and potential employees.”).
25 42 USC § 2000e-3(a).
26 Vance v Ball State University, 133 S Ct 2434, 2440–41 (2013) (agreeing with lower courts that “Title VII prohibits the creation of a hostile work environment”).
27 42 USC § 2000e(b).
28 42 USC § 2000e(f).
29 Pub L No 75-718, 52 Stat 1060 (1938), codified at 29 USC § 203(e)(1).
B. Relevant Supreme Court Cases

The Supreme Court has not addressed how Title VII should apply to volunteers, but three Supreme Court cases have served as starting points for the circuit courts’ reasoning in employment discrimination cases involving volunteers. While the following Supreme Court cases do not consider Title VII, they examine the employee-employer relationship under statutes that, like Title VII, are unclear regarding the meaning of the term “employee.”

1. **Reid:** the congressional intent associated with the term “employee” in statutes.

   In *Community for Creative Non-Violence v Reid,*[^34] the Supreme Court decided whether a nonprofit organization commissioned an artist for a sculpture constituting a “work made for hire”[^25] under the Copyright Act of 1976.[^36] The Copyright Act defines a “work made for hire” as “work prepared by an employee within the scope of his or her employment,” but the Act does not define the term “employee.”[^37]

   The Supreme Court began its analysis with a general principle: “[W]hen Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.”[^38] This conclusion followed from the fact that “where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.”[^39]

   The Supreme Court in *Reid* continued, “In past cases of statutory interpretation, when we have concluded that Congress intended terms such as ‘employee,’ ‘employer,’ and ‘scope of

[^39]: Reid, 490 US at 739 (quotation marks and citations omitted).
employment’ to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms.”

One reason to rely on the common law was the fact that “federal statutes are generally intended to have uniform nationwide application.” The Court then summarized the common law agency test:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

These factors were based on the Restatement (Second) of Agency, and the Supreme Court explained that “[n]o one of these factors is determinative.”

The Court concluded from an analysis of the common law agency factors that the sculptor was not an employee but an independent contractor. Though the sculptor created a sculpture that met the specifications and deadlines of the nonprofit organization, he worked in his own studio, supplied his own tools, was retained for less than two months, and had total discretion in all other aspects of his work. The cumulative

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40 Id at 740–41, citing Kelley, 419 US at 332; Ward v Atlantic Coast Line Railroad Co, 362 US 396, 400 (1960); Baker, 359 US at 228.
42 Reid, 490 US at 751–52 (citations omitted).
43 Id at 752.
44 Id.
45 Id at 752–53.
approach based on the Restatement (Second) of Agency allowed
the Court to examine all relevant aspects to the existence of
"employee" status.

2. *Darden*: the application of common law principles to a
circular definition.

In *Nationwide Mutual Insurance Company v Darden*, the
Supreme Court applied the common law agency test laid out in
*Reid* to the Employee Retirement Income Security Act of 1974 (ERISA). Like Title VII, ERISA's definition of "employee" is
"any individual employed by an employer." The Court started
its analysis of the term by recognizing that this definition "is
completely circular and explains nothing." The Supreme Court
did not find "any provision [in ERISA] either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency
law principles would thwart the congressional design or lead to
absurd results." Therefore, the Court adopted the common law
agency test for determining who qualifies as an "employee"
under ERISA. It also noted that "[s]ince the common-law test
contains no shorthand formula or magic phrase that can be
applied to find the answer, all of the incidents of the relationship
must be assessed and weighed with no one factor being
decisive."

The Supreme Court in *Darden* rejected the argument that
"employee" should instead be construed "in the light of the
mischief to be corrected and the end to be attained," which was
a broader standard used in *National Labor Relations Board v
Hearst Publications, Inc* and *United States v Silk*. *Hearst* and
*Silk* were earlier Supreme Court cases that interpreted

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49 29 USC § 1002(6). See also *Darden*, 503 US at 323.
50 *Darden*, 503 US at 323.
51 Id.
52 Id.
53 Id at 324 (quotation marks and citations omitted).
56 331 US 704, 713 (1947).
“employee” for the purposes of the National Labor Relations Act and the Social Security Act, respectively. The Court in Darden noted that after the Hearst and Silk opinions, Congress amended the statutes at issue “to demonstrate that the usual common-law principles were the keys to meaning,” providing guidance for future statutory construction.

The Court then remanded the case so that the Court of Appeals could determine whether Darden, an insurance salesman, was an employee of Nationwide Mutual Insurance. The Court directed that this analysis be conducted under “traditional agency law principles,” applying the cumulative approach to a statute with the same “employee” definition as Title VII.

3. Clackamas: an emphasis on the existence of control.

The most recent Supreme Court case relevant to the circuit split is Clackamas Gastroenterology Associates v Wells. This case dealt with an alleged violation of the Americans with Disabilities Act of 1990 (ADA), which has the same circular definition of “employee” as ERISA and Title VII. The issue in the case was whether the “employee” definition included physicians engaged as shareholders and directors of a medical clinic. The Court relied on Reid and Darden since they are “cases construing similar language [that] give us guidance on how best to fill the gap in the statutory text.” It then similarly concluded that Congress intended for “employee” and “employer” to describe the master-servant relationship under the common law agency test.

57 29 USC § 151 et seq (defining “employee” to mean “any employee”).
58 42 USC § 301 et seq (defining “employee” to “include,” among other, unspecified occupations, “an officer of a corporation”).
59 See Darden, 503 US at 323.
60 Id at 324–25.
61 Id at 328.
62 Id.
64 42 USC § 12101 et seq.
65 See 42 USC § 12111(4) (defining “employee” as “an individual employed by an employer”).
66 Clackamas, 538 US at 442.
67 Id at 444.
68 Id at 445.
The Clackamas Court elaborated on the common law doctrine by stating that “the relevant factors defining the master-servant relationship focus on the master's control over the servant.”69 The Court referred to the Restatement (Second) of Agency, which defines “servant” as a person whose work is “controlled or is subject to the right to control by the master.”70 The Restatement also repeats the control element in other sections.71 It states that a distinguishing factor between servants and independent contractors is the extent of control that one exercises over the work of the other.72

The Court supported its emphasis on the extent of control with guidance from the Equal Employment Opportunity Commission (EEOC), “the agency that has special enforcement responsibilities under the ADA and other federal statutes containing similar threshold issues for determining coverage.”73 The EEOC factors relevant to whether a shareholder-director is an “employee” are:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
- Whether and, if so, to what extent the organization supervises the individual's work
- Whether the individual reports to someone higher in the organization
- Whether and, if so, to what extent the individual is able to influence the organization
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts, and
- Whether the individual shares in the profits, losses, and liabilities of the organization.74

69 Id at 448.
70 Restatement (Second) of Agency § 2(2) (1957). See also Clackamas, 538 US at 442.
71 See Restatement (Second) of Agency § 220(1) (1957) (“A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.”).
72 See Restatement (Second) of Agency § 220(2)(a) (1957). See also Clackamas, 538 US at 448.
73 Clackamas, 538 US at 448.
74 EEOC Compliance Manual § 605.0009. See also Clackamas, 538 US at 449–50.
The Court further added that the “mere fact that a person has a particular title ... should not necessarily be used to determine whether he or she is an employee or a proprietor” and reiterated that the “employee” analysis depends on “all of the incidents of the relationship with no one factor being decisive.”

II. CIRCUIT SPLIT

The circuit courts have referred to Reid, Darden, and Clackamas when faced with the question of how volunteers should be analyzed for Title VII purposes. However, the circuits have applied the Supreme Court cases differently and are split on whether remuneration is necessary in determining whether a volunteer falls under the Title VII “employee” category. The majority circuits use a threshold-remuneration test, which requires that the plaintiff volunteer receive remuneration from the defendant organization before engaging in the common law agency analysis. The minority circuits use the common law agency test, which asks whether the plaintiff volunteer's relationship with the defendant organization resembles an employee-employer relationship.

A. Majority Circuits

The Second, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits have adopted a standard for Title VII volunteer cases known as the threshold-remuneration test. The test requires a volunteer to show that he or she received remuneration, such as salary or wages, before the court can proceed to analyze the employment relationship under the common law agency test.

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75 Clackamas, 538 US at 450–51 (citations omitted).
76 See O’Connor, 126 F3d at 116 (“We believe that the preliminary question of remuneration is dispositive in this case.”); Haavistola v Community Fire Company of Rising Sun, Inc, 6 F3d 211, 220 (4th Cir 1993); Juino, 717 F3d at 439; Graves v Women’s Professional Rodeo Association, Inc, 907 F2d 71, 74 (8th Cir 1990); McGuinness v University of New Mexico School of Medicine, 170 F3d 974, 979 (10th Cir 1998); Llampallas, 163 F3d at 1243.
77 See Juino, 717 F3d at 435.
1. The Eighth Circuit in *Graves*: the ordinary usage of “employee.”

The first major case that detailed the requirements for an employer-employee relationship under Title VII was *Graves v Women's Professional Rodeo Association, Inc.*, which was decided shortly after *Reid*. Lance Graves brought a suit against the Women's Professional Rodeo Association (WPRA) for denying him membership on the basis of his gender in violation of Title VII. Although the WPRA exercised a degree of control over its members via membership rules, it was primarily a voluntary organization that provided its members with the opportunity to compete for prize money.

The Eighth Circuit found that the relationship between the WPRA and its members was not one of “employment” based on the ordinary usage of the term. The court explained that Title VII failed to “set out any meaning for ‘employer’ and ‘employee’ distinct from those implied by ordinary usage” and believed that the “definitions seem to leave no other route.” The court also relied on the legislative history of Title VII, which it said “explicitly provides that the dictionary definition should govern the interpretation of ‘employer’ under Title VII.”

The Eighth Circuit relied on the following dictionary definitions: “employee” meaning “one employed by another... usually for wages,” “employer” as “one that employs something or somebody,” and “employ” as “to provide with a job that pays wages or a salary or with a means of earning a living.” Based on these definitions, the Eighth Circuit concluded that “[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

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78 907 F2d 71 (8th Cir 1990).
79 *Graves*, 907 F2d at 71.
80 Id at 72.
81 Id at 72–73.
82 Id at 73.
83 *Graves*, 907 F2d at 73, citing 110 Cong Rec 7216 (Apr 8, 1964) (response of the subcommittee to Senator Dirksen’s memorandum).
84 *Webster's Third New International Dictionary* 743 (unabridged) (Merriam-Webster 1981). See also *Graves*, 907 F2d at 73.
person who provides services— that person being the employee." \(^{85}\)

Consequently, the court viewed compensation as "an essential condition to the existence of an employer-employee relationship." \(^{86}\) Therefore, since members of the WPRA receive no compensation from the WPRA, there was no employer-employee relationship. \(^{87}\) The court affirmed summary judgment for the WPRA and noted that courts turn to common-law principles to analyze the character of an economic relationship "only in situations that plausibly approximate an employment relationship." \(^{88}\)

2. The Second Circuit in \textit{O'Connor}: a "hiring" prerequisite to the existence of an employment relationship.

\textit{O'Connor v Davis} \(^{89}\) is another early case that introduced a remuneration threshold for Title VII protections in the volunteer context. As a component of her major at Marymount College, Bridget O'Connor was required to intern at one of several Marymount-approved organizations. \(^{90}\) She accepted an unpaid internship at Rockland Hospital and received federal work-study funds through Marymount. \(^{91}\) Dr. James Davis, a psychiatrist at the hospital, began making inappropriate sexual remarks to O'Connor. \(^{92}\) She left the hospital to complete her internship elsewhere and brought sexual harassment claims against Davis pursuant to Title VII. \(^{93}\)

Noting that the definition of "employee" in Title VII is circular, the Second Circuit needed to determine whether O'Connor's position fit within "the conventional master-servant relationship as understood by the common-law agency doctrine." \(^{94}\) The court quoted the \textit{Reid} common law agency

\(^{85}\) \textit{Graves}, 907 F2d at 73.
\(^{86}\) Id.
\(^{87}\) Id.
\(^{88}\) Id at 74 ("[N]o compensation is made, only prize money won—and that is not supplied by the alleged employer nor does the recipient necessarily come from the postulated class of employees."). Id at 73.
\(^{89}\) 126 F3d 112 (2d Cir 1997).
\(^{90}\) \textit{O'Connor}, 126 F3d at 113.
\(^{91}\) Id.
\(^{92}\) Id at 113–14.
\(^{93}\) Id at 114.
factors but observed that the “conventional master-servant relationship” had previously been examined in cases determining whether a party was an employee or independent contractor. It then reasoned that since “the common feature shared by both the employee and the independent contractor is that they are ‘hired parties,’ . . . a prerequisite to considering whether an individual is one or the other under common-law agency principles is that the individual have been hired in the first instance.” To support this idea, the Second Circuit relied on the Eighth Circuit’s decision in Graves.

The Second Circuit concluded:

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.

Therefore, the Second Circuit determined that the question of remuneration was dispositive. Since it was uncontested that O’Connor did not receive salary, wages, or any other form of “economic remuneration” from the hospital, the court rejected O’Connor’s sexual harassment claim. It also rejected O’Connor’s argument that

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95 O’Connor, 126 F3d at 115, citing Reid, 490 US at 751–52.
97 O’Connor, 126 F3d at 115 (internal citations omitted).
98 Id at 115–16.
99 Id (internal quotations omitted) (noting that this conclusion is consistent with Tadros v Coleman, 88 F2d 10, 11 (2d Cir 1936) in which the court upheld the dismissal of Title VII claims of a plaintiff volunteer at Cornell Medical College who received no salary, health benefits, or retirement benefits on the ground that the plaintiff was not an employee under Title VII).
100 O’Connor, 126 F3d at 116.
101 Id.
she was compensated with federal work-study funding, as those payments were made by her college, not the hospital.\textsuperscript{102}

3. Other cases in the majority circuits that developed the standard.

The other circuits within the majority have relied on \textit{Graves} and \textit{O'Connor} to require that a volunteer show remuneration before engaging in the common law agency analysis described in \textit{Reid}, \textit{Darden}, and \textit{Clackamas}.\textsuperscript{103} They have also added additional reasoning and further developed the threshold remuneration test.

Most recently, the Fifth Circuit in \textit{Juino v Livingston Parish Fire District No. 5}\textsuperscript{104} elaborated on \textit{O'Connor}’s interpretation of \textit{Darden} and \textit{Reid}. The court highlighted the fact that \textit{Darden} and \textit{Reid} determined only whether a party was an employee or an independent contractor, not an employee or a volunteer.\textsuperscript{105} It then noted that the threshold-remuneration test is “uniquely suited to assessing a plausible employment relationship within the volunteer context.”\textsuperscript{106} This is because the promise or delivery of remuneration indicates whether volunteers have been “hired,” putting them in the same category as employees and independent contractors.\textsuperscript{107} Only at this point can a court appropriately apply the analysis from \textit{Darden} and \textit{Reid}.

The Fourth Circuit’s analysis in \textit{Haavistola v Community Fire Company of Rising Sun, Inc}\textsuperscript{108} serves as a response to the \textit{Clackamas} emphasis on control to signify an employment relationship. The Fourth Circuit acknowledged that the “common-law standard traditionally used when deciding whether an individual can claim employee status emphasizes

\textsuperscript{102} \textit{Id} at 116 n 2. See also \textit{Pastor v Partnership for Children’s Rights}, 2012 WL 4503415, *2 (EDNY Sept 28, 2012) (holding that school credit and a stipend do not satisfy the threshold remuneration test because they were conferred by the interns’ educational institutions).

\textsuperscript{103} See, for example, \textit{Juino}, 717 F3d at 435; \textit{Jacob-Mua v Veneman}, 289 F3d 517, 521 (8th Cir 2002); \textit{Daggitt v United Food and Commercial Workers International Union, Local 304}, 245 F3d 981, 987 (8th Cir 2001); \textit{McGuinness}, 170 F3d at 979 (10th Cir 1998).

\textsuperscript{104} 717 F3d 431 (5th Cir 2013).

\textsuperscript{105} \textit{See Juino}, 717 F3d at 435.

\textsuperscript{106} \textit{Id} at 439.

\textsuperscript{107} \textit{See id.}

\textsuperscript{108} 6 F3d 211 (4th Cir 1993).
the importance of the employer’s control over the individual.”

However, “[c]ontrol loses some of its significance . . . in those situations in which compensation is not evident.”

In *Llampallas v Mini-Circuits, Lab, Inc.*, the Eleventh Circuit extended the required showing of remuneration to individuals not labeled “volunteers.” It applied the threshold remuneration test to an “officer-director” who was not paid because “Congress did not intend Title VII to protect mere titles or labels.” The court believed that “an individual who sues only to maintain a purely gratuitous working relationship does so without the protection of that statute.”

The Eighth Circuit in *Daggitt v United Food and Commercial Workers International Union, Local 304A* further clarified that “[w]ithout compensation, no combination of other factors will suffice to establish the [employer-employee] relationship.” The implication is that two individuals could perform the exact same work for an employer, but only the one who receives remuneration enjoys an employer-employee relationship.

While remuneration is required, a showing of a salary or wages is not. Other forms of direct financial benefit are sufficient to satisfy the threshold-remuneration test. For example, in *Daggitt*, the cumulative monetary benefits of union dues, lost-time pay, and 401(k) plan contributions amounted to compensation. Non-economic benefits, however, are not considered compensation. An obvious example is *Jacob-Mua v Veneman*, in which research obtained through the volunteer’s work did not constitute compensation, even though it supported the volunteer’s related dissertation. Additionally, minimal compensation does not appear to meet the threshold

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910 Id at 220.
911 163 F3d 1236 (11th Cir 1998).
912 *Llampallas*, 163 F3d at 1244.
913 Id.
914 245 F3d 981 (8th Cir 2001).
915 *Daggitt*, 245 F3d at 987.
916 Id at 987–88.
917 289 F3d 517 (8th Cir 2002).
918 *Jacob-Mua*, 289 F3d at 521.
remuneration test. The Fifth Circuit in *Juino* held that a volunteer firefighter's compensation of $78 was insufficient.\textsuperscript{119}

Some courts within the majority circuits have invited Congress to alter this analysis. They believe “it is within the province of Congress . . . to provide a remedy under Title VII for plaintiffs in [a volunteer] position.”\textsuperscript{120}

4. Significant indirect benefits as remuneration.

Within the majority circuits, some courts have held that “significant indirect benefits” can constitute remuneration. As the Second Circuit explained in *York v Association of the Bar of the City of New York*,\textsuperscript{121} employee benefits like health insurance or vacation are also “indicative of financial benefit.”\textsuperscript{122} The significant indirect benefit cases emphasize that the indirect benefits “must meet a minimum level of significance, or substantiality, in order to find an employment relationship in the absence of more traditional compensation.”\textsuperscript{123} Also, the benefits must “primarily benefit the employee independently of the employer” and cannot be “merely incidental to the activity performed” in order to satisfy the threshold remuneration test.\textsuperscript{124}

In *Haavistola*, an early case involving significant indirect benefits, the Fourth Circuit determined whether a volunteer

\textsuperscript{119} *Juino*, 717 F3d at 439–40 (explaining that the plaintiff received $2 per fire/emergency call in addition to a life insurance policy, a full fighter's uniform and badge, firefighting and emergency response gear, and firefighting and emergency first-response training).

\textsuperscript{120} Id. See also *O'Connor*, 126 F3d at 119 (“[I]t is for Congress, if it should choose to do so, and not this court, to provide a remedy under . . . Title VII . . . for plaintiffs in O'Connor's position.”).

\textsuperscript{121} 286 F3d 122 (2d Cir 2002).

\textsuperscript{122} *York*, 286 F3d at 126 (internal quotations omitted).

\textsuperscript{123} Id (internal quotations omitted) (holding that limited tax deductions are not “sufficiently substantial”). See also *Pietras v Board of Fire Commissioners of the Farmingville Fire District*, 180 F3d 468, 473 (2d Cir 1999) (requiring numerous job-related benefits); *Ferroni v Teamsters, Chauffeurs & Warehousemen Local No. 222*, 297 F3d 1146, 1152 (10th Cir 2002) (holding that isolated reimbursements for lost time are “insufficient to establish employment relationships”); *Partnership for Children's Rights*, 2012 WL 4503415 at *2 (holding that reimbursement for CLE courses and multiple hours of classes and training are not “substantial job-related benefits that give rise to an employment relationship”).

\textsuperscript{124} *York*, 286 F3d at 126 (stating that benefits like clerical support and networking opportunities are “merely incidental”).
The firefighter was an employee covered under Title VII. The volunteer received no direct compensation, but this was not dispositive because she “did not affiliate with the company without reward entirely.” As a firefighter, she received several benefits, including a state-funded disability pension, survivors’ benefits for dependents, scholarships for dependents, group life insurance, and tuition reimbursement for emergency medical and fire service courses. Since “compensation” was not defined by statute or case law, the Fourth Circuit held that it was in the hands of the factfinder to conclude “whether the benefits represent indirect but significant remuneration as Haavistola contend[ed] or inconsequential incidents of an otherwise gratuitous relationship as the Fire Company argue[d].”

In Pietras v Board of Fire Commissioners of the Farmingville Fire District, the Second Circuit added that “an employment relationship within the scope of Title VII can exist even when the putative employee receives no salary as long as he or she gets numerous job-related benefits.” It held that a volunteer firefighter was a Title VII “employee” when the firefighter did not receive a salary or wages but did receive a retirement pension, life insurance, death benefits, disability insurance, and limited medical benefits.

In US v City of New York, the Second Circuit again found significant indirect benefits when the plaintiffs received food stamps and cash payments equaling minimum wage for their work as part of a mandatory welfare work program. The plaintiffs also received transportation and childcare expenses and eligibility for workers’ compensation. The court supported

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125 Haavistola, 6 F3d at 219.
126 Id at 221.
127 Id (listing also the following: bestowal of a state flag to family upon death in the line of duty, benefits under the Federal Public Safety Officers’ Benefits Act when on duty, coverage under Maryland’s Workers Compensation Act, tax exemptions for unreimbursed travel expenses, ability to purchase a special commemorative registration plate for private vehicles without additional fees, and access to a method to obtain certification as a paramedic).
128 Id at 221–22.
129 180 F3d 468 (2d Cir 1999).
130 Pietras, 180 F3d at 473.
131 See id at 471, 473.
132 359 F3d 83 (2d Cir 2004).
133 City of New York, 359 F3d at 92.
134 Id.
its holding by adding that the plaintiffs had to “perform useful work to receive any of the benefits.”

B. Minority Circuits

The Sixth and Ninth Circuits have not held that remuneration is an independent antecedent requirement but view remuneration as only one, non-dispositive factor in conjunction with the other common law agency test factors.

1. The Sixth Circuit in Bryson: consistency with the Supreme Court’s instructions.

In Bryson v Middlefield Volunteer Fire Department, Inc, the Sixth Circuit expressly declined to adopt O’Connor’s holding that, to be a “hired party” entitled to the Reid common law agency analysis, a plaintiff must demonstrate a threshold showing of “significant remuneration.” Similar to many other Title VII volunteer cases, such as Haavistola, Pietras, and Juino, Bryson involved a volunteer firefighter. Marcia Bryson alleged that the fire chief sexually harassed and retaliated against her in violation of Title VII.

The Sixth Circuit held that remuneration was not dispositive because it did “not believe that the term ‘hired party’ from Darden and Reid supports an independent antecedent requirement.” The court remarked that “[t]he Supreme Court included the term ‘hired party’ in Darden only in a direct quote from its decision in Reid, and the Reid Court’s use of ‘hired party’ was in the context of the ‘work for hire’ provision from the Copyright Act.” Therefore, the term was case specific and not applicable in the Title VII context.

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135 Id.

136 See, for example, Bryson v Middlefield Volunteer Fire Department, Inc, 656 F3d 348, 354 (6th Cir 2011); Fichman v Media Center, 512 F3d 1157, 1160 (9th Cir 2008).

137 656 F3d 348 (6th Cir 2011).

138 See Bryson, 656 F3d at 354.

139 See id at 350.

140 Id.

141 Id at 354.

142 Bryson, 656 F3d at 354.

143 Id. But see Clackamas, 583 US at 445 n 5 (describing the Reid factors as the “common-law test for determining whether a hired party is an employee” and therefore interpreting the phrase “hired party” to apply to employee-employer relationships.
The court further stated that “[a]lthough the [Supreme] Court did not define ‘hired party’ in Reid, it did define ‘hiring party’ . . . [as] the party who claims ownership of the copyright by virtue of the work for hire doctrine.”\textsuperscript{144} The court continued, “[w]e doubt that the [Supreme] Court would define ‘hiring party’ as such while at the same time considering ‘hired party’ to carry much more substantive weight in requiring that it be an individual who received significant remuneration for his services.”\textsuperscript{145}

Moreover, the Sixth Circuit in Bryson found that the Supreme Court’s instruction to apply the common law of agency is not limited to when the individual receives significant remuneration. Rather, it is applied “when Congress has used the term ‘employee’ without defining it.”\textsuperscript{146} The court supported its conclusion 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.”\textsuperscript{147} The Bryson court acknowledged that several of the factors listed in Darden and Reid related to financial matters but concluded that “no one factor, including remuneration, . . . is an independent antecedent requirement.”\textsuperscript{148}

2. The Ninth Circuit in Fichman and Waisgerber: different sources supporting its conclusion that remuneration is not dispositive.

In Fichman v Media Center,\textsuperscript{149} the Ninth Circuit considered whether directors and independent producers of a nonprofit media company were “employees” under the Americans with Disabilities Act\textsuperscript{150} and the Age Discrimination in Employment Act.\textsuperscript{151} After noting that remuneration was a non-dispositive factor, the court determined that directors were not “employees” under the common law agency analysis in Clackamas, which

\textsuperscript{144} Bryson, 656 F3d at 354, citing Reid, 490 US at 739.
\textsuperscript{145} Id (emphasis omitted), citing Reid, 490 US at 739-40.
\textsuperscript{146} Bryson, 656 F3d at 354.
\textsuperscript{147} Bryson, 656 F3d at 354, citing Darden, 503 US at 324.
\textsuperscript{148} Bryson, 656 F3d at 354.
\textsuperscript{149} 512 F3d 1157 (9th Cir 2008).
\textsuperscript{150} 42 USC § 12101 et seq.
\textsuperscript{151} 29 USC § 621 et seq.
adopted six control-focused factors from the EEOC standard.\textsuperscript{152} The court then holistically analyzed the remaining common law agency factors in light of the directors' relationship with the employer, ultimately concluding that the directors were not Title VII "employees."\textsuperscript{153}

A later Ninth Circuit case, \textit{Waisgerber v City of Los Angeles},\textsuperscript{154} similarly held that lack of remuneration was not dispositive in deciding whether an unpaid volunteer met the definition of "employee" under Title VII.\textsuperscript{155} Interestingly, the court used the substantial indirect benefits cases from the majority circuits—\textit{City of New York}, Pietras, and Haavistola—to support its reasoning.\textsuperscript{156} In those cases, the \textit{Waisgerber} court highlighted, the volunteers were considered "employees" even when they had not received any money in exchange for their work.\textsuperscript{157}

C. Circuits Yet to Rule

The First, Third, and Seventh Circuits have not yet ruled on this issue. A district court case in the Third Circuit followed the majority approach and required a showing of remuneration.\textsuperscript{158} District courts in the Seventh Circuit have disagreed on the proper analysis.\textsuperscript{159}

III. Solution

Since the Supreme Court has not yet addressed this circuit split, there continues to be inconsistency among circuits regarding the analysis for Title VII employment discrimination cases involving volunteers. Currently, it is possible for a plaintiff


\textsuperscript{153} See \textit{Fichman}, 512 F'3d at 1160-61.

\textsuperscript{154} 406 Fed Appx 150 (9th Cir 2010).

\textsuperscript{155} See \textit{Waisgerber}, 406 Fed Appx at 152.

\textsuperscript{156} Id.

\textsuperscript{157} Id.

\textsuperscript{158} See \textit{Cimino v Borough of Dunmore}, 2005 WL 3488419, *6 (MD Penn Dec 21, 2005) ("Where the plaintiff received no compensation from the defendant, she cannot plausibly assert she was an employee under Title VII.").

\textsuperscript{159} Compare \textit{Doe v Lee}, 943 F Supp 2d 870, 877 (ND Ill 2013) (holding that a finding of compensation was required to extend Title VII protections to an unpaid intern), with \textit{Volling v Antioch Rescue Squad}, 2012 WL 6021553, *8 (ND Ill Dec 4, 2012) (holding that the threshold-remuneration test is not consistent with the "Supreme Court's instruction to evaluate the question using the common-law principles of agency").
volunteer in a majority circuit to be dismissed at the summary judgment stage for lacking financial benefits, while a plaintiff volunteer in a minority circuit may be able to proceed to trial to litigate the common law agency factors.

Given the fact that “federal statutes are generally intended to have uniform nationwide application,” the circuit split should be resolved.\(^{160}\) This Comment argues that the minority circuits’ common law agency test should prevail because it corresponds with applicable provisions in the Restatement of Agency, which the Supreme Court used to shape its analysis in the cases discussed in Part I of this Comment.

A. The Supreme Court’s Reliance on the Restatement of Agency

The Restatement of Agency is a reliable source of authority, as it was used by the Supreme Court in *Reid, Darden,* and *Clackamas* to support its application of common law principles in the employment context.

As discussed in Part II, the Court in *Reid* concluded that Congress intended terms such as “employee,” “employer,” and “scope of employment” to be understood in light of agency law.\(^{161}\) It then implemented this conclusion by applying the common law of agency as laid out in the Restatement (Second) of Agency.\(^{162}\) The Court cited to the factors in the Restatement, exactly as listed, to determine what was relevant to the “employee” inquiry.\(^{163}\)

Due to “Reid’s presumption that Congress means an agency law definition for ‘employee’ unless it clearly indicates otherwise,” *Darden* continued the reliance on the Restatement’s common law agency doctrine when evaluating an employer-employee relationship.\(^{164}\) Nowhere did the Supreme Court state that the Restatement factors applied narrowly or only to circumstances involving independent contractors. It instead used the Restatement to formulate a “common-law test for

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\(^{160}\) *Reid,* 490 US at 741, citing *Holyfield,* 490 US at 43.

\(^{161}\) *Reid,* 490 US at 740 (1989).

\(^{162}\) Id.

\(^{163}\) See Restatement (Second) of Agency § 220(2) (1958). See also *Reid,* 490 US at 751.

\(^{164}\) *Darden,* 503 US at 325.
determining who qualifies as an ‘employee’ under ERISA” generally.165

In Clackamas, the Supreme Court again used sections from the Restatement (Second) of Agency to shape its analysis. The Court cited to Section 2(2) defining “servant” as someone whose work is “controlled or is subject to the right to control by the master” and Section 220(1), stating that a servant is “a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.”166 From these sections of the Restatement, the Court concluded that “the common-law element of control is the principal guidepost that should be followed.”167

B. The Restatement of Agency’s Treatment of Volunteers

The minority circuits’ approach is consistent with the Restatement of Agency. As discussed earlier in this Comment, the existence of a master-servant relationship signifies the existence of an employer-employee relationship for the purposes of Title VII.168 Section 225 of the Restatement (Second) of Agency clearly states, “One who volunteers services without an agreement for or expectation of reward may be a servant of the one accepting such services.”169 This means that the lack of remuneration does not control the presence of a master-servant relationship, which in turn means that remuneration is not a threshold for finding an employer-employee relationship.

Other sections of the Restatement (Second) of Agency support the idea that the definition of “servant” is broad. In describing the difference between servants and non-servants, a comment in Section 2 of the Restatement states that “there are many factors which are considered by the courts in defining the relation” and does not mention remuneration or compensation as distinguishing characteristics.170 A comment in Section 220 adds:

165 Id at 323.
166 Restatement (Second) of Agency §§ 2(2), 220(1) (1958). See also Clackamas, 538 US at 448.
167 Clackamas, 583 US at 448.
168 See Part I.B.
169 Restatement (Second) of Agency § 225 (1958).
170 Id § 2 (1958).
The relation of master and servant is indicated by the following factors: an agreement for close supervision of the servant's work; work which does not require the services of one highly educated or skilled; the supplying of tools by the employer; payment by hour or month; employment over a consideration period of time with regular hours; full time employment by one employer; employment in a specific area or over a fixed route; the fact that the work is part of the regular business of the employer; the fact that the community regards those doing such work as servants; the belief by the parties that there is a master and servant relation; an agreement that the work cannot be delegated.171

Again, while remuneration is relevant, there is no indication that remuneration is required for the existence of a master-servant relationship, and consequently an employer-employee relationship.

The most recent Restatement (Third) of Agency does not alter the expansive definition of "servant" in the Restatement (Second) of Agency.172 While it does not explicitly restate that unpaid volunteers can still be considered "servants," it does not override Section 225 of the Restatement (Second) of Agency. Also, within the section describing a principal's liability to an employee acting within scope of his or her employment, the Restatement says that "the fact that work is performed gratuitously does not relieve a principal of liability."173 It then restates the factors from the Restatement (Second) of Agency that were relied upon in Reid in determining "employee" status.174

171 Id § 220 (1958).
174 Id § 7.07 Comment f (2006) (relevant factors include "the extent of control that the agent and the principal have agreed the principal may exercise over details of the work; whether the agent is engaged in a distinct occupation or business; whether the type of work done by the agent is customarily done under a principal's direction or without supervision; the skill required in the agent's occupation; whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place in which to perform it; the length of time during which the agent is engaged by a principal; whether the agent is paid by the job or by the time worked; whether the agent's work is a part of the principal's regular business; whether the principal and the agent believe that they are creating an employment relationship; and whether the principal is or is not in business. Also relevant is the extent of control that the principal
C. Consistency with the Restatement of Agency and the Common Law Agency Test

Since the Supreme Court relied on one part of the Restatement of Agency's master-servant explanation, it follows that other clearly applicable parts of the Restatement would help determine how to evaluate the "employee" status of volunteers. Therefore, Section 225 of the Restatement (Second) of Agency's statement, that individuals who volunteer without reward can be servants, supports the minority circuits' common law agency test and refutes the majority circuits' threshold remuneration test.

One issue with the reliance on supplementary sections of the Restatement of Agency is that the EEOC appears to favor the majority circuits' threshold remuneration approach. Regarding the treatment of volunteers under Title VII, the EEOC's Compliance Manual states:

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, [he or she] 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."\textsuperscript{175}

This language suggests that the EEOC endorses the threshold-remuneration test, particularly because it quotes Haavistola, a majority circuit case.\textsuperscript{176}

As discussed earlier in this Comment, the Supreme Court in Clackamas described the EEOC as "the agency that has special enforcement responsibilities under ... federal statutes containing similar threshold issues for determining coverage."\textsuperscript{177} It also adopted the EEOC's control-focused factors relevant to

\textsuperscript{175} Equal Employment Opportunity Commission, EEOC Compliance Manual § 2-Ill(c), Covered Parties, 2009 WL 2966755 (2009), citing Haavistola, 6 F3d at 222.

\textsuperscript{176} See Part II.A.4.

\textsuperscript{177} Clackamas, 538 US at 448 (2003).
whether a shareholder-director is an “employee.” Nonetheless, the Court referred to the EEOC only after it determined control was an important element in the Restatement of Agency’s definitions of master and servant.

Additionally, the most recent Supreme Court case that defined terms under Title VII, Vance v Ball State University, suggests that the Restatement of Agency is a more influential source of authority than the EEOC. In Vance, the Court analyzed two possible standards for determining whether an employee is a “supervisor” for purposes of vicarious liability under Title VII. Justice Ginsburg, writing for the dissent, favored the EEOC’s standard because it “reflects the agency’s informed judgment and body of experience in enforcing Title VII.” However, the plurality, written by Justice Alito, rejected the standard advocated by the EEOC, labeling it a “nebulous definition.” The plurality instead turned to the Restatement of Agency. In defining “supervisor,” it “looked to the Restatement of Agency for guidance.”

D. Broader Protection Provided by the Common Law Agency Test

Volunteers are too valued in our society to leave them unprotected from discrimination at their places of service. Currently, there are other possible avenues of relief available to volunteers outside of employment law, such as state defamation law, whistleblower statutes, the First Amendment, statutes that outlaw discrimination in places of public accommodation, and tort against individual or company. However, volunteers need

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178 Id at 449–50.
179 Id at 448–50.
180 133 S Ct 2434 (2013).
181 Id at 2443 (deciding whether “supervisors” were only those employees who have the power to take tangible employment actions against the victim or whether the term could also include those who have the ability to exercise significant direction over the victim’s daily work).
182 Id at 2451–52 (Ginsburg dissenting) (internal quotations omitted) (emphasizing that the EEOC had paid close attention to the relevant case law and doctrinal framework in developing its definition for supervisor).
183 Id at 2443 (stating that the approach recommended by the EEOC would make the determination of supervisor status depend on a highly case-specific evaluation of numerous factors).
184 Vance, 133 S Ct at 2441.
185 See Mitchell H. Rubinstein, Our Nation’s Forgotten Workers: The Unprotected
not turn to these avenues if Title VII extends to them. The minority circuits’ common law agency test allows for broader Title VII protections because it does not require plaintiff volunteers to overcome an initial hurdle of proving receipt of remuneration.\textsuperscript{186} A recent district court case outlines the issue succinctly: “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 . . . , neither should have to quit to avoid sexual, racial, or other unlawful discrimination and harassment.”\textsuperscript{187} The minority circuits’ common law agency test accounts for negligible differences between paid employees and unpaid volunteers by looking cumulatively at factors relevant to an employment relationship. In contrast, the majority circuits’ threshold-remuneration test closes off Title VII protections from a class of volunteers who do not receive any financial benefits, but may have a relationship with their host organization that resembles an employee-employer relationship in other ways.\textsuperscript{188}

IV. CONCLUSION

The minority circuits’ common law agency test should be used to decide whether a volunteer qualifies as an “employee” entitled to Title VII protection. Unlike the majority circuits’ threshold-remuneration test, the common law agency test is consistent with both the Restatement of Agency and relevant Supreme Court precedent.\textsuperscript{189} Additionally, the common law agency test allows for Title VII to extend to volunteers who have a functional employee-employer relationship with their organization, regardless of whether they receive remuneration.\textsuperscript{190} Volunteers are valued by their organizations, their communities, and American society generally, so a test for plaintiff volunteers that is supported by significant sources of authority and provides broader Title VII protection is the best option.


\textsuperscript{186} See, for example, \textit{Bryson}, 656 F3d at 354.

\textsuperscript{187} \textit{Volling}, 2012 WL 6021553 at *10.

\textsuperscript{188} See, for example, \textit{O'Connor}, 126 F3d at 115.

\textsuperscript{189} See Part III.A–C.

\textsuperscript{190} See Part III.D.