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Protecting Volunteers Under Title VII: Amending the EEOC Compliance Manual Through Section 553(B) Interpretive Rulemaking

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PROTECTING VOLUNTEERS UNDER TITLE VII: AMENDING THE EEOC COMPLIANCE MANUAL THROUGH SECTION 553(B) INTERPRETIVE RULEMAKING

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I. INTRODUCTION

Volunteers provide an important component to many public and private organizations.[1] Between September 2012 and September 2013, 62.6 million people volunteered at least once and spent a median of fifty hours volunteering.[2] Despite these numbers, the Equal Employment

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1. *See* Maureen Minehan, *No Good Deed Goes Unpunished: Five Questions to Ask Before Using Volunteers*, 29 No. 15 EMP. ALERT 2, July 26, 2012 (calling volunteers "integral" parts of religious, public, and humanitarian organizations).

2. BUREAU OF LABOR STATISTICS, VOLUNTEERING IN THE UNITED STATES - 2013 (Feb. 25, 2014), *available at* http://www.bls.gov/news.release/pdf/volun.pdf. The numbers are likely higher

Opportunity Commission (EEOC) and federal courts have failed to protect volunteers from employment discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).[3]

Title VII requires individuals first to exhaust administrative remedies with the EEOC before filing suit in a court of competent jurisdiction.[4] The EEOC and federal courts will dismiss volunteer Title VII claims if volunteers do not receive "significant" benefits from their employer.[5] On appeal, federal circuit courts are split as to what benefits qualify as "significant" and whether receiving benefits should be either the singular factor or one of many factors to determine whether volunteers are employees for purposes of Title VII.[6]

Consider the following example: Jack and Jill begin volunteering for the same non-profit organization and perform the same tasks. Jack is unpaid, but Jill receives minimum wage. Their employer discriminates against both of them. The result? Jack cannot recover against his employer under Title VII because he is an unpaid volunteer. Alternatively, because Jill is paid by her employer, she is likely considered an employee for purposes of Title VII.[7] Thus, she is entitled to the same Title VII remedies as other employees, including compensatory damages, punitive damages, attorneys fees, court costs, and declaratory relief.[8]

The District Court for the Northern District of Illinois recently broke with the majority of jurisdictions in order to protect unpaid volunteers.[9] In its decision, the court noted the similarities between a traditional workplace environment and the workplace experiences of a volunteer:[10]

> A workplace is not necessarily any different for a non-compensated volunteer than it is for a compensated "employee," and while both are generally free to quit if they don't like the conditions (at-will employment being the norm), neither should

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because the BLS defines volunteers as those whose work is unpaid, except for expenses.

3. *See infra* Part II.

4. 42 U.S.C. § 2000e–5 (2014). *See infra* note 176 (explaining that the Americans with Disability Act (ADA), 29 U.S.C. § 12111(4) (2000), incorporates the rights and remedies of Title VII, and therefore also requires exhaustion with the EEOC).

5. *See* McInerney v. Rensselaer Polytechnic Inst., 505 F.3d 135, 138 (2d Cir. 2007).

6. *See infra* Part II.A.

7. *See* Tara Kpere-Daibo, Note, *Unpaid and Unprotected: Protecting Our Nation's Volunteers through Title VII*, 32 U. ARK. LITTLE ROCK L. REV. 135, 138 (2009).

8. James J. LaRocca, Note, Lowery v. Klemm*: A Failed Attempt at Providing Unpaid Interns and Volunteers with Adequate Employment Protections*, 16 B.U. PUB. INT. L.J. 131, 143 (2006).

9. Volling v. Antioch Rescue Squad, No. 11 C 04920, 2012 WL 6021553, at *10 (N.D. Ill. Dec. 4, 2012).

10. *Id.*

> have to quit to avoid sexual, racial, or other unlawful discrimination and harassment.[11]

Employers are aware of this reality, and an article in the Employment Alert newsletter outlined five questions for employers to ask themselves before even considering hiring volunteers.[12] In particular, the article indicates that volunteers ought to be "properly classified and managed to avoid potential legal liability" because "[m]ore than one employer has been *shocked* to find a court considered their volunteers to be employees entitled to wages, benefits, and other employment-related protections."[13]

Part II of this Article will address the standards used to evaluate whether a volunteer is a protected employee under Title VII. It will further introduce the circuit split over whether volunteers ought to first demonstrate that they receive "significant remuneration," or benefits, from their employer prior to further proceeding in federal court. Part III will present the importance of exhaustion requirements with respect to the EEOC and its coverage of volunteers under Title VII. Part IV will discuss interpretive rulemaking through Section 553(b) of the Administrative Procedure Act (APA). Part V will recommend using interpretive rulemaking to amend the EEOC's Compliance Manual, which is used as either the exclusive or a primary rationale for excluding volunteers under Title VII, in order to cover volunteers more effectively and resolve the circuit split. Part V argues that the majority of courts and the EEOC itself have forgotten the spirit of Title VII, which was to provide broad protections for workers.[14] Courts have instead excluded an entire class of individuals from protection simply because they serve an organization that does not and may not ever provide them with benefits that would constitute "significant remuneration."[15] This Article concludes by indicating that the Supreme Court's analysis in *Clackamas Gastroenterology Associates P.C. v. Wells* denotes that even the EEOC Compliance Manual's laundry list of characteristics to determine whether an individual is employed may fall short in protecting workers.

II. TITLE VII

Congress intended for Title VII[16] to provide the customary remedy

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11. *Id.*
12. Minehan, *supra* note 1.
13. *Id.* (emphasis added).
14. Am. Tobacco Co. v. Patterson, 456 U.S. 63, 80–81 (1982).
15. *Volling*, 2012 WL 6021553, at *8–9, *13 n.7.
16. 42 U.S.C. § 2000e–2(a)(1) (2014).

against employment discrimination.[17] Indeed, the Supreme Court wrote in *American Tobacco Co. v. Patterson*[18] that "[t]hrough Title VII[,] Congress sought in the broadest terms to prohibit and remedy discrimination."[19] The statute defines an "employer" as "a person . . . who has fifteen or more employees . . . and any agent of such a person."[20] This language is complicated by Title VII's circular[21] definition of an "employee" as "an individual employed by an employer."[22] The Supreme Court has confronted the ambiguous meaning of this definition in three major decisions: first in *Community for Creative Non-Violence v. Reid*;[23] next in *Nationwide Mutual Insurance Co. v. Darden*;[24] and most recently in its 2003 decision in *Clackamas Gastroenterology Associates, P.C. v. Wells*.[25]

In *Community for Creative Non-Violence v. Reid*,[26] the Court held that Congress's circular language was intended to describe the employee-employer context in a "conventional master-servant relationship as understood by common-law agency" principles.[27] Specifically, the Court

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17. *Id.*

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id. Title I of the Americans with Disabilities Act also incorporated the remedies under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a) (2014); *see supra* text accompanying note 14. *But see* Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) (2014) (offering a remedy for volunteers who are qualified individuals with a disability, whose workplace "receiv[es] Federal financial assistance," and whose workplace discriminates against them by reason of their disability).

18. 456 U.S. 63 (1982).

19. *Id.* at 80.

20. 42 U.S.C. § 2000e(b) (2014).

21. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444 (2003) (stating that this is a "mere nominal definition" and "completely circular") (internal citations omitted); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (stating that the definition is "circular and explains nothing").

22. 42 U.S.C. § 2000e(f) (2014). The following statutes define "employees" in the same manner: Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 630(f) (2014); Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2611(3) (2014); Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(e)(1) (2014); Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1002(6) (2014); Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12111(4) (2014).

23. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 731 (1989).

24. *Darden*, 503 U.S. at 322-28.

25. *Clackamas*, 538 U.S. at 444, 452.

26. *Reid*, 490 U.S. at 740, 751–52.

27. *Id.* at 740; RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) (providing list of

outlined the following factors that courts should consider when analyzing the employer-employee relationship:

> The employer has the right to control when, where, and how the worker performs the job; [t]he worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job; [t]he employer provides the worker with benefits such as insurance, leave, or workers' compensation; [t]he worker is considered an employee of the employer for tax purposes (i.e., the employer withholds federal, state, and Social Security taxes); [t]he worker and the employer believe that they are creating an employer-employee relationship.[28]

Three years later, the Court in *Darden* revisited and accepted the *Reid* Court's "right to control" analysis as the controlling test to use when federal employment law left the employer-employee relationship unclear.[29] In 2000, the EEOC published its Compliance Manual[30] and used the *Reid* and *Darden* agency "right to control" test as part of its list of factors to demonstrate whether "a worker is in an employment relationship with an employer."[31]

In 2003, the Supreme Court in *Clackamas* again examined an employer-employee relationship.[32] There, the Court was persuaded by the EEOC Compliance Manual's holistic approach.[33] Reiterating its earlier position from *NLRB v. United Insurance Co. of America*, the *Clackamas* Court held that "all of the incidents of the [employer-employee] relationship must be assessed and weighed with no one factor being decisive" when determining if a particular worker is an employee, and therefore protected by federal employment discrimination laws.[34]

A. *Volunteers Under Title VII*

The EEOC Compliance Manual indicates that "volunteers usually are not protected 'employees'" under Title VII.[35] Instead, the EEOC limits

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criteria for identifying master-servant relationship).

28. *Reid*, 490 U.S. at 751–52.

29. *Darden*, 503 U.S. at 323–24 (citing NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968)).

30. EEOC, COMPLIANCE MANUAL, (2009); 2006 WL 4673363.

31. EEOC, COMPLIANCE MANUAL, *supra* note 30, § 2–III(A)(1) (current through 2009); 2009 WL 2966755, at *1.

32. *Clackamas*, 538 U.S. at 442.

33. *Id.* at 448–51.

34. *Id.* at 451 (citing *NLRB*, 390 U.S. at 258, in the context of an independent contractor).

35. EEOC, COMPLIANCE MANUAL, *supra* note 30, § (A)(1)(c).

Title VII coverage to volunteers who fall into one of two exceptions.[36] Under the first exception, the volunteer position must regularly lead to compensable employment with the same employer.[37] This Article will focus entirely on the second exception. Under the second exception, the employer must (1) maintain sufficient control over the volunteer's work;[38] and (2) provide volunteers with some benefits constituting "significant remuneration," rather than benefits incidental to the "otherwise gratuitous relationship."[39]

Prior to commencing a civil action in federal court, volunteer claimants must first exhaust administrative remedies with the EEOC.[40] But, because unpaid volunteers typically do not receive sufficient benefits from their employer to qualify as "significant remuneration,"[41] and, do not regularly obtain employment from the entity,[42] the EEOC regularly dismisses volunteer actions for failure to state a claim.[43] Accordingly, issuing an interpretive rule through Section 553(b) interpretive rulemaking governing the EEOC Compliance Manual in order to reflect the reality of volunteer positions would improve coverage to volunteers and provide clarity to employers and employees over whether they are covered by Title VII.

Even after exhausting administrative remedies with the EEOC, most federal circuits likewise require a volunteer first to demonstrate that he or

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36. *Id.*

37. *Id.* (citing Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 198 n.4 (3d Cir. 1994) (indicating that individuals are not covered under Title VII until their employer has "the ability to directly affect a plaintiff's employment opportunities")).

38. This prong of the second exception is predicated primarily upon the agency principles articulated in *Reid*, *Darden*, and *Clackamas*.

39. EEOC, COMPLIANCE MANUAL, *supra* note 30, § (A)(1)(c) (citing Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 221 (4th Cir. 1993).

40. 42 U.S.C. § 2000e–5(c), (e), (f) (2014). This also subscribes to the general rule that claimants must exhaust administrative remedies prior to filing in federal court. McCarthy v. Madigan, 503 U.S. 140, 144 (1992), *superseded by statute on other grounds*.

41. *See infra* note 43, at *1.

42. Complainant v. Shinseki, EEOC Decision No. 0120133242 (E.E.O.C.), 2014 WL 586747, at *1–2 (Feb. 6, 2014) (treating interns and volunteers the same under Title VII). Fifty-three percent of college graduates for the class of 2012 were not paid for any internship they had in college. Dylan Matthews, *Are Unpaid Internships Illegal?*, WASH. Rachel Burger, *Why Your Unpaid Internship Makes You Less Employable*, FORBES (Jan. 16, 2014, 8:00 AM), http://www.forbes.com/sites/realspin/2014/01/16/why-your-unpaid-internship-makes-you-less-employable/.

43. *See Shinseki*, 2014 WL 586747, at *1–2 (treating intern "in essence" the same as a volunteer under Title VII and similarly first inquiring whether the intern received remuneration); Complainant v. Shinseki, EEOC Decision No. 0120132601 (E.E.O.C.), 2014 WL 199171, at *1 (Jan. 8, 2014) (holding that a volunteer who did not receive any "significant remuneration" had no standing to participate in the EEOC complaint process); Traylor v. Conner, EEOC DOC 0120063833 (E.E.O.C.), 2008 WL 1968721, at *1–2 (Apr. 25, 2008) (volunteer); 29 C.F.R. § 1614.107(a)(1) (2015).

she received "significant remuneration," or benefits, from her employer before he or she can proceed with his or her Title VII claim.[44] Only after a volunteer first demonstrates that she receives remuneration will these courts further inquire into the employer-employee relationship under the common law agency test articulated above.[45] In particular, the Eighth Circuit found it "unnecessary" to proceed to the second step if an individual does not receive compensation.[46] Likewise, the Second Circuit agreed and held that compensation was an "essential condition" of the employer-employee relationship.[47] However, as discussed below in part II: B, the Sixth Circuit and the District Court for the Northern District of Illinois departed from the threshold analysis, holding instead like *Clackamas* that no one factor was dispositive.[48]

To add to the confusion, courts have not specified how much compensation constitutes "significant" or what kind of benefits constitute "remuneration" in order to be an employee under Title VII.[49] For example, in *United States v. City of New York*,[50] the Second Circuit held that "remuneration" did not need to be a wage or salary, but could instead include transportation and childcare expenses, cash payments equal to minimum wage, pension, food stamps, eligibility for workers' compensation, etc.[51] By contrast, in *Tawes v. Frankford Volunteer Fire Co.*,[52] the District Court of the District of Delaware held that reimbursement for some work related expenses, line of duty benefits,

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44. *See* Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 438–39 (5th Cir. 2013) (rejecting Waisgerber v. City of Los Angeles, 406 F. App'x 150 (9th Cir. 2010) (repudiating Fichman v. Media Ctr., 512 F.3d 1157, 1160 (9th Cir. 2008), which originally embraced a multi-factor test to establish whether a volunteer was an employee); McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974, 979 (10th Cir. 1998); Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1243–44 (11th Cir. 1998); O'Connor v. Davis, 126 F.3d 112, 115–16 (2d Cir. 1997); Haavistola v. Cmty. Fire Co. of Rising Sun, Inc. 6 F.3d 211, 221–22 (4th Cir. 1993); Graves v. Women's Prof'l Rodeo Assoc., 907 F.2d 71, 73–74 (8th Cir. 1990); *see also* Morgan, *infra* note 63, at 1224; RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.02 (Tentative Draft No. 1, 2008) ("Unless otherwise provided by law, an individual is a volunteer and not an employee if the individual renders uncoerced [sic] services without being offered a material inducement.").

45. *Juino*, 717 F.3d at 434–36.

46. *See Graves*, 907 F.2d at 74.

47. *See O'Connor*, 126 F.3d at 116.

48. *See infra* Part II.B.

49. *See generally* LaRocca, *supra* note 8.

50. 359 F.3d 83 (2d Cir. 2004); Pietras v. Bd. of Fire Comm'rs, 180 F.3d 468, 473 (2d Cir. 1999) (indicating benefits may be provided by a third party, so long as they are provided to volunteers as a result of their position); EEOC, COMPLIANCE MANUAL, *supra* note 30, § (A)(1)(c).

51. *City of New York*, 359 F.3d at 92 (holding that only after a volunteer first demonstrates she receives significant remuneration from her employer will Second Circuit courts further examine whether she is a covered employee under Title VII, and therefore under the ADA); *Haavistola*, 6 F.3d at 221–22 (holding "significant remuneration" includes potential certification as an EMT and reimbursement for medical insurance).

52. No. Civ.A.03-842-KAJ, 2005 WL 83784 (D. Del. Jan. 13, 2005).

discounts with Verizon, and pension system were insufficient to qualify as a financial benefit or promise.[53] In addition, federal volunteers receiving a living allowance may not be considered employees if the organization for which they volunteer has fewer than 15 traditional employees because a living allowance was not a "wage."[54] Not surprisingly, under such a strict and uncertain regime, courts are reluctant to consider "indispensable work experience," "networking opportunities, or "giving back to the community" significant enough to cover unpaid volunteers or interns under Title VII.[55]

B. *The Split*

Citing *Clackamas*,[56] the Sixth Circuit[57] and Federal District Court for the Northern District of Illinois[58] repudiated the majority rule, instead applying a multi-factor test to the volunteer employment context.[59]

In *Bryson v. Middlefield Volunteer Fire Dep't, Inc.*,[60] the Sixth Circuit applied *Clackamas*' multi-factor test to volunteer employment discrimination claims, holding likewise that no single factor should be dispositive in determining whether an employer-employee relationship exists.[61] Instead, the Sixth Circuit held that remuneration should not be "an independent antecedent inquiry," upon which a court ends its analysis that a volunteer is not an employee.[62] Consequently, the court launched the first split with the majority rule.[63] Following the split, one commentator advocated for a broader repudiation of the majority rule and an adoption of the *Reid* and *Clackamas* test.[64]

In 2012, the District Court for the Northern District of Illinois in

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53. *Id.* at *7; Neff v. Civil Air Patrol, 916 F. Supp. 710, 715 (S.D. Ohio 1996) (free flight training, death benefits, and airplane use discounts were not "significant" benefits).

54. Self v. I Have a Dream Found.-Colo., No. 13-1090, 2013 WL 6698079, *2–3, (10th Cir. Dec. 20, 2013) (AmericCorps volunteers).

55. LaRocca, *supra* note 8, at 133–34; Craig J. Ortner, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2640 (May 1998); York v. Ass'n of the Bar of N.Y., 286 F.3d 122, 126 (2d Cir. 2002).

56. 538 U.S. 440, 450–57 (2003).

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

58. Volling v. Antioch Rescue Squad, 2012 WL 6021553, *8 (N.D. Ill. 2012).

59. 538 U.S. 440 (2003). *See Bryson*, 656 F.3d at 545–55; *Volling*, No. 11 C 04920, 2012 WL 6021553, at *3.

60. *Bryson*, 656 F.3d at 353–54.

61. *Id.*

62. *Id.* at 353.

63. Christopher R. Morgan, Note & Comment, Bryson v. Middlefield Volunteer Fire Department *and the Changing Understanding of Volunteer as Employee*, 17 LEWIS & CLARK L. REV. 1223, 1235 (2013).

64. *See id.* at 1238–39.

Volling v. Antioch Rescue Squad[65] similarly applied a multi-factor employment test to the volunteer context.[66] This court sits in the Seventh Circuit, which has not yet weighed in on the question of whether volunteers are covered employees under Title VII.[67] Nevertheless, citing *Bryson*,[68] *Darden*,[69] and the Seventh Circuit's decision in *EEOC v. Sidley Austin Brown & Wood*,[70] the district court held that inquiry into an employment relationship should not end if one does not receive remuneraion.the Seventh Circuit's decision in *Sidley Austin, Bryson, and Darden*, the district court held that inquiry into an employment relationship should not end if one does not receive remuneration.[71] Instead, the district court held that it should examine a myriad of factors under the common law agency test, and not set a single "bright line" when determining if a volunteer is an employee.[72]

The *Volling* court also found that inquiring into whether a worker received remuneration was less relevant in the context of volunteers.[73] In particular, the court noted that volunteers can comprise a significant percentage of a non-profit organization and individuals are generally not motivated to volunteer due to pecuniary rewards, but instead by a desire to perform public service or other spiritual or altruistic motives.[74] In support, the court cited the Restatement (Third) of Agency, which indicated "[m]any agents act or promise to act gratuitously."[75] As a result, the definition used by courts and the Restatement encompasses the broad range of volunteers who do not receive any or only receive insufficient

65. 2012 WL 6021553 (N.D. Ill. 2012).

66. *Id.* at *8–9 (citing and applying EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 705–08 (7th Cir. 2002) (applying an earlier multi-factor employment test from Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992), to a law firm partnership context to the context of volunteers).

67. *Id.* at *8. The Seventh Circuit in *EEOC v. Sidley Austin Brown & Wood* rejected the "tyranny of labels" that the Supreme Court, EEOC, and employers have used by distinguishing between traditional employees and independent contractors in order to escape liability under Title VII. 315 F.3d at 705. In particular, the Seventh Circuit adopted the Supreme Court's approach in *Darden* to look to a number of factors when considering whether an individual is an employee under Title VII. *See id.* at 705–08.

68. Bryson v. Middlefield Volunteer Fire Dep't, Inc., F.3d 348, 354 (6th Cir. 2011).

69. *Darden*, 503 U.S. at 318.

70. *Sidley Austin*, 315 F.3d 696 (7th Cir. 2002).

71. *See* Volling v. Antioch Rescue Squad, No. 11 C 04920, 2012 WL 6021553, at *8–10 (N.D. Ill. Dec. 4, 2012).

72. *Id.* at *7–10.

73. *Id.*

74. *Id.* at *9.

75. *Id.* at *8 (citing RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. d (2006)). Further, the Restatement (Third) of Agency defines "gratuitous agent" as an individual who "acts without a right to compensation." § 1.04(3) (2006).

remuneration for their position.[76] Moreover, the court noted that the degree of control of employees a supervisor may have in the volunteer context might also be strikingly similar to a traditional employer-employee relationship.[77]

The *Volling* court conceded that remuneration is indeed an important factor.[78] Nevertheless, the court noted that because Title VII neither refers to volunteers nor to the receipt or payment of remuneration, the Supreme Court mandated that courts use common law agency principles when assessing an employer-employee relationship.[79] As such, the court held that it made little sense and there was no textual basis to conclude that Title VII did not extend to an entire class of workers simply because one factor, namely remuneration, distinguished them from traditional employees.[80]

In 2013, the most recent circuit to examine whether volunteers are protected under Title VII explicitly rejected *Bryson*, holding instead with the majority of federal circuits.[81] In *Juino v. Livingston Parish Fire District Number 5*, the Fifth Circuit considered both the majority rule and *Bryson*'s reasoning, but held that the latter's analysis was "[un]persuasive" because unpaid volunteers are never "hired" in the traditional sense of receiving remuneration.[82] In its decision, the court cited the EEOC's Compliance Manual as an element of its rational, demonstrating the importance this document plays in determining whether volunteers are protected under Title VII.[83] Finally, the court articulated that it was not for the courts to expand the protection of Title VII to volunteers.[84] Rather, like *O'Connor v. Davis* before it, the court signaled that it was in the "province of Congress" to afford them a remedy.[85]

III. EXHAUSTION

The Supreme Court held that exhaustion of administrative remedies promotes two functions: protection of agency authority and judicial efficiency.[86] In particular, the Court noted that agencies, not courts, have

76. RESTATEMENT (THIRD) OF AGENCY § 1.04(3) (2006).
77. *Volling*, 2012 WL 6021553, at *8.
78. *Id.* at *10.
79. *Id.*
80. *Id.* at *9.
81. *Juino*, at 438–39.
82. *Id.* at 439.
83. *Id.*
84. *Id.* at 439–40.
85. *Id.* at 439 (citing *O'Connor*, 126 F.3d at 119.
86. *McCarthy*, 503 U.S. at 144–46.

the principal responsibility for programs that Congress delegated to them to administer.[87] Exhaustion of administrative remedies ensures that agencies have the opportunity to correct mistakes within their regulations and provide a forum for dispute resolution between parties so that further judicial action can be avoided.[88]

Title VII claimants must first exhaust administrative remedies with the EEOC before filing in federal court.[89] Further, individuals must file a charge of employment discrimination with the EEOC within 180 days after the discriminatory act.[90] In particular, the charge must be specific, give the agency reasonable opportunity to act upon it, and put the defendant on notice.[91] Moreover, if individuals do not first file a charge with the EEOC, the claim will be dismissed outright.[92]

Exhaustion of administrative remedies with the EEOC in particular is important because it gives the agency an opportunity to investigate whether it would like to sue on the plaintiff's behalf.[93] Once a claimant files with the EEOC, the EEOC must investigate the claim.[94] The EEOC may choose to represent the claimant and file a claim against the discriminating entity.[95] Finally, if the individual proceeds in federal court, the claims brought against the employer must be within the scope of the original EEOC claim.[96]

Like the majority of federal circuits, when a volunteer exhausts administrative remedies with the EEOC and the volunteer does not receive "significant remuneration" from her employer, the EEOC will not further inquire into the employer-employee relationship.[97] Unlike the

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87. *Id.* at 145.

88. *Id.* at 145; Parisi v. Davidson, 405 U.S. 34, 37 (1972); McKart v. United States, 395 U.S. at, 193–95 (1969).

89. *See* McCarthy v. Madigan, 503 U.S. at 144–45.

90. 42 U.S.C. § 2000e-5(e) (2013). The 180-day filing period is extended to 300 days if a local or state agency enforces a statute that prohibits employment discrimination on a similar basis. EEOC, *Time Limits for Filing a Charge*, www.eeoc.gov/ employees/timeliness.cfm (last visited Aug. 17, 2014).

91. *See* Marshall v. Fed. Express Corp., 130 F.3d 1095, 1098 (D.C. Cir. 1997).

92. *See* Vera v. McHugh, 622 F.3d 17, 29–30 (1st Cir. 2010); McInerney v. Rensselaer Polytechnic Inst., 505 F.3d 135, 138 (2d Cir. 2007); Hamilton v. Rhee, 770 F. Supp. 2d 241, 244 (D.D.C. 2011);*but see* McBride Cotton & Cattle Corp. v. Veneman, 290 F.3d 973, 978 (9th Cir. 2002) ("[F]ailure to exhaust does not deprive a federal court of jurisdiction when the exhaustion statute is merely a codification of the exhaustion requirement."). JOB DISCRIMINATION (2015).

93. Doe v. Oberweis Dairy, 456 F.3d 704, 708 (7th Cir. 2006). Furthermore, if a plaintiff seeks judicial review of the EEOC's action, the APA requires her first to exhaust administrative remedies. 5 U.S.C. § 704 (2014).

94. 42 U.S.C. § 2000e–5(b) (2013).

95. 42 U.S.C. §§ 2000e–4(g)(6), 2000e–5(f)(1) (2014).

96. Conner v. Ill. Dep't of Nat'l Res., 413 F.3d 675, 680 (7th Cir. 2005).

97. Shinseki, EEOC Decision No. 0120132601, 2014 WL 199171 *1 (Jan. 8, 2014) (holding that a volunteer who did not receive any "significant remuneration" had no standing to participate in the EEOC complaint process); *see also* Shinseki, EEOC Decision No. DOC.

federal circuits, however, the EEOC looks no further than its Compliance Manual for the rationale for its decision.[98]

IV. INTERPRETIVE RULEMAKING

As demonstrated in Part II, the EEOC and federal courts are split as to what benefits qualify as "significant" and whether receiving benefits should be either the singular factor or a collection of factors to determine whether volunteers are employed for purposes of Title VII.[99] This Article proposes that the EEOC issue an interpretive rule through the 5 U.S.C. § 553(b) rulemaking procedures to clarify this confusion. Specifically, the EEOC should interpret its Compliance Manual to indicate that remuneration is one of many factors to consider when determining if a volunteer is an employee. Whether a volunteer receives remuneration is neither dispositive nor a threshold issue after which other factors should be addressed.

A. *Rulemaking 101*

Under the APA, an agency must provide general notice of proposed rulemaking in the Federal Register and accept and consider comments from interested parties, with two exceptions.[100] First, the APA exempts agencies from the general notice and comment requirement when the agency finds for good cause that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[101] The first exception will not be the subject of this Article. Under the second exception, the APA exempts "interpretive" rules, as compared to substantive rules, from the notice and comment procedure.[102] Interpretive rules clarify existing rules to assist in adjudication and to clarify the meaning to the public;[103] alternatively, substantive rules are those that

0120133242, 2014 WL 586747 *1–2 (Feb. 6, 2014) (treating intern "in essence" the same as a volunteer under Title VII and similarly first inquiring whether the intern received remuneration).

98. Shinseki, EEOC Decision No. 0120132601, 2014 WL 199171 *1 (Jan. 8, 2014) (holding that "benefits such as a pension, group life insurance, workers' compensation, and access to professional certification, even if the benefits are provided by a third party," are sufficient to constitute "significant remuneration" (quoting Rose, EEOC Decision No. 0120101487, 2010 WL 3137321 *1 (July 27, 2010))).

99. *See supra* Part II.B.

100. *Id.* § 553.

101. *Id.* (noting that when an agency finds for good cause, it must "incorporat[e] the finding and a brief statement of reasons therefor in the rules issued").

102. *Id.* § 553(b)(3)(A).

103. *See* Sekula v. FDIC, 39 F.3d 448, 457 (3d Cir. 1994) ("Interpretive rules constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. Interpretive rules are not intended to alter legal rights, but to state the agency's view of

implement rules[104] or "create new law, rights, or duties, in what amounts to a legislative act."[105] The Supreme Court bars an agency "under the guise of interpreting a regulation . . . [from] creat[ing] de facto a new regulation."[106]

Like promulgating regulations, interpretations of existing regulations must be reasonable in order to receive full deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[107] Under *Chevron*, courts will utilize a two-step process for examining agency interpretation.[108] First, the court will examine whether the intent of Congress is clear, and if so, the court will end the judicial inquiry and is to impose Congress' expressed and unambiguous intent.[109] But, if Congress has either not spoken directly on the precise issue or the statute's meaning is ambiguous, the court is to accept an agency's "permissible" construction of the statute.[110] Moreover, the Supreme Court will not accept agency interpretations if they are "plainly erroneous or inconsistent with the regulation."[111]

B. *The Cases*

In *Clackamas*,[112] the Supreme Court examined the extent to which it would give *Chevron* deference to the EEOC for its Compliance Manual. Citing its decision in *Christensen v. Harris County*,[113] the Court held that the Compliance Manual would not receive *Chevron*-level deference.[114] Although the document constituted a "body of experience and informed judgment"[115] to which the court could look for guidance, it lacked the

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what existing law requires."); S. Cal. Edison Co. v. FERC, 770 F.2d 779, 783 (9th Cir. 1985).

104. Elizabeth Williams, *What Constitutes "Interpretative Rule" of Agency so as to Exempt such Action from Notice Requirements of Administrative Procedure Act (5 U.S.C.A. § 553(b)(3)(a))*, 126 A.L.R. FED. 347 (1995) (more broadly defining "interpretive" rules as those which "clarify, interpret, or explain existing law, state an administrative officer's understanding of a statutory or regulatory term, and/or remind affected parties of their responsibilities under existing law, or some similar language").

105. Clarry v. United States, 85 F.3d 1041, 1048 (2d Cir. 1996) (quoting White v. Shalala, 7 F.3d 296, 303 (2d Cir. 1993)).

106. Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000).

107. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); *see also* Fed. Express Corp. v. Holowecki, 552 U.S. 389, 397 (2008).

108. *Chevron*, 467 U.S. at 842–43.

109. *Id.*

110. *Id.* at 843.

111. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

112. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003).

113. Christensen v. Harris Cnty., 529 U.S. 576 (2000).

114. *Clackamas*, 538 U.S. at 449 n.9 (quoting Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000)).

115. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

force of law.[116]

More recently in *Federal Express Corp. v. Holowecki*,[117] the Supreme Court examined EEOC interpretive rulemaking in the agency's Compliance Manual and internal memoranda for the Age Discrimination in Employment Act of 1967 (ADEA).[118] At issue was what constituted filing a formal "charge alleging unlawful [age] discrimination."[119] This language appeared in the statute and in the EEOC regulation, but federal circuits adopted different definitions for what was required.[120] Consequently, employees met difficulties when they sought relief because filing requirements varied by jurisdiction.[121] Like in *Clackamas*, the Supreme Court in *Federal Express* did not afford the EEOC full *Chevron* deference, but instead gave it a "measure of respect" under *Skidmore v. Swift & Co.*[122] Using the *Skidmore* standard, the *Federal Express* Court examined a number of factors to determine the degree of deference the Court ought to afford the EEOC.[123] These factors include the consistency to which the agency applied its interpretation and the agency's relative expertise in the subject matter.[124] There, the Compliance Manual and internal memoranda had been binding for five years, noting a level of consistent application.[125] Consequently, the Court accepted the EEOC's interpretation of the statute, noting that the interpretation was consistent with the "design and purpose of ADEA" because the statute allowed for a "permissive[ly]" wide scope of charges.[126]

Further, the Court held that the EEOC complaint procedures ought to be accessible to laypersons with "no detailed knowledge" of the EEOC's processes or statutory functions.[127] Though a narrower rule could offer the EEOC more consistent filings from employees, the Court deferred to the EEOC due to the agency's expertise regarding ADEA claims. In addition to deference, the Court understood that statutory gaps and

116. *Clackamas*, 538 U.S. at 449 n.9.

117. Fed. Express Corp. v. Holowecki, 552 U.S. 389 (2008).

118. *Id.* at 392

119. *Id.* at 393.

120. *Id.*

121. *Id.*

122. *Id.* at 399.

123. *Id.* at 399–402.

124. *Id.* at 399, 403 (noting that when courts examine the "fairull measure" of agency deference, they look to the "degree of the agency's care . . . consistency . . . formality . . . relative expertness, and . . . the persuasiveness of the agency's position" (citing United States v. Mead Corp., 533 U.S. 218, 228 (2001))).

125. *Id.* at 399.

126. *Id.* at 402.

127. *Id.* at 403.

ambiguities are to be properly filled by agency policy decisions.[128]

V. THE RECOMMENDATIONS

Like the employees in *Federal Express*,[129] volunteers have met similar difficulties seeking relief under Title VII, given the varied jurisdictional interpretations of what constitutes "significant remuneration" and whether remuneration should be the threshold requirement or one of many factors.[130] "At the center of the courts difficulties is the phrase 'significant remuneration,' which neither appears in Title VII[131] nor the EEOC regulations." question is the phrase "significant remuneration," which neither appears in Title VII nor the EEOC regulations.[132] Instead, this phrase appears only in the EEOC Compliance Manual,[133] which courts utilize in vastly different ways.[134]

Unlike the Supreme Court, which announced on three occasions that a multi-factor test ought to decide an employer-employee relationship,[135] the EEOC and a majority of federal circuits departed from these holdings.[136] As a result, volunteers are either barred from pursuing a claim entirely or may not receive the same Title VII remedies afforded to traditional employees, including compensatory damages, punitive damages, attorneys' fees, court costs, and declaratory relief.[137]

This Article proposes to interpret the EEOC Compliance Manual to reflect more accurately the Supreme Court's multifaceted approach set forth in *Reid*[138] and later affirmed in *Clackamas*.[139] This Article demonstrated above that the EEOC Compliance Manual already sets up this proposition, but the EEOC itself and most federal circuits are ignoring the letter and spirit of the Manual and Title VII.[140] Part II showed that the EEOC Compliance Manual indicates volunteers are protected

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128. *Id.* (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005)).

129. *Fed. Express*, 552 U.S. at 389.

130. *See supra* Part II.

131. *See generally* 42 U.S.C. § 2000e (2008) (Title VII definitions).

132. *See generally* 29 C.F.R. § 1614 (2014).

133. EEOC Compl. Man. (BNA) § 2–III(A)(1)(c) (citing Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 221 (4th Cir. 1993)).

134. *Id.*

135. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 450–51 (2003); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1992); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989).

136. *See supra* Part II.A.

137. LaRocca, *supra* note 8, at 143.

138. *Reid*, 490 U.S. at 751–52.

139. *Clackamas*, 538 U.S. at 450–51.

140. *See supra* Part II.

under Title VII if they demonstrate both that they are under sufficient control of their employer and receive significant remuneration.[141] While a majority of federal courts and the EEOC will not examine a volunteer's claim unless the volunteer first demonstrates that he or she receives remuneration,[142] neither the Compliance Manual nor Title VII indicates that remuneration or the "right to control" should take precedence over the other when determining if a volunteer is protected.[143] Indeed, remuneration appears nowhere in Title VII.[144] Instead, the employer's "control" over an employee found in the EEOC Compliance Manual[145] is the same common-law "right to control" agency test first formulated in *Reid*.[146] As a result, the Supreme Court held that this language requires a more holistic understanding of the employer-employee relationship in which "with no one factor being decisive."[147] Consequently, it should have been self-evident to both the EEOC and federal courts that there shall be no "threshold" factors and that no factor shall be more important than any other.

Thus, this Article argues that the EEOC ought to issue an interpretive rule through Section 553(b) rulemaking specifically clarifying that its Compliance Manual utilizes no "threshold" factor when determining whether a volunteer is considered an employee for the purposes of Title VII. Instead, the EEOC should articulate, like the Supreme Court has held since *Reid*, that the determination of whether volunteers are employees should be made through considering a myriad of characteristics of the employment relationship. The controlling analysis should be the common law "right to control" test, which prevents a single factor from being uniquely dispositive over other qualities of a volunteer's position. Sample language of the interpretive rule should emphasize the *Clackamas* court's holding that "no one factor is dispositive"[148] and the Compliance Manual's language that a determination of an employer-employee relationship "requires consideration of *all* aspects of the worker's

141. EEOC Compl. Man. (BNA) § 2–III(A)(1).

142. *See supra* 44Part II.A ("Even after exhausting administrative remedies with the EEOC, most federal circuits likewise require a volunteer first to demonstrate that he or she received 'significant remuneration,' or benefits, from her employer before he or she can proceed with his or her Title VII claim.").

143. *See* Volling v. Antioch Rescue Squad, No. 11 C 04920, 2012 WL 6021553, *7, *9–10 (N.D. Ill. Dec. 4, 2012).

144. *Id.* at *7.

145. EEOC Compl. Man. (BNA) § 2–III(A)(1).

146. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740, 750–51 (1989).

147. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 451 (2003) (citing NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968), in the context of an independent contractor).

148. *Clackamas*, 538 U.S. at 451 (citing *NLRB*, 390 U.S. at 258).

relationship with the employer."[149] Because the EEOC[150] and federal courts[151] look to the Compliance Manual for guidance in their decision to cover volunteers, this clarification should reduce or eliminate the degree to which courts should look to remuneration as the singular factor in their analysis.

Though several law review comments and articles have made similar recommendations, none have addressed tackling this issue at its source, the EEOC Compliance Manual.[152] In particular, they have broadly endorsed certain aspects of case law, particularly the *Bryson* decision, but without providing a more tangible approach to confront the challenges volunteers face under Title VII.[153]

A. *First Steps*

Like promulgating agency rules under *Chevron*,[154] agency interpretive rulemaking will receive deference if (1) Congressional intent is not clear and (2) agency rules are a "permissible" interpretation under the statute.[155]

Under the first prong, the Supreme Court and lower courts have held that the employer-employee language in Title VII is "circular and explains nothing,"[156] therefore meeting the first prong of the *Chevron* test. Because both Title VII and the EEOC's regulation are silent on the matter and the purpose of Title VII is to prohibit employment discrimination,[157] increasing the scope of Title VII to protect volunteers more truthfully reflects the Supreme Court's holdings of broader protections to beyond the traditional employer-employee relationship.[158]

Under the second prong, the Supreme Court announced that the EEOC Compliance Manual in the context of an employer-employee relationship should not receive full *Chevron* deference, but rather the lower *Skidmore* deference afforded to regulations that constitute a "body of experience

149. EEOC Compl. Man. (BNA) § 2–III(A)(1) (emphasis added).

150. *See supra* text accompanying note 97.

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

152. *See* LaRocca, *supra* note 8, at 141–44 (looking to the courts and legislature for guidance). *See also* Morgan, *supra* note 63, at 1245–46 (similarly requesting future courts and Congresses adopt its recommendations).

153. Morgan, *supra* note 63, at 1237–46.

154. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 842–44 (1984).

155. *Id.* at 842–434; Fort Hood Barbers Ass'n v. Herman, 137 F.3d 302, 307–08 (1998).

156. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444 (2003) (stating that this language is a "mere nominal definition" and "completely circular"); Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (stating that the definition is "circular and explains nothing"); Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 489 (8th Cir. 2003) ("In both Title VII and the ADA, Congress adopted a circular definition of 'employee'. . . .").

157. *See* 42 U.S.C. § 2000e–2(a) (2008).

158. *See supra* notes 28–34.

and informed judgment."[159] Under that standard, the Court would accept an alteration of its position so long as the interpretive rule is not "plainly erroneous or inconsistent with the regulation."[160] Here, both an employer's "right to control" over a volunteer and the employee's remuneration are listed in the EEOC Compliance Manual.[161] Because this recommendation does not seek to change the elements the EEOC indicates that constitute an employer-employee relationship, but rather seeks to interpret the Compliance so that "no one factor is dispositive," like the holding in the Supreme Court's decision in *Clackamas* regarding the EEOC Compliance Manual in the context of independent contractors,[162] the interpretation is neither "plainly erroneous [n]or inconsistent with the regulation."[163]

B. *Substantive or Interpretive*

This Article does not recommend a substantive rule because it does not create new rights or obligations or have the effect of legislation.[164] The existing Compliance Manual does not indicate how to weigh the factors in the volunteer context.[165] The right to control is one of the factors of the test, which encompasses a variety of factors like those under Reid.[166] Indeed, remuneration should be a factor considered by the court because it goes to the degree of a relationship. Like the court held in *Volling*, the entirety of an employer-employee relationship should not hinge on whether one receives remuneration.[167] It does a disservice to the statute, which has the purpose of broadly providing a remedy against employment discrimination.[168]

In *Clackamas*, the Court articulated that the six factors listed in the EEOC's Compliance Manual to determine whether a shareholder-

159. Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

160. Clackamas Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

161. EEOC Compl. Man. (BNA) § 2–III(A)(1).

162. *Clackamas*, 538 U.S. at 451 (citing NLRB v. United Ins. Co. of Am., 390 U.S. 254, 258 (1968), in the context of an independent contractor).

163. *Bowles*, 325 U.S. at 414.

164. *See generally* Clarry v. United States, 85 F.3d 1041, 1048 (2d Cir. 1996).

165. *See* EEOC Compl. Man. (BNA) § 2–III(A)(1)(c).

166. *Id.* § 2–III(A)(1) (listing the following as factors: "[t]he employer has the right to control when, where, and how the worker performs the job[;] . . . [t]he work is performed on the employer's premises[;]; . . . [t]here is a continuing relationship between the worker and the employer[;]; . . . [t]he employer sets the hours of work and the duration of the job[;] . . . [t]he employer can discharge the worker.").

167. Volling v. Antioch Rescue Squad, No. 11 C 04920, 2012 WL 6021553, at *9 (N.D. Ill. Dec. 4, 2012).

168. Am. Tobacco Co. v. Patterson, 456 U.S. 63, 80 (1982) ("Through Title VII[,] Congress sought in the broadest terms to prohibit and remedy discrimination.").

director is protected under Title VII are not exhaustive.[169] The Court cited its earlier decision[170] in *Darden*, in which it indicated that the answer to whether one is in an employer-employee relationship cannot be decided by a "shorthand formula or magic phrase."[171] Since the EEOC's Compliance Manual should not receive as much deference as courts are affording it,[172] courts are welcome to look beyond the enumerated factors in it.[173] As such, this offers courts the opportunity to look beyond the two factors listed in the Compliance Manual towards a more holistic understanding of the relationship. As a result, it more accurately reflects the Supreme Court's holdings beginning in *Reid* to require a more comprehensive knowledge of the employer-employee relationship in question.[174]

This change has a number of benefits. First, it provides coverage for an entire class of individuals who have been left unprotected against workplace discrimination. Because a number of statutes, including the ADA, ADEA, and the FLSA, use the same language to describe the employer-employee relationship,[175] and some of those statutes incorporate the rights and remedies under Title VII,[176] this has a broad effect on protecting volunteers in a variety of employment contexts. Second, it puts employers on notice that volunteers can bring claims against them for violating Title VII. Third, because remuneration will no longer be the controlling factor, it eliminates confusion and discrepancy between jurisdictions over what qualifies as remuneration and whether remuneration should be one of many factors to consider. Finally, it preserves an intent of administrative exhaustion: namely, to halt litigation in federal courts, which are already overburdened; to permit the EEOC to conduct an investigation to verify whether the claims are indeed actionable; and to preserve a substantive record to judge the merits of an employment discrimination claim, not whether the claimant meets some uncertain threshold question from an EEOC Compliance Manual.

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169. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 450 n.10 (2003). Indeed, the Compliance Manual itself indicates that "[t]his list is not exhaustive." EEOC Compl. Man. (BNA) § 2–III(A)(1).

170. *Clackamas*, 538 U.S. at 450.

171. Nationwide Mut. Ins. Co. v. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 324 (1992).

172. *Clackamas*, 538 U.S. at 449 n.9.

173. *See id.* at 450 n.10.

174. *See generally id.* 440; *Darden*, 503 U.S. 318; Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989); NLRB v. United Ins. Co. of Am., 390 U.S. 254 (1968).

175. *See supra* note 22.

176. Title I of the ADA incorporated the remedies of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a) (2013).

VI. CONCLUSION

Though volunteers regularly play a substantial role in the operation of an organization, they often are not seeking pecuniary rewards for their service, and therefore do not receive benefits that would constitute "significant remuneration" from their employer. Consequently, volunteers are left unprotected under Title VII and other federal employment discrimination statutes that utilize similar language to define an employer-employee relationship.

The EEOC Compliance Manual provides the means by which volunteers are left unprotected, and also the methods by which the spirit of Title VII can be restored. In the EEOC Compliance Manual, the EEOC writes that volunteers are generally not considered employees unless (1) their volunteer position regularly turns into compensable employment or (2) their employer exercises a sufficient degree of control over their work and the employer provides them with some form of benefits that constitute "significant remuneration," a phrase that has neither a clear meaning nor a consistent application.

The majority of federal circuits and the EEOC held that volunteers must first demonstrate that they receive significant remuneration before the courts will examine any other factors of their employer-employee relationship. Consequently, because most volunteers do not receive these benefits, courts regularly dismiss their cases, and they are without any remedy from otherwise legitimate employment discrimination claims.

Only two jurisdictions have broken away from the majority of circuits, holding instead like the Supreme Court that no single factor in an employment relationship is uniquely dispositive. Indeed, the *Volling* court noted that because the statute never mentions remuneration and the EEOC Compliance Manual never indicates that remuneration should play any larger role than other characteristics of an employment relationship, it was irrational to believe that Congress intended to shield an entire class of workers from Title VII protection simply because they do not receive a paycheck or other forms of remuneration.

Suitably, the EEOC Compliance Manual can also serve as the source of remedy for volunteers' claims. This Article argued and demonstrated that clarifying the EEOC's Compliance Manual could restore Title VII as a broad measure to protect individuals against workplace discrimination. Through Section 553(b) interpretive rulemaking, the EEOC could declare the volunteers will be covered if they can demonstrate an employer-employee relationship exists under a myriad of factors using the *Reid* "right to control" test, which still includes remuneration.

This interpretive rule proposed by this Article meets the requirements of *Chevron* and *Skidmore* because Congressional intent of the definition of an "employee" is ambiguous and the interpretive rule is neither clearly

erroneous nor inconsistent with the regulation. The Supreme Court has consistently argued that the definition of an employer-employee relationship should not be refined to a "shorthand formula or magic phrase." Accordingly, phrases like "significant remuneration" should not control whether an otherwise legitimate employment discrimination claim succeeds or fails. Further, the Court has articulated that the EEOC Compliance Manual itself is not exhaustive, which even extends the inquiry beyond the factors enumerated in the Manual. As a result, though this Article only seeks to provide a more inclusive understanding of what constitutes an employer-employee relationship in the context of volunteers, there may be an argument that courts should even look beyond the EEOC Compliance Manual for guidance. Nevertheless, this Article provides the necessary first step in returning the spirit of Title VII back to the EEOC Compliance Manual.