Compensation Isn't Everything: The Threshold-Remuneration Test for Employment Discrimination Under Title VII

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I. INTRODUCTION

The employment rights of unpaid interns have recently become a hot topic in both the public and private sectors.[1] With the growing importance of work experience for college students and new graduates, internships have become a vital component to the development of a successful career or even to landing an entry-level job. Although internships have

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1. Stephen Lurie, *How Washington Abandoned America's Unpaid Interns,* THE ATLANTIC (Nov. 4, 2013 12:08 PM), http://www.theatlantic.com/business/archive/2013/11/how-washington-abandoned-americas-unpaid-interns/281125/ (arguing that the law has abandoned young employees who are not receiving just compensation because they have been labeled as interns); Cara Newlon, *Unpaid Interns Strike Back*, USA TODAY (Sept. 4, 2013 4:24 PM), http://www.usatoday.com/story/news/nation/2013/09/04/unpaid-interns-strike-back/2762911/ (reporting that over 8500 people have signed a petition for unpaid interns at the White House to receive compensation for the work they perform).

become a standard portion of a young adult's resume, those interns who do not receive compensation for their efforts do not enjoy the basic protections of federal anti-discrimination laws in the majority of circuits. Most circuits have adopted a threshold-remuneration test, which allows a plaintiff to proceed with claims of employment discrimination only if she is receiving significant remuneration for her work. Title VII of the Civil Rights Act entitles only employees to protections from employment discrimination, and within the framework of the threshold-remuneration test, an employment relationship cannot exist without significant compensation flowing from one party to the other.

This Note argues that unpaid interns and volunteer workers who are entitled to compensation under the Fair Labor Standards Act (FLSA) should also receive protections from employment discrimination under Title VII of the Civil Rights Act of 1964, regardless of whether the intern is actually receiving that compensation. Part II provides an overview of an employee's rights to be free from discrimination under federal law and control tests for employment. Additionally, Part II introduces the circuit split cases on the issue of a threshold-remuneration test. Part III analyzes the applicability of the threshold-remuneration test to the realities of today's employment landscape. Part III also provides an analysis of the FLSA's opposing view on what constitutes an employment relationship between an intern and an organization. Part IV recommends that courts expand the threshold-remuneration test to include a second prong, which would require courts to examine whether the FLSA entitles the unpaid worker to wages, and if so, consider that entitlement as actual remuneration.

II. BACKGROUND

This Part explains the purpose of Title VII and some of its sections as they are relevant to this Note. These sections include the crucial statutory definitions of harassment, employers, and employees. Next, this Part discusses the threshold-remuneration test and the emergence of a circuit split on its utility in determining whether a plaintiff is an employee for purposes of Title VII. This Part provides background on the development of this circuit split and the factors that each of the two opposing sides has found to be most important. Finally, it discusses the Fifth Circuit's most recent decision regarding remuneration as a threshold to employment under Title VII.

A. Title VII

Title VII of the Civil Rights Act of 1964 prohibits employers from engaging in unlawful employment practices based on race, color, religion, sex, and national origin.[2] These unlawful employment practices include failing or refusing to hire or discharge an individual or discriminating in compensation or terms and conditions of employment based on a protected class.[3] The term "discriminate" includes both sexual harassment and

2. 42 U.S.C. § 2000e-2 (2006).

3. 42 U.S.C. § 2000e-2(a) (defining forbidden, discriminatory practices to include: "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive 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.").

retaliation under Title VII.[4]

Although courts have easily applied the statute's principles in traditional employee-employer relationships, they have differed when applying the principles of the statute to non-traditional employment relationships, such as internships.[5] To determine whether Title VII's protections against discrimination extend to volunteer workers and unpaid interns, courts must determine whether the plaintiff is an "employee."[6] This requires courts to consult the statute's definitions section.[7]

While any statute's definitions of terms are extremely important, Congress has left the Title VII definitions of employer and employee to judicial interpretation.[8] Under Title VII, the definition of an employer hinges on the definition of an employee.[9] The statute defines an employee, however, merely as an "individual employed by an employer."[10] These circular definitions offer little assistance to those unpaid workers, including volunteers and interns, who seek to bring suits for employment discrimination. Courts have been left to make this determination without explicit statutory guidance.[11] As a result, a circuit split has emerged over the issue of remuneration as a basic requirement for an employment relationship to exist.[12]

B. The Circuit Split on Remuneration

The threshold-remuneration test requires that an individual must receive significant remuneration to qualify as an employee who is entitled to freedom from employment discrimination under Title VII.[13] If a court determines that the plaintiff received significant remuneration, it will move forward to analyze the employment relationship under the economic realities or formal control tests.[14] However, if the court determines that the

4. Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (explaining that Title VII's protections extend to victims of sexual harassment when the harassing behavior occurs within the scope of employment); Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 59 (2006) (referencing Title VII's antiretaliation provision which forbids employer actions that discriminate against an employee (or job applicant) because he or she has opposed a discriminatory practice that violates Title VII or has "'made a charge, testified, assisted, or participated in' a Title VII 'investigation, proceeding, or hearing'") (quoting 42 U.S.C. § 2000e-3(a)); 42 U.S.C. § 2000e-3 (2006).

5. *See infra* Part II.B (discussing the circuit split on the remuneration test and its role in determining employee status).

6. 42 U.S.C. § 2000e(f).

7. 42 U.S.C. § 2000e.

8. *See infra* Part II.B.(discussing the circuit split on the remuneration test and its role in determining employee status).

9. *See* 42 U.S.C. § 2000e(b) (defining an 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").

10. 42 U.S.C. § 2000e(f).

11. *See infra* Part II.B (describing the various circuit decisions).

12. *Id.*

13. Graves v. Women's Prof'l Rodeo Ass'n, Inc., 907 F.2d 71, 74 (8th Cir. 1990).

14. *See* Nancy E. Dowd, *The Test of Employee Status: Economic Relations and Title VII,* 26 WM. & MARY L. REV. 75, 80 (1984) (describing the various factors included in common law tests for employment and the great importance of control); *see* Cobb v. Sun Papers, Inc., 673 F.2d 337, 340 (11th Cir. 1982) (identifying relevant factors for the economic realities test as "(1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the 'employer' or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both

plaintiff did not receive significant remuneration, it will determine that an employment relationship cannot exist and will refrain from engaging in an unnecessary analysis of the factors within the other tests of employment.[15] The question of whether individuals must first demonstrate that they receive significant remuneration before a court will engage in an analysis of the employment relationship has been a divisive issue in the circuit courts.[16] The Second, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits have adopted this test.[17] On the other hand, the Sixth and Ninth Circuits have held that significant compensation is a relevant but nondispositive factor that must be considered along with all other indicators of an employment relationship as a whole.[18] The initial trend was for courts to require plaintiffs to demonstrate that they had received significant remuneration as a threshold test for employment.[19] In 2008 and 2011, however, two separate circuits reversed that trend by determining that remuneration itself was not dispositive.[20] But the most recent decision by the Fifth Circuit has again reversed the trend by siding with the earlier cases and once again requiring remuneration as a threshold inquiry.[21] This Part will discuss the elements that went into the reasoning of (1) the threshold-remuneration cohort, (2) the nondispositive factor cohort, and (3) the balancing of these factors by the Fifth Circuit in its recent decision.

1. The Threshold-Remuneration Cohort

In *Graves v. Women's Professional Rodeo Association, Inc*., the Eighth Circuit considered a case where a male alleged that he was the victim of discrimination on the basis of sex when the rodeo association denied him membership.[22] The court resorted to consulting a dictionary to determine what it means to employ an individual or to be an employee.[23] The court determined that the central focus of these definitions was the idea of compensation in an exchange for services where "an employer is someone who pays, directly or indirectly, wages or a salary or other compensation to the person who provides the services."[24] Because the members of the rodeo association received no compensation from the organization but rather were able to win prize money supplied by sponsors, the

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parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the 'employer'; (9) whether the worker accumulates retirement benefits; (10) whether the 'employer' pays social security taxes; and (11) the intention of the parties").

15. *See infra* Part II.B.1 (describing courts' unwillingness to proceed with a test for employment without a demonstration of remuneration).

16. Christopher R. Morgan, Bryson v. Middlefield Volunteer Fire Department *and the Changing Understanding of Volunteer As Employee*, 17 LEWIS & CLARK L. REV. 1223, 1235 (2013) (describing the emergence of a circuit split).

17. *See id.* at 1230–35 (describing each circuit's adoption of the test).

18. *Id.*

19. Graves v. Women's Prof'l Rodeo Ass'n, Inc., 907 F.2d 71, 73 (8th Cir. 1990); O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997); Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 221–22 (4th Cir. 1993); Pietras v. Bd. of Fire Comm'rs of Farmingville Fire Dist., 180 F.3d 468, 473 (2d Cir. 1999).

20. Fichman v. Media Ctr., 512 F.3d 1157, 1160 (9th Cir. 2008); Bryson v. Middlefield Volunteer Fire Dep't, Inc., 656 F.3d 348, 353 (6th Cir. 2011).

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

22. *Graves*, 907 F.2d at 73.

23. *Id.* (quoting the dictionary's definition of the verb to employ which is "to provide with a job that pays wages or a salary or with a means of earning a living").

24. *Id.*

court determined that belonging to the association was not a "remunerative proposition."[25] Without the demonstration of remuneration, the court held that it was unnecessary to engage in analysis of the "economic realities" or "right to control" test.[26]

In *O'Connor v. Davis*, the Second Circuit considered a case of an unpaid intern who filed a claim of sexual harassment under Title VII.[27] The court held that a common-law agency analysis should only be undertaken where a hire has occurred.[28] The court reasoned that if a purported employee obtains no financial benefit, then no plausible employment relationship of any sort can exist.[29] The court considered a financial benefit from the employer to employee an "essential condition" of the employer-employee relationship.[30] Under this analysis, interns who do not receive a salary, health benefits, retirement benefits, or vacation are not able to bring a discrimination suit under Title VII.

The Fourth Circuit dealt with the issue of a threshold remuneration test in *Haavistola v. Community Fire Co. of Rising Sun, Inc.*[31] In *Haavistola*, a female volunteer firefighter brought an action against the fire company, alleging sex discrimination.[32] The circuit court agreed with the district court's determination that Congress's intention in enacting Title VII was to "eliminate a pervasive, objectionable history of denying or limiting one's livelihood simply because of one's race, color, sex, religion or national origin."[33] Because unpaid volunteers' livelihoods are not denied or limited when they are the victims of discrimination, they are not "susceptible to the discriminatory practices which the act was designed to eliminate."[34] Based on this congressional intent, the court determined that a demonstration of remuneration for employment was an appropriate requirement.[35] The Fourth Circuit nevertheless reversed the lower court's decision that the plaintiff's benefits were insufficient to prove remuneration and remanded the case.[36] In *Pietras v. Board of Fire Commissioners of Farmingville Fire District*, the Second Circuit agreed with the Fourth Circuit, stating that an employment relationship can exist even when the "putative employee receives no salary so long as he or she gets numerous job-related benefits."[37] However, the court stood by its decision in *O'Connor* and held that whether or not someone is an employee under Title VII depends on "whether he or she has received 'direct or

25. *Id.*

26. *Id.* at 74 (stating that it is not possible for an individual to be an employee without demonstrating the existence of an employment relationship).

27. O'Connor v. Davis, 126 F.3d 112, 113 (2d Cir. 1997).

28. *Id.* at 115.

29. *Id.* at 116 (agreeing that without financial benefits, no employment relationship of any type can exist).

30. *Id.* (holding that because there was an "absence of either direct or indirect economic remuneration or the promise thereof," the plaintiff was not an employee within the meaning of Title VII and could not bring a discrimination claim).

31. Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 219 (4th Cir. 1993).

32. *Id.* at 213.

33. *Id.* at 221 (quoting Smith v. Berks Cmty. Tel., 657 F. Supp. 794, 795 (E.D. Pa. 1987)).

34. *Id.*

35. *Id.* at 220 (relying on its previous decision in Garrett v. Phillips Mills, Inc., 721 F.2d 979 (4th Cir. 1983) and citing the cases from its sister circuits addressing the meaning or definition of the term employee in the context of volunteer workers).

36. *Haavistola*, 6 F.3d at 221–22 (stating that the benefits received by the volunteer firefighters, which included disability pensions, survivors' benefits for dependents, scholarships for dependents in the event of disability or death, group life insurance, and other benefits, may be sufficient to show significant remuneration and is a disputed material fact to be determined).

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

indirect remuneration' from the alleged employer."[38]

2. Remuneration as a Nondispositive Factor

More recent decisions from other circuits have taken a new approach to remuneration as a factor in determining employment. In 2008, the Ninth Circuit considered whether directors and officers of a nonprofit organization were employees under the Americans with Disabilities Act and the Age Discrimination in Employment Act.[39] The court held that the lower court correctly applied the Supreme Court's analysis of whether an employment relationship exists by analyzing six common law factors that were not exhaustive, "with no one factor being decisive."[40] Remuneration was held not as a threshold test but as merely one of several factors to be considered when determining the status of an employment relationship.[41]

The Sixth Circuit took this position further when it rejected the Second Circuit's two-step test for determining whether an individual is an employee under Title VII in *Bryson v. Middlefield Volunteer Fire Dept., Inc*.[42] The court decided to "consider and weigh all incidents of the relationships no matter how the parties characterize the relationship."[43] It ruled that the lower court erred in conducting an independent antecedent inquiry on remuneration when evaluating whether an individual is an employee.[44]

3. The Fifth Circuit Decision

The Fifth Circuit has been the most recent federal court of appeals to address the issue of remuneration in the context of determining an employment relationship through its decision in *Juino v. Livingston Parish Fire Dist. No. 5*.[45] After expounding on the history of the threshold-remuneration test and the division between the circuits, the Fifth Circuit adopted the threshold-remuneration test as being the most suitable for evaluating the plausible "employment relationship in the volunteer context."[46] The court resolved that it would "turn to common-law principles to analyze the character of an economic relationship 'only in situations that plausibly approximate an employment relationship.'"[47] Without compensation, it is implausible to say that an employment relationship exists.[48]

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38. *Id.*

39. Fichman v. Media Center, 512 F.3d 1157, 1158 (9th Cir. 2008).

40. *Id.* at 1160.

41. *Id.* (providing a non-exhaustive list of six factors that are relevant to determining whether a person is an employee, including: (1) the organization's ability to hire or fire the individual, (2) supervision of work, (3) reporting structures, (4) individual influence on the organization, (5) the manifested intent of the parties regarding the relationship, and (6) the individual's stake in the organization).

42. Bryson v. Middlefield Volunteer Fire Dep't, Inc., 656 F.3d 348, 354 (6th Cir. 2011) (declining to require a plaintiff to demonstrate significant remuneration to be considered a hired party).

43. *Id.* at 355.

44. *Id.* (pointing out that by limiting its analysis to the issue of remuneration, the district court failed to consider many relevant aspects of the relationship between the organization and its volunteers).

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

46. *Id.* at 439.

47. *Id.* (quoting O'Connor v. Davis, 126 F.3d 112, 115 (1997)).

48. *Id.* (agreeing with the Second Circuit that an individual must be a paid employee in order to be considered a "hire" for an organization).

III. ANALYSIS

This Part examines the realities and difficulties of applying the threshold-remuneration test to volunteers and unpaid interns. First, this Part analyzes Title VII's applicability to internships based on its language concerning the definitions of employees and employers. Next, it discusses Title VII's purpose of protecting the livelihood of an employee falling within a protected class within the context of a volunteer worker. Finally, this Part considers a recent ruling on the Fair Labor Standards Act (FLSA) claims of two unpaid interns and its potential to displace the threshold-remuneration test as the first step in an analysis of Title VII claims by unpaid workers.

A. Title VII's Language Regarding Employment

Although courts have applied the principles of Title VII to traditional employment relationships with general ease, the circularity inherent in the definitions section of the statute has made it difficult for courts to determine the statute's applicability to unconventional employment relationships.[49] Under Title VII, an entity's status as an employer is based on the number of employees it uses in its commercial endeavors.[50] Thus, the definition of an employer hinges on what constitutes an employee.[51] However, the statute defines an employee merely as an "individual employed by an employer."[52] In the most familiar situation where an employee performs a task and receives a wage as compensation for her efforts, courts have little reason to give pause when applying the provisions of Title VII to the relationship. However, volunteers who do not receive any meaningful compensation may not fall within the parameters of the statute as Congress had originally intended. Courts must make these determinations without explicit statutory guidance. These circular definitions offer little assistance to unpaid workers struggling to determine their status under the law. Without explicit statutory guidance, courts have been left to consider the purpose of Title VII's prohibition on discrimination in an employment setting and how unpaid interns and volunteers fit into the goals of the legislation.

B. Protecting the Livelihood of Employees

Congress's primary intention in enacting Title VII was to "eliminate a pervasive, objectionable history of denying or limiting one's livelihood simply because of one's race, color, sex, religion, or national origin."[53] Because volunteers and unpaid interns do not receive compensation, several circuits have held that their labors do not assist them in making a living. Therefore, when employers discriminate against unpaid workers on the basis of a protected class, the workers' livelihoods are not in jeopardy. However, this line

49. Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990); *O'Connor*, 126 F.3d at 113.

50. *See* 42 U.S.C. § 2000e(b) (2014) (defining an employer as any "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").

51. *Id.*

52. 42 U.S.C. § 2000e(f).

53. Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 212–13 (4th Cir. 1993) (quoting Smith v. Berks Cmty. Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987)); McBroom v. W. Elec. Co., 429 F. Supp. 909, 911–12 (M.D.N.C. 1977).

of reasoning may not fit the true nature of unpaid internships in today's job market.[54] With the increasing number of students graduating from post-secondary institutions, employers have begun to look for more than just good grades in a potential employee.[55] One university president has stated that internships give "students an edge that they would not have otherwise."[56] These internships give students exposure to the types of environments they are likely to encounter in their full-time employment after graduation.[57] With the inherent value it provides to its carrier, experience has truly become a new form of currency.

For an intern, the benefits of an internship program are often much more direct than the valuable but unquantifiable "work experience" students obtain.[58] According to one recent survey by an online internship portal, 69% of companies with 100 or more employees offered full-time jobs to their interns upon the completion of the internship.[59] Furthermore, a 2013 survey by the National Association of Colleges and Employers shows that employers made offers of full-time positions to 56.5% of their interns.[60] Because of the likelihood that an internship will develop into a full-time job, the internship may have a direct effect on the livelihood of the volunteer, which the Fourth Circuit deemed to be the congressional focus of Title VII.[61]

Although the potential of landing a full-time offer may not be as direct a benefit as an hourly wage, it certainly carries value. Today's job market for recent college graduates is increasingly competitive and unstable.[62] The opportunity to audition for a job is a benefit upon which interns heavily rely.[63] Apart from the prospect of securing a full-time paid position, interns and volunteers receive on-the-job training that is generally not acquired through studies in a conventional academic institution.[64]

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54. Brian Burnsed, *Degrees Are Great, But Internships Make a Difference*, US NEWS (Apr. 15, 2010), http://www.usnews.com/education/articles/2010/04/15/when-a-degree-isnt-enough (stating that university officials and employers maintain that working in an internship is "integral" to finding employment in today's seemingly impenetrable job market).

55. *Id.* (stating that employers will often use a potential employee's participation in internships to differentiate between applicants who have strong academic records).

56. *Id.* (quoting Patricia Cormier, President of Longwood University in Virginia).

57. *See id.* (describing internships turning into full-time positions).

58. *Internships.com Survey Reveals the Increasing Importance of Internships for Both Students and Employers*, PRWEB (Dec. 6, 2012), http://www.prweb.com/releases/2012/12/prweb10208282.htm (stating that a survey of over 300 human resources professionals indicates that relevant work experience is more important than strong academic credentials in evaluating a potential candidate).

59. *Id.* (demonstrating that internship opportunities are very likely to lead to a full-time role within a specific team or company).

60. *Student Internships Lead to Jobs*, GONZAGA UNIV. (Oct. 14, 2013), http://news.gonzaga.edu/2013/students-interns-jobs-grads (demonstrating the value of internships to students who will be seeking entry level positions upon graduation).

61. *See* Haavistola v. Cnty. Fire Co. of Rising Sun, 6 F.3d 211, 221 (4th Cir. 1993) (stating that Congress enacted Title VII to eliminate the practice of "denying or limiting one's livelihood simply because of one's race, color, sex, religion or national origin").

62. Tami Luhby, *Recent College Grads Face 36% 'Mal-Employment' Rate*, CNN MONEY (June 25, 2013, 5:56 AM), http://money.cnn.com/2013/06/25/news/economy/malemployment-rate/index.html (reporting that over 36% of college graduates under the age of 25 are working in positions that don't require a degree and pay up to 40% less per week than those that require a college degree).

63. Craig J. Ortner, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2640 (1998).

64. *Four Out of 10 Recent College Grads Are Underemployed, New Accenture Research Finds*,

C. The Employment of Unpaid Interns Under the Fair Labor Standard Act

The decision of the United States District Court in New York in *Glatt v. Fox Searchlight Pictures Inc.* may introduce a new point of consideration into the debate regarding a threshold-remuneration test for Title VII claims.[65] In that case, the court considered the claims of several unpaid interns who argued that they were misclassified as unpaid interns instead of paid employees while they worked on the production and post-production of the films *Black Swan* and *500 Days of Summer*.[66] In that case, the court began its analysis by examining the definitions of employee and employer under the FLSA, which defines "employ" as "to suffer or permit to work."[67] The court followed the Second Circuit's holding that the "FLSA's definition of 'employ' 'stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles.'"[68] The Supreme Court has held that "whether an employer-employee relationship exists for purposes of the FLSA should be grounded in 'economic reality' rather than technical concepts."[69] In evaluating the claims of the unpaid interns, the court used the Second Circuit's formal control test and functional control test.[70]

Using the framework of the four-pronged formal control test, the court weighed the power of the intern's employer to hire and fire him, control his work schedule, determine compensation, and maintain employment records.[71] The court next considered the facts against the functional control test, based on the Second Circuit's ruling that a district court must "look beyond an entity's formal right to control the physical performance of another's work before declaring that the entity is not an employer under the FLSA."[72] The functional control test hinges on whether an entity has functional control over workers, even in the absence of mechanisms of formal control.[73] After considering the applicability of the facts to the various prongs of both the formal and functional control tests, the court determined that Searchlight was an employer because it met each prong of the formal control test and also exercised significant functional control over the interns.[74]

After determining that Searchlight was indeed an employer of the interns under the FLSA, the court turned its focus to the Department of Labor's (DOL) criteria for an unpaid internship.[75] The DOL Fact Sheet #71 enumerates the following six requirements:

> The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational

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ACCENTURE (Apr. 30, 2013), http://newsroom.accenture.com/news/four-out-of-10-recent-college-grads-are-underemployed-new-accenture-research-finds.htm (citing a corporate study which found that 63% of college graduates who are underemployed will require additional training to get their desired job).

65. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516 (S.D.N.Y.), on reconsideration in part, 11 CIV. 6784 WHP, 2013 WL 4834428 (S.D.N.Y. Aug. 26, 2013), *and* motion to certify appeal granted, 11 CIV. 6784 WHP, 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013).

66. *Id.* at 1.

67. 29 U.S.C § 203(g) (2006).

68. *Glatt*, 293 F.R.D. at 525.

69. *Id.* at 525.

70. *Id.* at 526.

71. *Id.* at 526–29.

72. Zheng v. Liberty Apparel Co. Inc., 355 F.3d 61, 69 (2d Cir. 2003).

73. *Id.* at 72 (holding that an employment relationship may be found to exist when the putative employer effectively controls the conditions of employment even if it does not literally pay the workers or set their wages).

74. *Glatt*, 293 F.R.D. at 532.

75. *Id.* at 531.

> environment;
>
> The internship experience is for the benefit of the intern;
>
> The intern does not displace regular employees, but works under close supervision of existing staff;
>
> The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
>
> The intern is not necessarily entitled to a job at the conclusion of the internship; and
>
> The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.[76]

Based on the requirements found in the DOL Fact Sheet #71, the court held that unpaid internships must be for the benefit of the intern.[77] Moreover, if an intern performs the routine tasks of a paid employee, the employer may not classify the position as an unpaid internship.[78] Whether the interns understand that they are not entitled to wages is of little consequence since the FLSA does not allow employees to waive their entitlement to wages.[79]

The FLSA is the primary federal legislation pertaining to wages and overtime pay for employees.[80] It also provides a more expansive definition of employment than the circuit courts in the threshold-remuneration camp assigned to Title VII.[81] Therefore, it is possible to have a situation where an unpaid intern is able to sue his employer for wages under the FLSA and win as an employee, but unable to sue his employer for discrimination under Title VII because he does not qualify as an employee. It is also possible that after successfully suing the employer for compensation, the unpaid intern would then survive the threshold-remuneration test.[82] Under such a system, unpaid employees who suffer employment discrimination on the basis of membership in a protected class would first have to successfully sue for remuneration before proceeding with a claim of discrimination. However, this would be inefficient for those claimants who eventually are able to successfully show entitlement to wages, especially while that worker is experiencing potential discrimination in the workplace.

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76. U.S. DEP'T OF LABOR, FACT SHEET NO. 71, INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (Apr. 2010), *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.pdf [hereinafter DOL FACT SHEET #71].

77. *Glatt*, 293 F.R.D. at 532 (holding that an unpaid internship should provide interns with education and training, and not simply provide a resume listing or job reference).

78. *Id.* at 533 (holding that employers must compensate interns in cases where the interns are performing tasks that provide an immediate advantage to the employer and that the employer would usually have to pay someone to perform).

79. *Id.*

80. 29 U.S.C. § 206 (2007).

81. Graves v. Women's Prof'l Rodeo Ass'n., Inc., 907 F.2d 71, 73 (8th Cir. 1990); O'Connor v. Davis, 126 F.3d 112, 113 (2d Cir. 1997).

82. The award of unpaid wages would likely be considered significant remuneration for the purposes of the threshold-remuneration test.

D. The Current State of the Test: Wang v. Phoenix Satellite Television US, Inc.

The most recent appearance of the threshold-remuneration test in *Wang v. Phoenix Sattelite Television US, Inc.* has received national attention.[83] In *Wang v. Phoenix Sattelite Television*, a master's degree student began an unpaid internship with a large media congolomerate, after an interview with her future supervisor.[84] The plaintiff, Lihuan Wang, claimed that the purpose of the internship was to "'provide [her] with training and serve as a potential basis for later employment with Phoenix.'"[85] Her internship responsibilities were substantial and she reported to her supervisor daily through email about her activities.[86] Wang also alleged that her supervisor told her that she could obtain a full-time position after she completed school.[87] Other employees informed her that the company had previously sponsored employees in her position to obtain work visas.[88] The plaintiff claimed that her employer did not offer her a full-time position at the conclusion of her internship because she rejected the unwelcome sexual advances of her supervisor.[89] It appeared that the supervisor perpetrated a classic form of quid pro quo and hostile work environment sexual harassment against Wang.[90] However, the district court ruled that the plaintiff was unable to bring suit under Title VII because she was an unpaid intern.[91] This case demonstrates a situation where an unpaid intern was performing a significant function for an employer with a reasonable expectation of full-time employment, yet does not receive protection from clear sexual harassment because the intern was not paid for her labors. Under the Second Circuit's decision a "mutually beneficial economic substance" is the touchstone of an employment relationship.[92] Courts adhering to the threshold-remuneration test reject the notion that interns in Wang's position have the civil rights of employees performing the same functions for wages.

IV. RECOMMENDATION

This Part argues that courts can fulfill the legislative intent of the Civil Rights Act of 1964 while providing reasonable protection and guidance to employers by adopting a two-

83. Emily Jane Fox, *Unpaid Interns Not Protected from Sexual Harassment*, CNN MONEY (Jan. 25, 2014 12:52 PM), http://money.cnn.com/2013/10/09/news/economy/unpaid-intern-sexual-harassment/ (reporting on the "big hole in employment law" which allows supervisors to sexually harass their unpaid interns); Venessa Wong, *Unpaid Intern Is Ruled Not an 'Employee,' Not Protected from Sexual Harassment*, BLOOMBERG BUSINESSWEEK (Oct. 8, 2013), http://www.businessweek.com/articles/2013-10-08/unpaid-intern-not-an-employee-not-protected-from-sexual-harassment (reporting that unpaid interns are not entitled to certain employee protections, such as being able to bring a sexual harassment claim against a former supervisor).

84. Wang v. Phoenix Satellite Television US, Inc., 976 F. Supp. 2d 527, 529 (S.D.N.Y. 2013).

85. *Id.*

86. *Id.* (describing Ms. Wang's duties as "shooting news footage, drafting scripts, and editing footage recorded in the field").

87. *Id.*

88. *Id.*

89. *Wang*, 976 F. Supp. 2d at 530 (claiming that her supervisor invited her to his hotel room to discuss her performance and full-time opportunities with the business, and then made strong sexual advances toward her, which she rejected).

90. *Id.* (describing a situation where the supervisor conditioned benefits on the exchange of sexual favors and made unwelcome sexual advances such as kissing, hugging, and squeezing Wang's buttocks).

91. *Id.* at 532 (citing the Second Circuit's requirement that remuneration is a threshold inquiry in establishing the existence of an employment relationship).

92. *Id.* at 536.

prong test to determine a worker's status as an employee with rights under Title VII. Under this test, courts would determine: (1) whether the worker receives significant remuneration, and if not, (2) whether the worker is entitled to remuneration through unpaid wages and overtime based on the DOL Fact Sheet #71.[93] For the first portion of the test, courts would subject plaintiffs to the original threshold-remuneration test.[94] If the worker receives significant remuneration, the court will continue its analysis to determine whether she is an employee who is entitled to Title VII rights. If the worker does not receive significant remuneration, the court will move to the second prong of the test, which requires it, using the framework of DOL Fact Sheet #71, to evaluate the relationship between the worker and alleged employer, as well as the nature of the worker's service.

A. This Test Preserves Title VII's Original Goal of Protecting Employees' Livelihood in the New Realities of Employment

The new test would preserve the original goals of Title VII by protecting employees' rights to earn a livelihood without suffering discrimination based on their status as a member of a protected class.[95] Workers who are receiving significant compensation for their labors are likely using those benefits for the living expenses of both themselves and their family members.[96] Courts would classify such individuals as employees under the threshold-remuneration test, and therefore enjoy the rights to bring discrimination suits under Title VII.[97] While the new test would bring about identical results as the threshold-remuneration test for workers receiving numerous benefits, it would allow those workers who do not receive significant remuneration, but who should be receiving such compensation, to exercise their civil rights in the workplace.

Under the current threshold-remuneration test, a worker who performs vital tasks for the employer's business operations without pay will not qualify as an employee.[98] The Department of Labor Fact Sheet #71 specifies that an unpaid worker cannot displace a regular employee.[99] Under the new test, an employee who performs a "discrete line-job" that is integral to the business of an employer would qualify as an employee who is entitled to wages and overtime under the FLSA.[100] The fact that the worker is entitled to compensation would allow the intern to be treated as if she were receiving an hourly wage, which would allow her to survive the threshold-remuneration test and sue under Title VII.

In the current employment landscape, internships have become a key element to landing a job or building a successful career.[101] Furthermore, these internships often, and

93. DOL FACT SHEET #71, *supra* note 76.

94. *See infra* Part II.B.

95. Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 221 (4th Cir. 1993) (quoting Smith v. Berks Cmty. Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987)).

96. *Id.*

97. *Id.* at 221–22.

98. *See* O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997) (holding that remuneration is an essential condition of employment); *see also* Tadros v. Coleman, 898 F.2d 10, 11 (2d Cir.1990) (holding that a Title VII plaintiff is only an employee if the defendant pays him).

99. DOL FACT SHEET #71, *supra* note 76.

100. *Id.* at 1 (stating that requirement number three must be met to avoid the classification of the intern as an employee under the FLSA).

101. *See Are Internships Worth It?*, THE CHRONICLE (Oct. 31, 2013), http://www.dukechronicle.com/articles/2013/10/31/are-internships-worth-it (identifying the perceived pressure on students to build up their resumes through paid and unpaid internships, especially considering that many of their classmates/competitors

are expected to, lead to a full-time position.[102] Because the livelihood of these interns depends on their participation and performance in internships, Title VII's protections against harassment and discrimination in the workplace should extend to them. Without such protections, these volunteer workers may have to endure hostile and unsafe working conditions at an internship that they expect to lead to a full-time position. Furthermore, interns are often particularly vulnerable, as demonstrated by the fact that they are willing to work without pay. The proposed test would require organizations offering unpaid internships to give notice that interns are not entitled to a job at the conclusion of the internship and also ensure that interns receive education and training that is similar to that which is "given in an educational environment."[103] Under such a program, employers would explicitly inform volunteer interns that they will not be entitled to a position or compensation based on their performance during the program. Interns would begin with the mindset that the position is temporary and, therefore, would not be justified in relying on the position for future compensation. Thus, discriminatory practices would likely not jeopardize the livelihood of the interns.

B. This Test Prevents Non-Employee Volunteers From Gaining Rights Under Title VII

The test would also protect employers by preventing those volunteers who are clearly not employees under Title VII from bringing discrimination lawsuits. If employers meet the DOL factors, courts will find that the worker is not entitled to wages under the FLSA, and that an employment relationship does not exist.[104] Using the factors in the DOL's test, any employer can demonstrate that the nature of its relationship with an unpaid worker is not that of employment.

One example of this is that the test for unpaid interns requires that "the intern does not displace regular employees."[105] If employers are able to demonstrate that the volunteer is performing tasks that the employer would not have to hire a paid employee to perform, this would significantly weaken a plaintiff-worker's claim that the employer must pay compensation and refrain from encroaching on rights under Title VII. Volunteers who are not performing tasks integral to the employer's operations are less likely to be employees who fall under Title VII's protections.

C. This Test Provides Concrete and Predictable Guidance to Employers

The use of DOL Fact Sheet #71 provides employers with clear guidance on how to design a volunteer-worker program without creating liability under Title VII. The Fact Sheet requires that employers establish a fixed duration for the service of each unpaid intern.[106] By specifying a timeframe for the volunteer work, employers quash the potential

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are gaining an upper hand through unpaid experience).

102. Burnsed, *supra* note 54; *see also* Melissa Korn, *Internships Are Increasingly the Route to Winning a Job*, WALL ST. J. (June 5, 2013, 8:00 PM), http://www.wsj.com/articles/SB10001424127887324423904578525431344927240 (identifying internships as a trial period for a full-time position for business students).

103. DOL FACT SHEET #71, *supra* note 76.

104. *Id.*

105. *Id.* (requiring that interns not displace regular employees, but work under the close supervision of existing staff).

106. *Id.*

expectation of the volunteer that the position is permanent or one of employment. The Fact Sheet also requires that organizations using volunteers provide education and training that is for the exclusive benefit of the intern. These express conditions of an unpaid internship program afford human resources professionals an opportunity to review their organizations' use of volunteer workers and make changes to their policies as necessary. By adhering to the Fact Sheet's clear requirements, employers will still be able to maintain an unpaid internship program that may ultimately benefit the interns and their employers.

VI. CONCLUSION

By adding a second inquiry to the threshold-remuneration test, courts can grant the protections of Title VII to rightfully entitled paid and unpaid employees. This would provide consistency to the treatment of wages as an integral part of the employment relationship between the Civil Rights Act of 1964 and the Fair Labor Standards Act. A uniform test would also provide needed guidance to those employers who are currently struggling to determine the future of their internship programs.[107]

107. Rheana Murray, *Condé Nast to Eliminate Internship Program Following Lawsuits*, DAILY NEWS (Oct. 23, 2013, 10:57 AM), http://www.nydailynews.com/life-style/no-interns-conde-nast-article-1.1493854 (identifying firms that eliminated internship programs in the wake of court decisions classifying unpaid interns as employees entitled to wages under the FLSA).