BRYSON V. MIDDLEFIELD VOLUNTEER FIRE DEPARTMENT AND THE CHANGING UNDERSTANDING OF VOLUNTEER AS EMPLOYEE

by
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Our nation has been shaped by Americans who have volunteered their time and energy, yet we often do not afford volunteers many of the same workplace protections that paid employees enjoy, even when the work they perform is of a similar nature. Most circuits of the United States Courts of Appeals have required a threshold showing of remuneration to receive protections under federal employment discrimination law, resulting in the exclusion of volunteers from its protection. However, the Sixth Circuit, in its decision, Bryson v. Middlefield Volunteer Fire Department, *reexamined both the criteria by which one determines whether a volunteer is an employee, and applied a more reasonable standard that more closely follows the Supreme Court's guidance. This Comment discusses the circumstances in* Bryson, *how and when volunteers have been classified as employees under federal employment discrimination law, the methods courts have used in making that determination, and then offers suggestions as to how one might provide for a more appropriate application of the federal protections, both under present law and with an eye toward future reforms.*

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I. Introduction

As President Obama recently acknowledged, "[o]ur Nation has been profoundly shaped by ordinary Americans who have volunteered their time and energy,"[1] yet our country often does not afford volunteers many of the protections offered to paid employees, even when the work they perform is of a similar nature. While volunteers have seldom received protections under federal employment discrimination laws, there exist some circumstances where these laws should apply to a volunteer that works in an environment similar to that of the traditional paid employee. But when should a volunteer receive the protections that these laws afford?

Most circuits of the United States Courts of Appeals have required a threshold showing of remuneration to be considered an "employee" in order to receive race, color, religion, sex, and national origin-based protections under Title VII; disability-based protections under the Americans with Disabilities Act (ADA); and age-based protections under the Age Discrimination in Employment Act (ADEA).[2] However, the Sixth Circuit, in its decision in *Bryson v. Middlefield Volunteer Fire Department*, reexamined both the criteria by which one determines whether a volunteer is an employee and the reasoning behind that determination.[3] While most circuits have adopted a standard that looks only to dictionary definitions and a more traditional understanding of what it means to be an employ-

[1] Proclamation No. 8797, 77 Fed. Reg. 22,179 (Apr. 9, 2012).

[2] Title VII refers to Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. §§ 2000e to 2000e-17 (2006). The ADA is codified at 42 U.S.C. §§ 12101–12213 (2006), and the ADEA is codified at 29 U.S.C. §§ 621–634 (2006).

[3] Bryson v. Middlefield Volunteer Fire Dep't, Inc., 656 F.3d 348 (6th Cir. 2011).

ee, the court in *Bryson* took a more substantive approach and arrived at a more reasonable result.

After a brief discussion of the circumstances in *Bryson*, this Comment traces the jurisprudential lineage of how and when volunteers have been classified as employees under federal employment discrimination law, discusses the methods courts have used in making that determination, and then offers some suggestions as to what policies might clarify and provide a more appropriate application of the federal employment protections, both under present law and with an eye toward future reforms.

II. A Brief Synopsis of *Bryson*

Marcia Bryson was a firefighter and paid administrative assistant for the Middlefield Volunteer Fire Department in Middlefield, Ohio.[4] She alleged that the Department's fire chief made several unwanted sexual advances in exchange for pay raises.[5] Bryson filed charges of discrimination with both the Ohio Civil Rights Commission and the Equal Employment Opportunity Commission (EEOC), alleging discrimination on the basis of sex.[6]

The EEOC completed its investigation to determine that the Department was an employer for the purposes of Title VII.[7] To be considered an "employer" under Title VII, and in order for Bryson to receive protections under the law, the Fire Department needed "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[8] If the organization met this standard, then those considered employees under its employ would receive Title VII protections, including protections against those who "limit, segregate, or classify [their] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[9] It was undisputed that several of the Fire Department's staff and trustees qualified as employees; however, the Department disputed that its volunteer firefighters qualified as employees; without them, the Department would not meet the fifteen-person threshold to be subject to Title VII.[10]

The EEOC found that the Middlefield Volunteer Fire Department's firefighters were employees: the Department "exercise[d] sufficient control over the actions of the Members," and they received some compensa-

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[4] *Id.* at 350.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at 351 (quoting 42 U.S.C. § 2000e(b) (2006)).
[9] 42 U.S.C. § 2000e-2(a)(2) (2006).
[10] *Bryson*, 656 F.3d at 351.

tion for their services, even though they were not on payroll.[11] The EEOC also determined that Bryson was sexually harassed and subjected to a hostile work environment.[12] Because the volunteer firefighters were considered employees, the Fire Department was considered an employer for the purposes of Title VII, and Bryson was issued a Notice of Right to Sue, which allowed her to proceed in federal district court.[13]

However, Bryson did not initially fare well in court. When undertaking its own determination of whether the Middlefield firefighters qualified as employees for the purpose of Title VII protection, the District Court for the Northern District of Ohio disregarded the EEOC's findings.[14] It determined that the Sixth Circuit had "not set forth the appropriate standard to distinguish employees from volunteers" and looked to the several circuits to find an approach in order to do so.[15] The court adopted a two-step test: first, it would determine whether a plaintiff received "adequate remuneration," and only if this first step was met would the court then apply "traditional employment status tests, such as the common law agency test," to determine whether that person was an employee.[16] The court found that because the Middlefield Fire Department's volunteer firefighter-members did not receive enough compensation to establish sufficient remuneration as a matter of law, it did not need to proceed to the second step.[17] Because the lack of remuneration was dispositive, the Fire Department prevailed on summary judgment, and the court dismissed the case.[18]

Bryson appealed to the Sixth Circuit. Judge Karen Nelson Moore, writing for the court, reconsidered the test employed by the district court and determined that while remuneration was a factor that could establish an employment relationship, it did not solely guide whether the firefighters were Title VII employees.[19] Because Bryson provided evidence that the firefighters received workers' compensation coverage, insurance coverage, gift cards, personal use of the Department's facilities and assets, training, and access to an emergency fund, and because some department members also received a retirement payment or hourly wage—but

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[11] *Id.* at 350 (quoting Letter from EEOC to Middlefield Volunteer Fire Dep't (Feb. 16, 2005)).

[12] *Id.*

[13] *Id. See generally* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, FILING A LAWSUIT, http://www.eeoc.gov/employees/lawsuit.cfm (describing complaint process for allegations of discrimination on the basis of sex).

[14] Bryson v. Middlefield Volunteer Fire Dep't, Inc., No. 1:07CV724, 2009 WL 5030799, at *5 (N.D. Ohio Dec. 14, 2009); *see also Bryson*, 656 F.3d at 351.

[15] *Bryson*, 2009 WL 5030799, at *1 (emphasis omitted).

[16] *Id.* at *2.

[17] *Id.* at *4.

[18] *Id.* at *5–6. Bryson's state law claims survived summary judgment, but because only state law claims remained, the court declined to exercise supplemental jurisdiction. *Id.* at *6.

[19] *Bryson*, 656 F.3d at 354.

also that non-remunerative factors could lead to an employment relationship—the court found that the firefighters potentially could be employees and remanded the case back to the district court to reanalyze the employment relationship without considering remuneration as a predicate inquiry.[20]

III. When Is a Volunteer an Employee?

Whether volunteers can also be employees for purposes of the federal employment discrimination laws can be a somewhat difficult question. In *Bryson v. Middlefield Volunteer Fire Department*, and with claims by other volunteers that engage in similar unpaid work, this determination ultimately controls whether their claim can move forward. Therefore, this determination has significant ramifications for those who work without formal pay and experience injuries for which the protection of employment discrimination laws are necessary.

The definitions of "employee" that Congress offered with Title VII, the ADA, and the ADEA do not provide sufficient direction to determine what the term as used in these laws really means: according to Title VII, for example, an "employee" is "an individual employed by an employer."[21] The Supreme Court recognized this problem in *Community for Creative Non-Violence v. Reid*,[22] and then later in *Nationwide Mutual Insurance Co. v. Darden*,[23] and indicated that when Congress uses the term "employee" without sufficiently defining it, courts should presume it had in mind "the conventional master-servant relationship as understood by common-law agency doctrine."[24]

The Supreme Court's attempts to discern Congress's intent amidst this ambiguity have generally arisen out of cases addressing more tradi-

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[20] *Id.* at 355–56 ("The district court . . . limited its analysis to remuneration without considering any other aspects of the Department's relationship with its firefighter-members. Although remuneration is a factor to be considered, it must be weighed with all other incidents of the relationship.").

[21] 42 U.S.C. § 2000e(f) (2006). A similarly circular definition is used in the ADA and ADEA. *See* 42 U.S.C. § 12111(4) (2006) (adopting the same definition for the ADA); 29 U.S.C. § 630(f) (2006) (adopting the same definition for the ADEA). Thus, to the extent the courts define what an "employee" is for the purposes of one of these laws, the resulting analysis is generally also applicable to the other two laws. *See, e.g.*, Mariotti v. Mariotti Bldg. Prods., 714 F.3d 761, 766–67 (3d Cir. 2013) (applying the Supreme Court's employment relationship analysis in an ADA case to a Title VII case); Fichman v. Media Ctr., 512 F.3d 1157, 1161 (9th Cir. 2008) (applying the Supreme Court's analysis regarding the definition of an employee in an ADA case to an ADEA matter, and noting that "[m]ost courts consider the definition of 'employee' to be uniform under federal statutes where it is not specifically defined").

[22] 490 U.S. 730 (1989) (addressing an insufficient definition of "employee" in the Copyright Act of 1976).

[23] 503 U.S. 318 (1992).

[24] *Id.* at 322–23.

tional employment and independent contracting relationships.[25] In these instances, the Supreme Court has turned to traditional agency principles to outline factors one should consider when making a determination as to if a sufficient relationship exists, as it first did in *Reid*:

> 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.[26]

This analysis was revisited by the Court in *Darden* when it considered a similarly insufficient definition in the Employee Retirement Income Security Act of 1974, establishing a precedent of turning to a "right to control" agency analysis whenever federal employment law left the definition of the employment relationship indefinite.[27]

The Supreme Court provided additional guidance and reiterated the importance of the agency-based analysis in the employment discrimination context when it decided *Clackamas Gastroenterology Associates, P.C. v. Wells*.[28] In *Clackamas*, Justice Stevens recognized that, ever since *Darden*, the Court had "often been asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it."[29] Because the Court was addressing whether or not directors of a professional corporation were to be considered employees, it adopted the EEOC's agency-based analysis for determining an employment relationship with regard to shareholder-directors, rather than using the factors it set out earlier in *Reid*.[30] Specifically, the Court found the EEOC's six evaluative factors, adopted from its Compliance Manual, to be probative:

> Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work[;] [w]hether and, if

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[25] *See, e.g.*, *Darden*, 503 U.S. at 322–23; *Reid*, 490 U.S. at 739. Unfortunately, the Supreme Court has not specifically addressed whether one traditionally deemed a volunteer was an "employee" under the federal employment discrimination laws.

[26] *Reid*, 490 U.S. at 751–52 (footnotes omitted); *see also Darden*, 503 U.S. at 323–24; *Bryson*, 656 F.3d at 352.

[27] *Darden*, 503 U.S. at 323–24.

[28] 538 U.S. 440 (2003) (determining whether four physician-shareholders who owned a professional corporation were to be counted as employees for the purpose of determining whether the corporation had enough employees to be subject to the ADA).

[29] *Id.* at 444 (quoting *Darden*, 503 U.S. at 322).

[30] *Id.* at 449 & n.9.

> 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.[31]

While the Court did not employ the same "right to control" test it had used in previous cases, the factors set out in the EEOC's test generally articulated a similar agency-based standard and thus further advanced the Supreme Court's acknowledgement that a multi-factor, agency-based control test was the best method by which to determine the employment relationship in the context of federal employment discrimination law.

However, *Clackamas* is notable for a more important reason: there, the Court recognized that a holistic analysis of these factors is key. In *Clackamas*, the party seeking relief argued that because the employer had "employment agreements," the EEOC test's fifth factor was dispositive, regardless of how the other factors shook out.[32] Justice Stevens dispelled this notion, and provided notable key language from an earlier case, *National Labor Relations Board v. United Insurance Company of America*,[33] to guide the analysis: "the answer to whether [a possible employee] is an employee depends on 'all of the incidents of the relationship . . . *with no one factor being decisive*.'"[34]

The U.S. Courts of Appeals, when performing their own analyses, have chosen to adopt several different tests to guide their determinations, including the common-law agency test set out in *Reid*; a test that considers the "economic realities" of the employment relationship and whether or not an employee has the ability to get up and walk away without financial penalty; some combination of these two tests; and more issue-specific standards like the EEOC's analysis that the Court adopted in *Clackamas* for shareholder-directors.[35] However, regardless of the test used, given the Supreme Court's directive in *Clackamas* that no factor used to determine the employment relationship should be decisive, the courts should give weight to all factors that are traditionally used in con-

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[31] *Id.* at 449–50 (quoting 2 EQUAL EMP'T. OPPORTUNITY COMM'N, COMPLIANCE MANUAL § 2-III(A)(1)(d) (2000)).

[32] *See id.* at 450.

[33] 390 U.S. 254, 258 (1968).

[34] *Clackamas*, 538 U.S. at 451 (emphasis added) (quoting *Darden*, 503 U.S. at 324) (remanding the case for a factual analysis of the factors).

[35] *See, e.g.*, Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983) ("[O]ne must examine the economic realities underlying the relationship between the individual and the so-called principal in an effort to determine whether that individual is likely to be susceptible to the discriminatory practices which the act was designed to eliminate."). For further discussion of the various employment tests used by courts to determine the employment relationship, see generally Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 158–70 (2006).

templating an agency relationship, abandoning any standard by which any one factor in the analysis is entirely dispositive.[36] As explained below, the instruction in *Clackamas* becomes key in achieving a sufficient analysis to determine whether a volunteer is an employee.

IV. The Remuneration Question

The U.S. Courts of Appeals have often recognized that the Supreme Court's multi-factor analyses set out in *Darden*, *Reid*, and *Clackamas* are appropriate tools for determining whether a volunteer is also an employee for the purposes of federal employment discrimination law. Where the courts do not agree is whether there must be a separate analysis regarding remuneration as "an independent antecedent inquiry."[37] Of course, considering remuneration as a threshold analysis becomes problematic in the volunteer context, as discussed below.

A. *The Pre-*Clackamas *Era*

The several circuits have commonly considered the issue of whether one is compensated for their work as a threshold question that must be answered prior to engaging in any further employment relationship analysis. With respect to unpaid workers in the employment discrimination law context, this issue first arose in the Eighth Circuit in 1990, when it decided *Graves v. Women's Professional Rodeo Association*.[38] Faced with the question of whether or not a rodeo association member was an employee—and left without an adequate definition from Title VII—the court noted that the legislative history of Title VII "explicitly provides that the dictionary definition should govern the interpretation of 'employer.'"[39] It turned to Webster's Third New International Dictionary for an answer: "em-ploy-er . . . [is] one that employs something or somebody: as . . . the owner of an enterprise (as a business or manufacturing firm) that employs personnel *for wages or salaries*."[40] The court embraced Webster's language:

> Central to the meaning of these words is the idea of compensation in exchange for services . . . . Compensation by the putative em-

[36] In this regard, those circuits that employ an "economic realities" test, without considering other agency factors, should consider the adoption of a right to control-based test or perhaps consider control-based factors alongside its economic realities analysis in order to comport with the Supreme Court's suggestion in *Reid* and its progeny that a control-based test is especially probative of the employment relationship.

[37] Bryson v. Middlefield Volunteer Fire Dep't, Inc., 656 F.3d 348, 353 (6th Cir. 2011).

[38] 907 F.2d 71 (8th Cir.1990).

[39] *Id.* at 73 (citing 110 Cong. Rec. 7216 (1964) (noting the response of the subcommittee to a memorandum by Sen. Dirksen: "[t]he term 'employer' is intended to have its common dictionary meaning, except as expressly qualified by the act").

[40] *Id.* (emphasis added) (quoting Webster's Third New Int'l Dictionary 743 (unabr. 1981)).

> ployer 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.[41]

The court considered the issue of pay a "crucial and elementary initial inquiry," and because the members received no compensation from the rodeo association, the court did not proceed to a more thorough control-based analysis, finding no employment relationship at the first step.[42]

This methodology was applied with a volunteer firefighter by the Fourth Circuit in *Haavistola v. Community Fire Company of Rising Sun*.[43] Haavistola, a volunteer at a fire company, made similar claims of discrimination based on sex, in violation of Title VII.[44] The court pointed to *Graves*'s rationale—that the dictionary definition governed because Congress intended it to do so—and then relied on the very same definition to justify a remuneration-based threshold analysis.[45]

The Second Circuit followed similar reasoning in *O'Connor v. Davis* when it decided whether a student receiving work-study funding could bring claims of sexual harassment.[46] Pointing to *Graves* and *Haavistola*, remuneration was found to be a precondition to further analysis.[47] Specifically, the court gave a nod to both circuit solidarity and the Supreme Court's use of the term "hired party" when describing to whom it applied an agency analysis in *Community for Creative Non-Violence v. Reid*.[48] The Second Circuit reasoned that, in *Reid*, the analysis used to determine whether an independent contractor was an employee was predicated on whether or not he was first a "hired party."[49] Because the Supreme Court in *Reid* noted the common feature between an employee and an independent contractor was that they were hired, the Second Circuit concluded that *Reid* required a determination that an employee is necessarily a "hired party," which, in turn, required an independent and antecedent remuneration inquiry prior to consideration of other factors.[50]

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[41] *Id.* (emphasis added).

[42] *Id.* at 73–74.

[43] 6 F.3d 211 (4th Cir. 1993).

[44] *Id.* at 213.

[45] *Id.* at 220–22.

[46] O'Connor v. Davis, 126 F.3d 112, 113–14 (2d Cir. 1997).

[47] *Id.* at 115–16.

[48] *Id.*; *see also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989) ("In determining whether a *hired party* is an employee under the general common law of agency, we consider [several factors].") (emphasis added).

[49] *O'Connor*, 126 F.3d at 115 (citing *Reid*, 490 U.S. at 751–52).

[50] *Id.* ("[T]he common feature shared by both the employee and the independent contractor [in *Reid*] is that they are 'hired part[ies],' and thus, a prerequisite to considering whether an individual is one or the other under common-law agency principles is that the individual ha[s] been hired in the first instance. That is, only where a 'hire' has occurred should the common-law agency analysis be undertaken.") (alteration in original) (citation omitted). *Black's Law Dictionary* defines the verb "hire" as "[t]o engage the labor or services of another for wages or other payment." BLACK'S LAW DICTIONARY 799 (9th ed. 2009).

The Eleventh Circuit also adopted a remuneration predicate in *Llampallas v. Mini-Circuits, Lab, Inc.*, but it too only cited its sister circuits, and offered no new rationale for the two-step test.[51] The Tenth Circuit followed in *McGuinness v. University of New Mexico School of Medicine*, making similar reliances.[52] Up to and including *McGuinness*, the circuits relied only on the reasoning offered in *Graves* and *O'Connor*, trusting Webster's definition and their understanding of what it means to be a "hired party" as a complete rationale for the remunerative predicate.

*B. Post-*Clackamas*: Does the Court's "All the Factors" Directive Matter?*

Little changed until after the Supreme Court decided *Clackamas* in 2003. In 2008, turning to *Clackamas* and its conclusion that no one factor is dispositive in determining employment status,[53] the Ninth Circuit decided *Fichman v. Media Center*.[54] *Fichman* addressed whether directors on the board of a non-profit organization were employees for the purposes of the ADA and ADEA.[55] The court looked to *Clackamas* for an analysis with which it could decide that question, but also importantly noted the Court's directive that all facets of the relationship should be considered, including the remunerative factor.[56]

One of the issues the *Fichman* court considered was the directors' lack of compensation; while they received travel reimbursements and food supplied at board meetings, none of those benefits rose to the level of "compensation."[57] However, the court correctly noted that, even then,

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[51] Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1243–44 (11th Cir. 1998) (embracing the rationales of both *O'Connor* and *Haavistola*).

[52] McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974, 979 (10th Cir. 1998) (citing *O'Connor*, 126 F.3d at 116) (providing no rationale for the remuneration requirement).

[53] It should be noted that the "all of the incidents of the relationship . . . with no one factor being decisive" language was mentioned prior to *Clackamas*—first, in *National Labor Relations Board v. United Insurance Company of America*, 390 U.S. 254, 258 (1968), and then in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 324 (1992). However, each of these cases dealt with one who was already deemed a "hired party" by the Court—in each, an independent contractor. Moreover, *Clackamas* was the first instance in which the Supreme Court used this instruction in the employment discrimination law context. Assuming that a "hired party" usually indicates a compensated party, *see supra* note 50 and accompanying text, the lower courts had little reason to factor this language into deciding whether or not to apply a threshold analysis, as they could easily reason that the "all the factors" approach required only that their second-step agency analysis be all-encompassing. *See Darden*, 503 U.S. at 324; *NLRB*, 390 U.S. at 258. *Clackamas* provided the first instance where a non-hired party was evaluated with the "all the factors" language in mind, and therefore is the turning point at which the lower courts should have reevaluated their remunerative threshold.

[54] 512 F.3d 1157 (9th Cir. 2008).

[55] *Id.* at 1160.

[56] *Id.*

[57] *Id.*

that absence of compensation was not dispositive of the employment relationship analysis.[58] It proceeded further, giving weight to the other *Clackamas* factors, determining whether or not the directors reported to someone higher in the organization, the extent of their influence, and their share of the profits and losses.[59] Because the directors did not have other sufficient attributes of an employee, the court ultimately concluded that an employment relationship did not exist.[60] However, the decision is notable in that it correctly engaged in a complete evaluation in accordance with the Supreme Court's requirement that one consider all of the incidents of the relationship, with no one factor being decisive.[61]

However, the Ninth Circuit later backpedaled on its embrace of the requirement that it evaluate "all of the incidents of the relationship, with no one factor being decisive" (hereinafter "all the factors"), in an unpublished decision, *Waisgerber v. City of Los Angeles*.[62] Waisgerber, a volunteer reserve officer with the Los Angeles Police Department reserve officers, made a claim for sex discrimination in termination.[63] The *Waisgerber* court looked to *Fichman* and noted that a lack of remuneration was not dispositive, however, it narrowed *Fichman*'s standard and construed the finding that a lack of compensation should not be dispositive to mean that a *lack of salary* was not dispositive.[64] It embraced its sister circuits' predicate remuneration requirement and required the plaintiff to establish in her pleadings that she received "substantial benefits" in order to avoid dismissal,[65] effectively establishing a two-step threshold test.

Unlike the Ninth Circuit's brief departure in *Fichman,* other post-*Clackamas* decisions persisted with analyses that refused to give even a brief look at non-remunerative factors in the first stages of inquiry. The Second Circuit ignored the "all the factors" statement when it decided *United States v. City of New York* in 2004.[66] Instead, it restated its own standard previously adopted in *O'Connor*: remuneration is to be considered first, and if the remuneration threshold is satisfied, only then can one look to *Reid*'s agency-based control factors for a determination as to

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[58] *See id.*

[59] *Id.* at 1160–61.

[60] *Id.* at 1161.

[61] *Id.* at 1160–61; *see also* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449–51 (2003).

[62] 406 F. App'x 150 (9th Cir. 2010).

[63] *Id.* at 151.

[64] *Id.* at 152.

[65] *Id.* (citing, among others, United States v. City of New York, 359 F.3d 83, 92 (2d Cir. 2004) ("[R]emuneration need not be a salary, but must consist of substantial benefits not merely incidental to the activity performed" (alteration in original)); Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 221–22 (4th Cir. 1993)).

[66] 359 F.3d 83 (considering whether participants of a New York City "workfare" program were employees for the purpose of Title VII).

whether an employment relationship is present.[67] The Fifth Circuit also recently adopted the two-step approach in *Juino v. Livingston Parish Fire District No. 5*, and gave little credence to the idea that the Supreme Court's "all the factors" language should be applied to reconsider the appropriateness of a threshold remuneration analysis.[68]

C. Bryson v. Middlefield Volunteer Fire Department*: A Significant Departure*

In September 2011, the Sixth Circuit decided *Bryson v. Middlefield Volunteer Fire Department*, heeding the Supreme Court's direction in *Clackamas*, and departing from an adoption of its sister circuits' remunerative prerequisite—one that was primarily based on a single dictionary definition adopted by the Eighth Circuit in a few-pages-long decision.[69]

Judge Karen Nelson Moore first addressed the ambiguity in Title VII's definition, and pointed to application of the agency-based factors set forth in *Darden* and *Reid* for a means by which one could measure whether the Middlefield volunteer firefighters were employees.[70] Like fellow circuits, the court included remuneration as a factor in the analysis, but distinguished the inquiry when applying the directive from *Clackamas*, drawing the reasonable and crucial inference that because no one factor can be dispositive, remuneration should not be "an independent antecedent inquiry."[71]

Judge Moore also found that the Second Circuit's conclusion, that the Supreme Court's use of "hired party" meant that only the compensated parties could be considered employees, was erroneous.[72] She suggested that the Supreme Court used the term in *Darden* and *Reid* only as a means to identify the parties and doubted that it was to "carry much more substantive weight in requiring that [an employee] be an individual who received significant remuneration for his services."[73]

Moore aptly noted that *Reid* did not instruct one to apply the whole of the common law agency test only when an "individual receives significant remuneration[,] but rather 'when Congress has used the term "em-

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[67] *Id.* at 91–92 (citing O'Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989)).

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

[69] Bryson v. Middlefield Volunteer Fire Dep't, Inc., 656 F.3d 348, 352–54 (6th Cir. 2001); *see infra* Part IV.A.

[70] *Bryson*, 656 F.3d at 352.

[71] *Id.* at 353–54 (opining that the district court below adopted the Second Circuit's *City of New York* two-step analysis in error).

[72] *Id.*; *see also supra* text accompanying notes 48–50.

[73] *Id.* at 354. The court noted that the Supreme Court was using the term "in the context of the 'work for hire' provision from the Copyright Act," and that the Court, in *Reid*, intended to use the term "to refer to the party who claims ownership of the copyright by virtue of the work for hire doctrine." *Id.* (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739 (1989)).

ployee" without defining it.'"[74] Given that the other circuits' remunerative prerequisite was only premised on *Graves*'s dictionary definition and their construction of "hired party" to require a separate two-step analysis, the court's new look at the approach by which one undertakes this inquiry—especially in light of the then years-old decision *Clackamas*—was long overdue. The court concluded that *Darden* and *Clackamas* required complete evaluation of the employment relationship with "all of the incidents of the relationship [being] assessed and weighed with no one factor being decisive."[75]

Additionally, the *Bryson* court keenly suggested that one should "weigh all incidents of the relationship *no matter how the parties characterize the relationship*. . . . [E]mployee-employer relationships can be complex and may not fit neatly into one particular categorization."[76] It is this notion—that employment relationships are not always easily definable, and sometimes a rigid analysis does not account for the realities of unique employment situations—that sets the *Bryson* decision apart.

With all this in mind, the court remanded the case for consideration of all of the factors in one unitary factual analysis.[77]

With *Bryson*, a circuit split has emerged: its sister circuits that have considered this issue (save, perhaps, the Ninth) have adopted the two-step remuneration test first articulated in *Graves*, whereas the Sixth Circuit has set forth a *Clackamas*-based "all the factors" approach in *Bryson*.[78] The Eight Circuit, in *Graves*, did correctly note that the drafters of Title VII intended for dictionary definitions to fill in definitional gaps and reasonably employed a dictionary-driven conclusion that remuneration is inherent in the term "employee."[79] However, that dictionary definition must now be squared with the Supreme Court's directive in *Clackamas* that all factors used to analyze the employment relationship must be given weight. That *Clackamas* itself considered remuneration in the mix of factors in its unitary analysis suggests that the two-step evaluation cannot stand.

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[74] *Id.* (emphasis omitted) (quoting *Reid*, 490 U.S. at 739–40).

[75] *Id.* (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992)).

[76] *Id.* at 355 (emphasis added).

[77] *Id.* at 356.

[78] The one exception to this conclusion is the Ninth Circuit's opinion in *Fichman*. *See supra* text accompanying notes 54–61. However, given the Ninth Circuit's wavering in *Weisgerber*, *see supra* text accompanying notes 62–65, the *Bryson* court is the first to truly and fully adopt this new approach. Also of note is that while the Seventh Circuit has not weighed in, Judge John J. Tharp, Jr. of the Northern District of Illinois adopted the *Bryson* court's reasoning in *Volling v. Antioch Rescue Squad*, No. 11 C 04920, 2012 WL 6021553 (N.D. Ill. Dec. 4, 2012), which provides a fine summation and analysis of the case law to date.

[79] *See* Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990).

V. The Remuneration Analysis Performed

Regardless of whether or not remuneration is to be an antecedent step, it still is a significant factor that tilts in favor of finding an employment relationship, to the extent that other factors do not establish one. The numerous volunteer firefighter cases that often intersect with this issue serve as an instructive example of how any remunerative analysis may be performed.

In *Bryson*, for example, the district court was to determine whether Bryson's workers' compensation benefits, insurance coverage, gift cards, personal use of the fire department's facilities, training, access to an emergency fund, and lump-sum retirement benefits constituted sufficient remuneration for the purpose of determining if an employment relationship existed, in tandem with the other control factors outlined in *Darden* and *Reid*.[80] Other courts have noted that just because remuneration is not offered in the form of wages, evidence of substantial benefits does not foreclose the possibility of showing compensation.

The Fourth Circuit, in *Haavistola*, analyzed whether or not volunteer firefighter Paula Haavistola's non-wage compensation rose to the level of significant remuneration.[81] While she did not receive direct wage compensation, she did receive a disability pension, survivor's benefits for dependents, dependent scholarships on disability or death, life insurance, tuition reimbursement, workers' compensation coverage, and tax exemptions for travel expenses, among other benefits.[82] The *Haavistola* court found that the issue of compensation was a factual question and was to be left to the fact-finder to make an ultimate determination as to whether or not the benefits rose to the level of sufficient remuneration as to establish an employment relationship.[83] The Second Circuit, in *Pietras v. Board of Fire Commissioners*, echoed that a firefighter with "significant benefits" but no wages might also be eligible for employee status.[84] Concluding that, because the benefits received by firefighter Pietras were greater than that of Haavistola,[85] a factual finding of an employment relationship was not erroneous.[86]

Other courts have been less apt to leave this question to the fact-finder, noting that benefits provided in furtherance of a volunteer's ability to perform their volunteer work should specifically be excluded. For example, in a Northern District of Indiana decision, *Holder v. Town of Bristol*, a volunteer reserve police officer was found not to be a Title VII

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[80] *Bryson*, 656 F.3d at 355.

[81] Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211 (4th Cir. 1993).

[82] *Id.* at 221.

[83] *Id.* at 221–22.

[84] Pietras v. Bd. of Fire Comm'rs, 180 F.3d 468, 473 (2d Cir. 1999).

[85] Pietras's benefits included, among other things, a retirement pension, as opposed to Haavistola's disability pension and minor medical benefits. *See id.* at 473 n.6.

[86] *Id.* at 473.

employee as a matter of law, even though he was entitled to "(1) free use of police equipment; (2) a uniform and dry cleaning allowance; (3) worker's compensation insurance; (4) disability insurance; and (5) state-funded life insurance for death in the line of duty."[87] The court reasoned that:

> [A]ll of these so-called benefits are incidental to [police officer] Holder's volunteer duties and have no independent value. For example, the police department pays for Holder's use of a police car, weapons, and protective gear. This is only sensible since the reserve officers need these items to perform their volunteer duties. It's like giving someone who volunteers at a soup kitchen a ladle. If the volunteer officers are putting themselves in harm's way in order to ensure public safety, the least the Town can do is pay for their equipment. But Holder doesn't get to keep these items for personal use. . . .
>
> As for the line-of-duty benefits that Holder received—workers' compensation, disability insurance, and death benefits—these are not guaranteed forms of remuneration. Holder and his dependents would have only seen a dime if something bad happened to him while he was on duty. Holder was never injured in the line of duty. So he didn't receive any health insurance benefits or compensation for medical expenses. It's worth noting that these insurance benefits are just as much for the Town's protection as they are for the reserve officers. If Holder had injured himself and made a claim against the Town, the policies would cover the medical costs. So, without more, it can't be said that these mechanisms for insuring risk had independent value as consideration in exchange for labor.[88]

Ultimately, regardless of whether or not remuneration is a factual question, a showing of some financial benefit, when it exceeds mere reimbursement, should lead any analysis toward a finding of an employment relationship, along with the other contours of the agency analysis.

VI. Recommendations

Given the divergence in how courts have analyzed whether or not volunteers are employees for the purposes of the federal employment discrimination laws, it is important to consider which principles that have been advanced by the courts are the most meritorious, most sensible, and which should be most instructive going forward. It is also important to consider whether a legislative fix would provide a better solution. Below

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[87] Holder v. Town of Bristol, No. 3:09-CV-32, 2009 WL 3004552, *5 (N.D. Ind. Sept. 17, 2009).

[88] *Id.* The district court in *Juino v. Livingston Parish Fire Dist. No. 5*, No. 11-466, 2012 WL 527972, *6 (M.D. La. Feb. 14, 2012), similarly found that a two-dollar-per-call reimbursement was meant only to defray wear and tear on the volunteer firefighter's vehicle, and that life insurance benefits were offered to provide only in an unfortunate event.

is an attempt to outline a practical framework for determining when a volunteer should receive the protections of federal employment discrimination laws, and some suggestions as to how to clarify and better the law.

A. In an Effort to Follow Supreme Court Precedent, Bryson*'s "All the Factors" Approach, and Not a Two-Step Approach, Should Be Adopted*

Courts should carefully reconsider whether the Supreme Court clearly set out a directive in *Clackamas* when it said that "the answer to whether [a possible employee] is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'"[89] If this is an instruction that no one factor in the employment relationship analysis is dispositive, must one, when weighing the factors, consider them each at the same time?

A plain reading of the Court's repeated directive would suggest the answer is "yes," yet one must square this conclusion with later post-*Clackamas* decisions by the courts—including the Second Circuit in *City of New York* and the Fifth Circuit in *Juino v. Livingston Parish Fire District No. 5*—that ignore it and continue with a two-step analysis, with remuneration as a threshold element.[90] Neither *City of New York* nor *Juino* offered an explanation for why *Clackamas*'s requirement should not be, at the very least, contemplated. While *Clackamas* specifically involved the determination of whether or not owners of a professional corporation were employees, the opinion's application of agency-based factors appears to serve as a guide by which to determine the employment relationship for any federal discrimination law that otherwise did not clearly define it. Regardless of the specific agency test used, the Court was clear that any analysis be pragmatic and all-encompassing.[91]

These circuits may argue that the question of whether or not one is compensated is excluded because of the inherent remunerative nature of "employment," and thus, a remuneration analysis must be an inherent predicate. However, given that remuneration was specifically one of the six factors in *Clackamas* of which the Court required consideration in tandem—"[w]hether the individual shares in the profits, losses, and liabilities of the organization"[92]—any such conclusion is misguided. That the Court said no one factor could individually dispense with the analysis, and that it included a remunerative factor in the very list of factors to be considered together, suggests remuneration *must* be considered with all other factors at the same time. In any case, a prudent evaluation by those

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[89] Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 451 (2003) (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992)).

[90] *See supra* text accompanying notes 66–68.

[91] *See Clackamas*, 538 U.S. at 450–51.

[92] *Id.* at 449–50. Of course, this factor specifically addresses the remunerative relationship between director and corporation, but it serves to show that with any agency analysis, the remunerative relationship—however it exists—is to be considered as one of many factors.

courts that have not adopted *Clackamas*'s directive should at the very least rule out its applicability.

Fichman and *Bryson* took a better tack when they chose to evaluate all factors holistically. Given the unambiguous directive that no one factor is alone dispositive, no one factor should foreclose a consideration of the other factors. For this reason, the "all the factors" approach in *Bryson* comports with Supreme Court precedent and should therefore be given more credence than other post-*Clackamas* opinions that have not contemplated this issue.

B. Remuneration and Control Should Both Play Roles in a Determination of the Employment Relationship

Assuming then, that all factors are to be analyzed at the same time, with no one factor foreclosing analysis of the others, should some factors be given more weight than others? And how great a role should remuneration play?

The presence of remuneration should certainly be given *some* weight in establishing that a volunteer is an employee, and certainly, it favors a finding of an employment relationship when present, but it should not necessarily disfavor one when it is not. The Supreme Court turned to an agency-based analysis when determining the contours of the employment relationship, and traditional agency has always allowed for master-servant relationships where the agent acts gratuitously.[93] At the same time, it is also true that most master-servant agency relationships usually involve some sort of compensation. Thus, remuneration may be a marker of an employment relationship, but it should not rule one out.

The federal employment discrimination laws were enacted, in part, to prevent undue discriminatory influence in pay and employment status. For example, Title VII was enacted to protect against employers attempts to "limit, segregate, or classify . . . employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin."[94] Therefore, the purpose of the law itself suggests the presence of

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[93] *See* Volling v. Antioch Rescue Squad, No. 11 C 04920, 2012 WL 6021553, *8 (N.D. Ill. Dec. 4, 2012) (quoting RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. d (2006): "('Many agents act or promise to act gratuitously.'); *id.* § 1.04(3) (defining 'gratuitous agent' as one who 'acts without a right to compensation'); *id.* § 7.07(3)(b) (noting that when the agent acts gratuitously, the principal is not relieved from responsibility for agent's acts)"). Of course, it could be said that just because an agency-based test is helpful to determine whether one is an employee because agency principles of control generally mirror the right to control held by employers, that does not mean that all agents are employees. However, given that the Supreme Court used agency principles to define the employment relationship when not otherwise defined by Congress, it is not unreasonable to assume the term "employee," when given a supergeneric definition, can include a person who would not traditionally be considered an employee, but would be considered an agent.

[94] 42 U.S.C. § 2000e-2(a)(2) (2006).

remuneration should favor a finding of an employment relationship so that the protections may serve their purpose. But the very same law also states a secondary purpose: to guard against employer conduct that would "otherwise adversely affect [one's] *status* as an employee."[95] Such language suggests a broader purpose than mere financial protection. Thus, it is important to consider whether other non-remunerative factors bring a volunteer within the scope of the law because of its larger goal of protecting those who might have otherwise been harmed through a relationship of subservience. Here, considerations as to how an individual is supervised in his volunteer work, or to whom he reports, may come into play.

Therefore, when analyzing whether or not the volunteer is an employee, one should consider whether the purpose for which he is working is to receive a financial benefit, but also whether his relationship with the organization for whom he works creates the potential for undue influence, harassment, a hostile work environment, or other non-pecuniary harm. Neither pay nor control should be dispositive, and both should be evaluative in determining whether the volunteer is acting to serve his organization in a manner that merits protection. In our example case of the firefighter, this might involve a consideration of whether or not his primary purpose in working is to receive financial benefits, but also—and more importantly—whether he was placed in circumstances that created the potential for discrimination in the assignment of work, in his relationships with the fire chief and other management, and in his interactions with his fellow firefighters.

Additionally, that courts have determined the evaluation of whether or not one is an employee to be a factual question is of likely benefit to the volunteer in this analysis: as the *Bryson* court stated, "employee-employer relationships can be complex and may not fit neatly into one particular categorization."[96] By giving the issue to the fact-finder, a door is left open for those situations where the employment relationship does not fit a traditional mold, allowing a necessary flexibility for the right outcome to be reached. Ultimately, because both pay and control are issues contemplated by the federal employment discrimination laws, the fact-finder should be instructed to consider them both carefully and fully in determining the contours of the employment relationship.

C. The Reason Why Remuneration Is Being Provided Should Also Be Considered

When offered, the type of remuneration provided to the volunteer should also be considered in determining whether an employment relationship exists. If one is being compensated only for the expenses incurred to perform his volunteer work, he is receiving no net financial benefit. Those benefits that are provided solely to reimburse the volun-

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[95] *Id.* (emphasis added).

[96] Bryson v. Middlefield Volunteer Fire Dep't, Inc., 656 F.3d 348, 355 (6th Cir. 2011).

teer for costs incurred in completing his volunteer work should not be considered compensation for the purpose of determining whether he is an employee.[97] Much like how a businessperson's compensation for a business lunch is intended only to provide him reimbursement for an expense he would have not otherwise incurred, these benefits are seeking only to make the volunteer whole for what expenses he may have in furtherance of the agency's work.

Also, benefits that have no immediate value, and those offered as a gratuity, should be viewed with more scrutiny. Examples might include disability pensions, workers' compensation coverage, and term life insurance policies. But for some significant calamity, a volunteer worker will not likely utilize these benefits. Therefore, because there is a lesser chance these benefits will actually provide some remunerative value to the volunteer, and because they may be offered more as a courtesy in recognition of their assistance, they should be considered with greater reservation. However, these courtesies do indicate that the employer seeks to provide some financial benefit to the volunteer for the work he has done, so they should not be discounted entirely.

Finally, those benefits that provide immediate financial gain that exceeds any return of expenses incurred while engaged in volunteer work should be given the same consideration as money wages. Examples of non-recompensatory benefits might include retirement pensions and gifts. These benefits likely provide the volunteer with some financial motivation in performance of his work, even if his primary purpose is charitable. Here, he should receive the protections of the employment discrimination laws for the very reason that employment discrimination in the face of financial motivation often results in improper influence over the employee, compelling him to act in a manner contrary to his own interests.

D. Volunteer Work in Which an Employer Exerts a Significant Degree of Control Should Dictate a Finding of an Employment Relationship Even if the Volunteer Receives Little or No Remuneration

Many volunteers work in significant, time-consuming positions that do not provide significant remuneration, yet they deserve the protections that federal anti-discrimination laws afford; here, the prototypical example is the volunteer firefighter. While a volunteer firefighter may do his work because he seeks to improve his community or better himself, his

[97] However, the presence of only reimbursements should not foreclose the possibility of an employment relationship. For example, in *Seattle Opera v. NLRB*, 292 F.3d 757 (D.C. Cir. 2002), the D.C. Circuit determined that a flat $214.00 "honorarium" for a chorister's seven to nine rehearsals and six to eight performances was offered to defray transportation costs, but because the employer had a right to control the choristers, a sufficient employment relationship was present for coverage under the National Labor Relations Act, which has a similarly vague definition of employee. *Id.* at 762–65.

work requires significant physical effort and technical training, and the environment in which he works, which often includes dangerous or stressful situations, involves a typical master-servant agency relationship.

Therefore, even if the volunteer receives little or no financial gain, one should consider whether the type of work he is performing is similar to work that would otherwise allow an employee the protection of federal anti-discrimination laws if remuneration was otherwise present. This can be completed within the traditional agency-based analyses, but it may require a finding that other non-remunerative factors are alone sufficient to create an employment relationship. For example, when one applies the traditional right-to-control factors to the typical volunteer firefighter, one might easily find an agency relationship, even absent any compensation: the average volunteer firefighter can be hired and fired, his department sets regulations of his work, his work is supervised by the fire company, he reports to a fire chief or other director, he often may have some influence in determining how the organization is run, and he often enters into an agreement to work for a specific duration or during certain hours.[98] Generally then, if the type of work so closely mirrors the type of employment for which one would regularly receive remuneration, it is not unreasonable that a fair and thorough employment analysis would yield a finding of an employment relationship even absent any pay.

However, it is unlikely that many courts will allow a finding of an employment relationship when no, or very little financial benefit is conferred on the volunteer, even if the position mirrors compensated work in every other respect. For these situations, a legislative change may be necessary, removing remunerative considerations altogether for those positions that society is prepared to protect because we accept that discriminatory treatment in volunteer situations should be dissuaded.[99]

It might be said that a lack of remuneration leaves few tangible damages in the face of discrimination, however injunctive relief, reinstatement, and punitive damages could be available to the injured party even in the absence of any financial loss.[100] Even if a financial remedy is not available, often the volunteer—with an altruistic intent of serving others

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[98] *See* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 449–50 (2003); *see also supra* text accompanying note 26.

[99] A legislative fix may be as simple as defining "employee" as one that meets all of the non-remunerative factors set out in *Darden* and *Reid*. Congress may also take a cue from its language in the Fair Labor Standards Act, which broadly defines "employ" as "to suffer or permit to work," 29 U.S.C. § 203(g) (2006), "whose striking breadth . . . stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles," Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992). Such liberality has prompted several recent suits by interns who were completing non-educational work for employers in positions that traditionally would have received pay. *See, e.g.*, Steven Greenhouse, *Judge Rules that Movie Studio Should Have Been Paying Interns*, N.Y. TIMES, June 12, 2013, at B1.

[100] For further discussion, see Rubinstein, *supra* note 35, at 179–80 & nn.162–65.

without intended financial compensation—would often be equally happy retaining his position without the threat of discrimination.

E. The Purpose for Which One Is Volunteering Should Also Be Considered, as Volunteer Work Is More Frequently Being Used as "Pre-employment" Work in Furtherance of a Career

The reasons for which many choose to volunteer are changing. While many perform volunteer work for the public good, personal betterment, or to help a cause, many more are also completing volunteer work to advance their career or obtain initial job placement. Many younger people are working in internships or other unpaid positions in order to improve their resume, make employment connections, or hone skills needed to gain paid work. In some fields, unpaid internships are practically required to gain entry into one's chosen field.[101] Traditionally, many have viewed personal satisfaction or societal status as the primary benefit of volunteer work,[102] but now, for many, volunteerism is first and foremost unpaid work. In these situations, the protections of federal employment discrimination law should certainly be extended.

Many of these unpaid positions may meet some of the agency factors the courts use to establish an employment relationship, but they may not meet them to the same degree as, say, the volunteer firefighter in *Bryson*. Take, for example, the unpaid student intern: while the intern may be working in the very same work environment as other paid employees, and his employer exerts some level of control over his work, the frequently short duration of the relationship between him and his employer, that his work may not be a regular part of the employer's business, that little skill is often required for his job, that he does not receive employee benefits, and most importantly, his lack of pay, all tip the scale away from a finding of an employment relationship.

This person may be doing the same work, in the same office, and for the same supervisor as the paid employee, but rather than working for money, he is seeking a good word for his next employer, on-the-job training, and a leg up in the job market. Here, one might argue that he should not receive the same protections under the federal employment discrimination laws because he can always leave without repercussion: if discrimination is occurring in his workplace, there is no financial loss, and he simply must seek out new volunteer work.[103] However, this notion is flawed. As a society, we should want to encourage positive and lawful environments for our volunteer workplaces. But, of equal importance is

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[101] *See* David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 228 (1998); David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 215 (2002).

[102] *See, e.g.*, Fichman v. Media Ctr., 512 F.3d 1157, 1160 (9th Cir. 2008) (noting that the traditional reason one would serve on a board of directors is for personal and social benefit).

[103] *See, e.g.*, Smith v. Berks Cmty. Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987).

that because volunteers frequently receive benefits in the form of career advancement, recommendations from supervisors, or placement within the organization when a paid opening arises, in these situations, a loss of future financial benefit may occur.

For the volunteer, discrimination in the workplace will have negative effects similar to the paid employee; while he may be able to leave at will without fear of immediate financial consequence, often doing so may affect future employment. Leaving an internship early due to discrimination may be an inaccurate signal to future employers that the intern was not diligent in his work, and any relationships with those who might provide him future reference may be negatively impacted, which may translate into a sizeable economic loss in the form of lost work opportunities from a history of inconsistent or insufficient work experience. For example, if an unpaid law clerk experiences a racially hostile work environment, but is declined Title VII protections, he must either endure the situation without recourse, or quit, and carry with him the stigma of starting but not completing his time in the position, and risk receiving unfavorable references. And an internship cut short has additional effects: a shorter work period often yields a lesser degree of experience, and therefore a lesser position in later employment than the person who continued on in the position.

In *Rafi v. Thompson*,[104] a federal district court was willing to factor in the effect of a volunteer position on future employment in its employment relationship analysis. It determined that a researcher who was not selected for an unpaid volunteer position with the Human Genome Research Institute met the qualifications of a Title VII employee because he presented evidence that there was a "clear pathway to employment" for those volunteers in the position in which he was denied.[105] There, the promise of future compensation constituted a sufficient financial benefit as to establish an employment relationship.[106] Other potential plaintiffs may be able to make similar arguments that, because their volunteer position is one that often leads to future paid employment, they will suffer future financial loss from being unable to work in the position, thus implicating the policy consideration that one should not be able to "limit, segregate, or classify . . . employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities."[107]

However, because most courts still impose a distinct remuneration threshold and require sufficient immediate financial gain to find applicability in these laws, legislative reform is likely necessary to provide

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[104] No. 02-2356, 2006 WL 3091483 (D.D.C. Oct. 30, 2006).

[105] *Id.* at *1; *see also* Order Granting Partial Motion to Dismiss at 23, *Rafi*, No. 02-2356 (D.D.C. Sept. 30, 2005) ("[A]ccess to paid positions would be a substantial benefit of an unpaid position.").

[106] *Rafi*, 2006 WL 3091483, at *1 (noting that there was a high conversion rate of volunteers moving into full-time paid positions).

[107] 42 U.S.C. § 2000e-2(a)(2) (2006).

protections for those who enter unpaid volunteer positions designed for, or commonly used for, advancement of future employment prospects. But accurately determining one's purpose in volunteering can be a difficult endeavor, and sometimes one might be volunteering for more than one reason—to gain job experience, but also to help out one's community. Therefore, rather than drafting a legislative protection to safeguard that work from which the volunteer intends to derive future benefit, it may be more practical to offer protections whenever work is of a type from which *an employer* traditionally derives immediate financial gain from the volunteer's work, such that they would be required to comply with federal law were the volunteer in a traditional employment relationship.

In the interim, states can adopt measures extending their own anti-discrimination laws to volunteers. Taking the lead, the State of Oregon recently passed H.B. 2669, which affords many of the state's wide-ranging employment discrimination protections to "interns," who are individually defined as:

> a person who performs work for an employer for the purpose of training if: [among other requirements] . . . the person performing the work is not entitled to wages for the work performed; and [t]he work performed: [s]upplements training given in an educational environment that may enhance the employability of the intern; [and] [p]rovides experience for the benefit of the person performing the work.[108]

Any solution, then, must be a flexible one. Rather than consider the volunteer's subjective intentions for performing the work, one must look at objective factors that suggest the work is that which would traditionally be afforded anti-discrimination protections. Some volunteer positions may already fit within the Supreme Court's agency-based analysis; an employer's right to control and direct the student intern, for example, is often fairly significant. Other situations, however, may require legislative changes that provide volunteers with protections when the remunerative or control-based factors are insufficient, but the workplace environment is one that the discrimination laws should protect.

VII. Conclusion

Determining when a volunteer should be afforded federal employment discrimination protections is not an easy proposition, but the mere absence of clearly articulable remunerative benefits should never cause one to dispense with adequate consideration of the merits of a volunteer's discrimination claim. *Bryson v. Middlefield Volunteer Fire Department* provides a good model for the necessary effort needed to determine whether a volunteer can establish an employment relationship: the *Bryson* court chose not to rely on other circuits' quickly conceived analyses, but

[108] H.R. 2669, 77th Leg. Assemb., Reg. Sess. (Or. 2013).

rather, it conducted its own inquiry and closely followed the Supreme Court's direction. Like the *Bryson* court, future courts and legislators should apply a similar degree of diligence in considering an appropriate application of the employment discrimination laws to the volunteer and arrive at a conclusion that accounts for the unique facets of each volunteer position, the intended purposes of the law's protections, and the realities of our modern employment environment.