THE UNPROTECTED WORKFORCE: WHY TITLE VII MUST APPLY TO WORKFARE PARTICIPANTS

By: Nicola Kean*

I. INTRODUCTION

Because Congress has not explicitly granted protection from gender discrimination under Title VII of the 1964 Civil Rights Act[1] to welfare recipients in workfare programs, these workfare participants are often forced to work in positions where they are subjected to repeated sexual harassment in order to preserve their welfare benefits. In order to protect these vulnerable workers, Congress should enact legislation to provide explicit Title VII protection for workfare participants.

As a result of the welfare reforms of 1996, federal law now requires many welfare recipients to work in public or private sector jobs in order to receive their welfare benefits.[2] If these workfare participants do not perform their jobs satisfactorily, their job placement will be terminated, and they will no longer receive their welfare benefits.[3] Unfortunately, these workfare participants often experience gender and race discrimination in their job placements.[4] Because they will lose their welfare benefits if they do not continue their job placements, these workers are often forced to remain in positions where they are consistently harassed.[5]

The Personal Responsibility and Work Reconciliation Act (PRWORA),[6] which implements the workfare requirements, does not

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* Instructor of Legal Research and Writing at University of San Diego Law School; J.D., Harvard Law School, 1997. The author would like to thank Toni Martinson and Robert Brainin for their helpful comments on various drafts of this article.

1. 42 U.S.C.A. §§ 2000e-1 to -17 (West 2004). The Personal Responsibility and Work Reconciliation Act (PRWORA) does include a non-discrimination provision that prohibits gender discrimination in programs that receive funds through the Welfare-to-Work program. The provision does not apply to all TANF programs, however. 42 U.S.C.A. § 603(a)(5)(I)(iii) (West 2004).

2. PRWORA, 42 U.S.C.A. § 607(e) (West 2004).

3. *See* PRWORA, 42 U.S.C.A. § 607(e) (West 2004); 45 C.F.R. § 261.14 (2004).

4. Rebecca Gordon, Applied Research Center, *Cruel and Unusual: How Welfare 'Reform' Punishes Poor People* 5 (Feb. 1, 2001), *available at* http://www.arc.org/downloads/arc010201.pdf.

5. Welfare and Human Rights Monitoring Project, California Case File (on file with the Unitarian Universalist Service Committee, 130 Prospect St., Cambridge, MA 02139-1845, http://www.uusc.org), *cited in* Shruti Rana, *Restricting the Rights of Poor Mothers: An International Human Rights Critique of "Workfare"*, 33 COLUM. J.L. & SOC. PROBS. 393, 425 (2000) ("I took a terrible job because my worker told me if I didn't he would cut me off benefits. I have been sexually harassed at this job and I told the worker about this. I told him I could not keep dealing with this kind of thing. He said it was my decision. I could quit and lose my benefits or keep the job.").

6. 42 U.S.C.A. §§ 601-19 (West 2004).

explicitly state that workfare participants are entitled to protection from employment discrimination under Title VII. Congress enacted Title VII to protect employees from discrimination based upon gender, race or religion in the workplace.[7] In *Meritor Savings Bank v. Vinson*, the United States Supreme Court held that sexual harassment was a form of gender discrimination, and therefore, it was prohibited under Title VII.[8] Since Title VII only protects employees from discrimination, however, in order to bring a successful lawsuit under Title VII, a worker must convince the court that she is an employee as defined by Title VII. This can be complicated because Title VII does not provide a clear definition of the term "employee."[9]

In order to determine if a worker is an employee under Title VII, a court will likely examine the specific facts of the employment situation. First, the court will determine if an employment relationship exists. If so, the court will apply one of three tests to determine if the worker is an employee or an independent contractor. Following the United States Supreme Court's decision in *Nationwide Mutual Insurance Co. v. Darden*,[10] it appears that the common-law agency test is the correct one to apply in Title VII situations.[11]

Because Congress has not explicitly stated that Title VII protects workfare participants, it is up to a court's interpretation of Title VII to determine if workfare participants are employees and therefore covered under the Act. The Second Circuit Court of Appeals found that workfare participants are employees in the specific situation when the workfare participants' welfare benefits are paid by the agencies where they work.[12] However, other courts may not follow the Second Circuit or may find that workfare participants are not employees in other situations, such as when the agency paying the welfare benefits is not the same agency where employees are working. Despite the fact that the legislative

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7. 42 U.S.C.A. § 2000e-2(a)(i) (West 2004).

8. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

9. Title VII defines an employee as someone who is "employed by an employer." 42 U.S.C.A. § 2000e(f) (West 2004).

10. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992).

11. In *Darden*, the Supreme Court said that when Congress does not make a statutory definition clear, Congress intended to describe the "conventional master-servant relationship as understood by common-law agency doctrine." *Id.* (citing Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989)). *See also* Walters v. Metro. Educ. Enter., Inc., 519 U.S. 202, 211 (1997) (finding that the common law agency test should be applied to find an employment relationship under 42 U.S.C. § 2000e(b)).

12. United States v. City of New York, 359 F.3d 83, 94 (2d Cir. 2004). *But see* United States v. City of New York, No. 01 CV 4604 (RCC) (S.D.N.Y. Mar. 8, 2002); Colon v. City of New York, No. 01 CV 8797 (LTS) (S.D.N.Y. Mar. 8, 2002) (holding that workfare participants are not employees under Title VII), *vacated and remanded by* United States v. City of New York, 359 F.3d 83 (2d Cir. 2004). *See also* McGhee v. City of New York, No. 113614/01, 2002 WL 1969260, at *4 (N.Y. Sup. Aug. 5, 2002) (holding that workfare participants are not employees under the New York State Human Rights Law or the Administrative Code); Brukhman v. Giuliani, 727 N.E.2d 116, 119 (N.Y. 2000) (holding that workfare participants are not "'in the employ of' anyone, within the intendment of New York Constitution, article I, § 17").

history of the PRWORA and the agency regulations that implement the PRWORA suggest that Title VII should apply to workfare participants, there is enough ambiguity surrounding Title VII's application to workfare participants that courts may determine that workfare participants would not be protected. In light of this ambiguity, Congress must enact or amend legislation that clearly provides that workfare participants are employees for purposes of Title VII.[13]

Without explicit Title VII protection, workfare participants are required to work side-by-side with non-workfare workers without a guarantee of the same protections from sexual harassment and other forms of gender discrimination that non-workfare workers receive. Because workfare participants will lose their welfare benefits if they do not perform in their workfare placements, they should be entitled to the same protections as regular employees. Although the 1997 Balanced Budget Act, which amends the PRWORA, does include a nondiscrimination provision, this provision does not apply to all workfare participants and provides insufficient protection.

Extending Title VII to workfare participants is clearly within the goals of Title VII, namely to protect the jobs of those who are vulnerable to the discrimination that Title VII prevents. Although the Second Circuit Court of Appeals did find that workfare participants are employees of the agencies where they are working when those agencies are paying their welfare benefits, the Southern District Court of New York previously did not reach that conclusion.[14] Other courts may follow the rationale of the Southern District of New York. Therefore, Congress should ensure universal protection by enacting legislation so that no court can deny coverage to a workfare participant.

Part II of this article will discuss the PRWORA, Title VII, and how both statutes affect workfare participants. Part III will focus on the courts' application of Title VII to workfare participants and why courts may determine that workfare participants are not employees. Part IV will discuss why it is imperative that Title VII provides coverage for

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13. This article only addresses the employee status of workfare participants under Title VII. It does not address the implications of extending employee status to workfare participants in other contexts such as workplace safety or other anti-discrimination statutes such as the Age Discrimination in Employment Act, 29 U.S.C.A. § 621 (West 2004), or the Americans with Disabilities Act, 42 U.S.C.A. § 12101 (West 2004). This article focuses solely on Title VII because Title VII was specifically not included in the PRWORA, 42 U.S.C.A. § 601-19 (West 2004). In addition, this issue has recently been addressed by the Second Circuit Court of Appeals. Furthermore, the fourth TANF Annual Report to Congress stated that ninety percent of all adult TANF recipients are women. Luchina Fisher, *NYC Agrees to Education for Welfare Recipients, at* http://www.now.org/eNews/aug2003/082203welfare.html (Aug. 22, 2003). Therefore, the PRWORA affects women more than men, and the applicability of Title VII is particularly important. *See* NOW Legal Defense and Education Fund, *Welfare and Poverty/Employment/Civil Rights, at* http://www.nowlegaldefense.org (last visited Feb. 2, 2004).

14. United States v. City of New York, No. 01 CV 4604 (RCC) (S.D.N.Y. Mar. 8, 2002), *vacated and remanded by* United States v. City of New York, 359 F.3d 83 (2d Cir. 2004); Colon v. City of New York, No. 01 CV 8797 (LTS) (S.D.N.Y. Mar. 8, 2002), *vacated and remanded by* United States v. City of New York, 359 F.3d 83 (2d Cir. 2004).

workfare participants. Part V will argue that Congress must amend the PRWORA to explicitly provide that Title VII protections apply to workfare participants or, more broadly, that Congress should provide a uniform definition of employer and employee that includes workfare participants.[15]

II. THE PRWORA AND TITLE VII

A. THE PRWORA AND THE WORKFARE SYSTEM

When the PRWORA was adopted in 1996, Congress intended for it to reform the welfare system significantly. One of the goals of the PRWORA was to reduce the number of families that received welfare benefits.[16] In addition, the PRWORA was intended to promote employment among welfare recipients to assist them in achieving greater financial independence and security.[17]

The PRWORA replaced the Family Support Act of 1988 (FSA),[18] which supported needy families through Aid to Families with Dependent Children (AFDC). In addition, AFDC was replaced with Temporary Assistance for Needy Families (TANF).[19] The PRWORA also removed the FSA's corresponding work program, Job Opportunity and Basic Skills (JOBS).[20]

Under the PRWORA, states receive block grants from the federal government to fund their TANF programs, provided they comply with the federal PRWORA requirements.[21] States have a broad amount of discretion in determining how they will use the federal block grants.[22] Each state, however, must submit a plan to the Secretary of Health and Human Services that states its strategy to provide assistance to needy families and to provide individuals with the job preparation, work and

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15. Defining "employer" and "employee" to include workfare participants will have a broader implication because Congress would be extending employment law benefits to workfare participants in areas other than Title VII also. *See supra* note 13.

16. Steve Savner, Julie Strawn, & Mark Greenberg, Center For Law And Social Policy (CLASP), *TANF Reauthorization: Opportunities to Reduce Poverty by Improving Employment Outcomes* 1 (Jan. 2002), http://www.clasp.org/LegalDev/CLASP/DMS/Documents/1012240597.57/tanf%20reauthorization%20opportunities%20to%20reduce.pdf [hereinafter *TANF Reauthorization*].

17. *Id.*

18. For an excellent discussion of the PRWORA, *see* Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 STAN. L. & POL'Y REV. 19 (1998).

19. Sharon Dietrich, Maurice Emsellem, & Jennifer Paradise, National Employment Law Project, *Employment Rights of Workfare Participants and Displaced Workers* 6 (2d ed. 2000), *available at* http://www.nelp.org/docUploads/pub18%2Epdf [hereinafter *Employment Rights*].

20. Erin Elizabeth Raccah, *Thrown into the Gap: Employment Discrimination in Workfare*, 18 WOMEN'S RTS. L. REP. 67, 68 (1996).

21. *TANF Reauthorization, supra* note 16, at 1.

22. Cary LaCheen, *Using Title II of the Americans with Disabilities Act on Behalf of Clients in TANF Programs*, 8 GEO. J. ON POVERTY L. & POL'Y 1, 12 (2001).

support services that are needed to enable them to leave the welfare program and become self-sufficient.[23]

Although states now have much more autonomy in administering their welfare programs than they had under AFDC,[24] the PRWORA does have certain regulations that all states must follow. The PRWORA requires that needy families only receive welfare benefits for a maximum of sixty months.[25] As part of the program, welfare recipients are required to participate in jobs or other work activities.[26] Any welfare recipient that the state determines is eligible for work or that has received assistance for twenty-four consecutive or non-consecutive months must work to receive welfare benefits.[27] The law currently states that fifty percent of all families with one adult and ninety percent of all families with two adults must meet the work requirements.[28] In addition, workfare participants on average are required to work thirty hours per week if there is one adult in the household and thirty-five hours per week if there are two adults in the household in order to maintain their welfare benefits.[29] Ten of these hours may be devoted to training, and the remainder must be actual work in qualified work activities, such as unsubsidized or subsidized private and/or public sector employment.[30] If a workfare participant does not work, she will receive a reduction in her family's aid with respect to any portion of the month in which she did not work.[31] States may establish systems to permanently terminate aid for participants who do not meet their work obligations.[32] If a state does not comply with the work requirements, the Department of Health and

23. *See* 42 U.S.C.A. § 602 (West 2004).

24. Susan L. Thomas, *'Ending Welfare as We Know It,' or Farewell to the Rights of Women on Welfare? A Constitutional and Human Rights Analysis of the Personal Responsibility Act*, 78 U. DET. MERCY L. REV. 179, 186 (2001) ("Instead of federally defined entitlement of assistance, each state now has the discretion to define its own criteria for deciding who will receive TANF assistance.").

25. *See* 42 U.S.C.A. § 608(a)(7) (West 2004); 45 C.F.R. § 264.1 (2004).

26. *See* 42 U.S.C.A. § 607 (West 2004); 45 C.F.R. § 261.10 (2004).

27. *See* 42 U.S.C.A. § 602 (a)(1)(A)(ii) (West 2004); 45 C.F.R. § 261.10(a)(1) (2004).

28. *See* 42 U.S.C.A. § 607 (West 2004); 45 C.F.R. § 261.21 (2004); 45 C.F.R. § 261.23 (2004). *See also* U.S. Department of Labor, *How Workplace Laws Apply to Welfare Recipients*, http://www.dol.gov/asp/w2w/welfare.htm#How (May 1997 (Rev'd Feb. 1999)) [hereinafter *How Workplace Laws Apply*]. *See also* LaCheen, *supra* note 22, at 31.

29. *See* 42 U.S.C.A. § 607(West 2004); 45 C.F.R. § 261.31 (2004); 45 C.F.R. § 261.32 (2004). *See also How Workplace Laws Apply*, *supra* note 28.

30. *See* 45 C.F.R. § 261.31 (2004). Robert Pear, *House Endorses Stricter Work Rules for Poor*, N.Y. TIMES, Feb. 14, 2003, at A25. *See also* Maurice Emsellem and Naomi Zauderer, National Law Employment Project, *Workfare—The Road Less Traveled: Comparing the Bush Administration's TANF Reauthorization Proposal with the Latest Workfare Research & State TANF Programs* 4 (Apr. 11, 2002), *available at* http://www.nelp.org/docUploads/pub126%2Epdf. *See also* 45 C.F.R. 260-65 (2004).

31. 42 U.S.C.A. § 607(e) (West 2004); 45 C.F.R. § 261.14 (West 2004).

32. 42 U.S.C.A. § 607(e) (West 2004); 45 C.F.R. § 261.14 (West 2004). The only exception to this rule is a parent of a child under five years of age who can demonstrate an inability to obtain childcare. 42 U.S.C.A. § 607(e)(2) (West 2004); 45 C.F.R. § 261.15 (West 2004).

Human Services may reduce the state's block grant.[33] Therefore, as a result of the PRWORA, there has been a dramatic increase in the number of welfare recipients being placed into the workforce.

Recent federal legislation demonstrates a trend towards a greater focus on work requirements over employment training. In 2003, the House of Representatives and the Senate Finance Committee both approved a bill that would impose stricter work requirements on welfare recipients.[34] President Bush supported these TANF reforms.[35] The legislation provides that by 2008, at least seventy percent of each state's welfare recipients would be required to work.[36] Furthermore, the recipients would need to work forty hours per week,[37] with only sixteen hours of training and the remainder hours being actual work.[38] In addition, states would have to permanently terminate welfare benefits for any person who does not comply with his or her work requirements for two months.[39]

Unlike the FSA that placed a premium on training workfare participants, the PRWORA does not emphasize training but rather focuses on workfare participants working. Under AFDC, workfare participants needed to be placed into work experience programs that were "limited to projects which serve a useful public purpose."[40] As a result, workfare placements were primarily in the public and non-profit sectors.[41] TANF, on the other hand, authorizes "subsidized private sector employment."[42] In fact, TANF states that work experience should only be used "if sufficient private sector employment is not available."[43]

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33. U.S. Department of Health and Human Services, *U.S. Department of Health and Human Services, Fact Sheet: Temporary Assistance for Needy Families* 2 (Sept. 2001), http://www.acf.dhhs.gov/news/facts/tanf.html.

34. *See* H.R. 4, 108th Cong. (2003); Pear, *supra* note 30; Robert Pear, *Bill on Changes Advances to Full Senate*, N.Y. TIMES, Sept. 11, 2003, at A16.

35. Scott Lindlaw, Associated Press, *Bush Demands Stiffer Welfare to Work Laws*, http://www.asylumnation.com/asylum/_r/showthread/threadid_27836/index.html (Jan. 14, 2003).

36. H.R. 4, 108th Cong. § 407(a)(5)(2003); Pear, *supra* note 30. *See also* Mark Greenberg, Center For Law and Social Policy, *Work Participation and Child Care Funding Issues in TANF Reauthorization 2003* 6 (Jan. 25, 2003), *available at* http://www.clasp.org/DMS/Documents/1045086272.01/TANF_NCSL.pdf. *See also* Children's Defense Fund, *TANF Reauthorization: A Side-by-Side Comparison of the Proposals before Congress*, *available at* http://www.childrensdefense.org/familyincome/welfare/tanf_reauthorization/default.asp (Mar. 2003).

37. H.R. 4, 108th Cong. § 407(b)(2) (2003).

38. H.R. 4, 108th Cong. § 407(e) (2003); Pear, *supra* note 30.

39. Pear, *supra* note 30.

40. 42 U.S.C. § 682(f)(1)(A) (1995).

41. Sharon Dietrich, Maurice Emsellem, & Karen Kithan Yau, National Employment Law Project, *Welfare Reforming the Workplace: Protecting the Employment Rights of Welfare Recipients, Immigrants and Displaced Workers* 30 (Mar. 1997), *available at* http://www.nelp.org/docuploads/pub53.pdf [hereinafter *Welfare Reforming the Workplace*].

42. 42 U.S.C.A. § 607(d) (West 2004); 45 C.F.R. § 261.30 (2004).

43. 42 U.S.C.A. § 607(f) (West 2004); 45 C.F.R. § 261.30 (2004). Interestingly, but beyond the scope of this article, there is no obligation for the private sector placements to offer paid employment in exchange for the state providing free workfare labor. *See Welfare Reforming the Workplace*, *supra* note 41, at 30.

Thus, there has been a significant shift in policy that makes workfare participants more like employees than welfare recipients were prior to 1996. As such, it is even more important than it was under AFDC that these workers receive Title VII protection.

Workfare participants are often an important part of an employer's workforce.[44] Because workfare participants can be placed into both public and private sector jobs, public and private sector employers can satisfy their hiring needs without hiring traditional employees.[45] In effect, these employers are provided with a low cost workforce that is partially subsidized with TANF funds.[46]

Although the TANF legislation contains provisions that are designed to prevent employers from replacing their workforce with relief workers, workfare participants are indeed replacing regular employees. An employer, for example, cannot terminate a regular employee and replace her with a workfare participant.[47] However, if an employee leaves through resignation or retirement, a workfare participant can replace her.[48] In addition, employers can fill new jobs with workfare participants.[49]

As a result, workfare participants are replacing the working poor in many positions.[50] It is

> clear that many [workfare] participants have taken the place of city workers . . . doing much of the work once performed by departed city employees, [and] in many instances, . . . doing the same work as current ones . . . In many municipal agencies, the city has shrunk its regular work force and increased the number of workfare participants.[51]

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44. *See* Louis Uchitelle, *Welfare Recipients Taking Jobs Often Held by the Working Poor*, N.Y. TIMES, Apr. 1, 1997, at A1. ("Across the country, thousands of people on welfare are going to work, but often not a new job created for them . . . Frequently they do the work once done by regular employees.").

45. Diller, *supra* note 18, at 29.

46. *Id.*

47. 42 U.S.C.A. § 607(f) (West 2004).

48. Diller, *supra* note 18, at 30.

49. 42 U.S.C.A. § 607(f) (West 2004).

50. In addition to losing jobs to workfare participants, regular employees have alleged that they are losing bargaining power in the workforce. For example, a number of lawsuits have been filed by union representatives alleging that the City of New York is using WEP workers to perform the jobs of union members "which policy has allegedly resulted, over time, in a decline in the number of union workers as the number of WEP workers increases, the loss of jobs and benefits to individual union workers and the loss of bargaining unit positions . . . ." Sauders v. City of New York, 725 N.Y.S.2d 18, 19 (N.Y. App. Div. 2001). *See also* Mary J. O'Connell, *Municipal Labor Perspectives on the Public Sector Welfare Workforce in New York City*, 73 ST. JOHN'S L. REV. 805 (1999).

51. Steven Greenhouse, *Many Participants in Workfare Take the Place of City Workers*, N.Y. TIMES, Apr. 13, 1998, at A1.

Furthermore, workfare participants are taking jobs in the private sector as well.[52] This job replacement most significantly affects the thirty-eight million workers who are earning $7.50 an hour or less.[53] In addition to receiving a subsidized workforce, employers who utilize workfare participants receive a tax credit for doing so.[54] They do not receive the same tax credit for employing the non-welfare working poor.[55]

B. TITLE VII

Congress intended for Title VII to provide all people with the right to be employed without discrimination.[56] Title VII provides,

> [I]t 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.[57]

Title VII applies to all labor organizations, employment agencies, and private employers that have 15 or more employees during 20 or more weeks per year.[58] Title VII provides equitable relief, compensatory and punitive damages, and affirmative action.[59] The EEOC, the Attorney General, and the complainant who has allegedly been wronged can all bring actions under Title VII.[60]

Title VII serves a remedial purpose designed "to assure equality of employment opportunities,"[61] in particular to protect employees with little bargaining power. Because of Title VII's remedial purpose, many courts have given it a broad interpretation.[62] As one court stated,

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52. Marriott Hotels, for example, has workfare participants working in positions including housekeeping and reservations. As of 1997, Marriott had trained 650 workfare participants since 1991. Louis Uchitelle, *Welfare Recipients Taking Jobs Often Held by the Working Poor*, N.Y. TIMES, Apr. 1, 1997, at A1.

53. Uchitelle, *supra* note 44 at A1.

54. *Id.*

55. *Id.*

56. H.R. Rep. No. 88-914, at 26 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2391, 2401.

57. 42 U.S.C.A. § 2000e-2(a)(1) (West 2004).

58. 42 U.S.C.A. § 2000e(b) to (d) (West 2004).

59. 42 U.S.C.A. § 2000e-5(g)(1) (West 2004).

60. 42 U.S.C.A. § 2000e-5(f)(1) (West 2004).

61. Pullman-Standard v. Swint, 456 U.S. 273, 276 (1982) (quoting McDonnell Douglass Corp. v. Green, 411 U.S. 792, 800 (1973)).

62. *See* Hornick v. Borough of Duryea, 507 F. Supp. 1091, 1098 (M.D. Penn. 1980). *See also* Armbruster v. Quinn, 711 F.2d 1332, 1340-41 (6th Cir. 1983) ("Since this statute has been universally held to be broadly remedial in its purpose, such remedial effect can be given only upon a broad interpretation of the term employee."); Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979) ("Because the Act is remedial in character, it should be liberally construed, and ambiguities should be resolved in favor of the complaining party.").

"Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination . . . We must therefore avoid interpretations of Title VII that deprive victims of discrimination a remedy."[63]

Congress did not provide much legislative history to guide the courts in their interpretations of Title VII as it pertains to gender discrimination because sex was added to Title VII immediately before Congress' vote to approve the 1964 Civil Rights Act.[64] One court decided that "[i]n attempting to read Congress' intent in these circumstances, however, it is reasonable to assume, from a reading of the statute itself, that one of Congress' main goals was to provide equal access to the job market for both men and women . . . ."[65] According to the legislative history, "The rights of citizenship mean little if an individual is unable to gain the economic wherewithal to enjoy or properly utilize them."[66]

The Supreme Court found in *Meritor Savings Bank v. Vinson* that sexual harassment is a form of sex discrimination and is therefore illegal under Title VII.[67] The Court stated, "The phrase, 'terms, conditions or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[68] Title VII outlaws both quid pro quo sexual harassment and hostile workplace sexual harassment. Quid pro quo sexual harassment is when a supervisor or other employee offers job benefits, such as advancement, in exchange for sexual favors.[69] Hostile workplace sexual harassment occurs when a person at the workplace creates a "sexually intimidating or abusive work environment."[70]

C. SEXUAL HARASSMENT IN THE WORKFARE WORKPLACE

Congress enacted Title VII because it recognized that many groups were being subjected to discrimination in the workplace. Unfortunately, this is true for workfare participants as well.[71] In 2000, the Applied

63. County of Washington v. Gunther, 452 U.S. 161, 178 (1981).

64. Gwendolyn Mink, Houghton Mifflin Company, *Civil Rights Act of 1964*, *available at* http://college.hmco.com/history/readerscomp/women/html/who_006400_civilrightssa.htm (last visited Feb. 2, 2004).

65. Diaz v. Pan Am Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971).

66. H.R. Rep. No. 88-914 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2516.

67. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

68. *Id.* at 64 (quoting Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 n. 13, quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

69. NOW LEGAL DEFENSE AND EDUCATION FUND, KNOW YOUR RIGHTS: A WOMAN'S GUIDE TO SEXUAL HARASSMENT AND WORKFARE 2 (1998).

70. *Id.* For a discussion of an employer's vicarious liability for sexual harassment by a supervisor as well as the current requirements for a successful sexual harassment claim, see Edward N. Stoner, II & Catherine S. Ryan, *Burlington, Faragher, Oncale and Beyond: Recent Developments in Title VII Jurisprudence*, 26 J.C. & U.L. 645, 645-46 (2000).

71. Gordon, *supra* note 4, at 5.

Research Center surveyed 1,512 people from 13 states.[72] The survey found that one in six female workfare participants had experienced sexual harassment in her work placement.[73] Furthermore, according to the NOW Legal Defense Fund, between 1998 and 2001, the Equal Employment Opportunity Commission (EEOC) filed at least ten sexual harassment claims against the City of New York in connection with harassment experienced by workfare participants.[74]

Similar to low-wage workers, workfare participants have little bargaining power in the workplace and need the protection of employment laws.[75] The women face the risk of losing their welfare benefits if they do not show up for work as a result of the gender discrimination they encounter. "Such workers have both the most acute need to protect their livelihoods and, because of that need, are the most susceptible to the invidious discrimination that Title VII forbids . . . [these] workers [have] nowhere else to turn if discrimination interferes with the job on which their income depends."[76]

D. TITLE VII AND THE PRWORA

Unfortunately, the PRWORA removed many of the workplace protections that were granted under the FSA.[77] As a result, by imposing work requirements and removing employment law protections, the PRWORA "permits and promotes the creation of a social and legal status in which recipients work and provide valuable services, but receive . . . potentially only a few of the legal protections of employment."[78] For example, the Department of Health and Human Services regulations that implemented JOBS provided participants with several significant protections, including a broad nondiscrimination provision that made it clear that federal anti-discrimination laws applied to workfare participants.[79] The regulations provided that "[a]ll participants will have such rights as are available under any applicable Federal, State, or local law prohibiting discrimination on the basis of race, sex, national origin,

72. *Id.* at 3.

73. *Id.*

74. *Hearing Before the Subcommittee on Human Resources Committee on Ways & Means*, 108th Cong. 5 (2002) (statement of Maurice Emsellem) [hereinafter *Statement by Maurice Emsellem*].

75. *Id.*

76. Brief of Amici Curiae AFL-CIO and New York State AFL-CIO, et al. in support of Appellants and Urging Reversal, at 15, United States of America v. City of New York, 359 F.3d 83 (2d Cir. 2003) (No. 02-6102(L)), *available at* http://www.nelp.org/docuploads/pub172.pdf.

77. *Employment Rights*, *supra* note 19, at 6.

78. Diller, *supra* note 18, at 20.

79. 42 U.S.C. § 684(a)(3) (1995); 45 C.F.R. § 251.1(c) (1995).

religion, age, or handicapping condition."[80] In addition, JOBS provided a procedure for redress of any alleged discrimination.[81]

The PRWORA does not contain an analogous statement that all federal, state, and local anti-discrimination laws apply to workfare participants. In fact, the PRWORA explicitly lists four federal laws that apply to any welfare program that is funded through the Act.[82] These laws are: the Age Discrimination Act of 1975,[83] Section 504 of the Rehabilitation Act,[84] the Americans with Disabilities Act,[85] and Title VI of the Civil Rights Act of 1964.[86] There is notably no mention of Title VII, the only law that prohibits gender discrimination in employment.

Although the PRWORA does not specifically list Title VII as applying to workfare programs, the Department of Health and Human Services regulations that implement TANF suggest that Title VII should apply in the workfare context. The regulations provide that federal anti-discrimination laws "apply to TANF beneficiaries in the same manner as they apply to other workers."[87] Although the language is not as broad as the anti-discrimination provision that was in effect under the FSA, this provision does indicate that the Department of Health and Human Services believes that TANF beneficiaries should receive Title VII protection. Congress should make Title VII's application to workfare participants explicit so there is no ambiguity and so all workfare participants are protected.

Those that oppose Title VII protection for workfare participants argue that if Congress had intended for Title VII to apply, it would have listed Title VII as one of the anti-discrimination statutes set forth in Section 608(d) of the PRWORA.[88] Even without clear adoption by Congress, however, Title VII may still apply to workfare participants. Section 608(d) does not state that the statutes listed are the only anti-discrimination statutes that apply to workfare participants. In other words, Congress did not explicitly state that Title VII should not apply to workfare participants.

The Second Circuit Court of Appeals in *United States v. City of New York*[89] expressly found that the Title VII's exclusion from Section 608(d) of the PRWORA does not mean that Congress intended to

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80. 45 C.F.R. § 251.1(c) (1995).
81. 45 C.F.R. § 251.1(c) (1995).
82. 42 U.S.C.A. § 608(d) (West 2004); 45 C.F.R. § 260.35 (2004).
83. 42 U.S.C.A. § 6101-6107 (West 2004).
84. 29 U.S.C.A. § 794 (West 2004).
85. 42 U.S.C.A. § 12101-12102 (West 2004).
86. 42 U.S.C.A. § 2000(d) (West 2004). Title VI prohibits race discrimination in any federally funded program or activity. *Id.*
87. 45 C.F.R. § 260.35(b) (2004).
88. For an example see Defendant's arguments in United States v. City of New York, 359 F.3d 83, 97-98 (2d Cir. 2004).
89. 359 F.3d 83 (2d Cir. 2004).

exclude workfare participants from Title VII protections.[90] Instead, the Second Circuit found that the statutes listed in Section 608(d) are statutes that prevent discrimination in programs and activities that generally receive federal funds. [91] Title VII does not fit in this list because it applies to employment relationships, and it may not involve federal funds.[92] The court decided, "[t]herefore, [that] Congress's failure to list Title VII with the 'programs or activities' discrimination provision is not a clear indication of Congressional intent to exclude from the protection of Title VII those PRWORA participants who under Title VII would be employees."[93]

Through the 1997 Balanced Budget Act which amends the PRWORA, Congress added a nondiscrimination provision that applies only to welfare programs that receive funds through the Welfare-to-Work (WtW) program. This provision states:

> (iii) Nondiscrimination. In addition to the protections provided under the provisions of law specified in section 608(c), [42 U.S.C.S. § 608(c)] of this title, an individual may not be discriminated against by reason of gender with respect to participation in work activities engaged in under a program operated with funds provided under this paragraph.[94]

The amendment provides for states to establish their own nondiscrimination mechanisms and grievance procedures through state agencies for any claims filed under the nondiscrimination provision.[95] Thus, Congress has provided that states that receive WtW funds must establish their own nondiscrimination procedures for their WtW programs.

Although some have argued that the nondiscrimination provision in the 1997 Balanced Budget Act indicates that Congress did not intend for Title VII protections to apply to workfare participants, the Second Circuit Court of Appeals in *United States v. City of New York* stated that the legislative history of the WtW program does not suggest that Congress intended for WtW's gender discrimination provision to preempt Title VII.[96] The nondiscrimination provision in the 1997 Balanced Budget Act does not preempt Title VII because the

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90. *Id.* at 98.
91. *Id.*
92. *Id.*
93. *Id.*
94. 42 U.S.C.A. § 603(a)(5)(I)(iii) (West 2004). The amendment incorrectly refers to section 608(c). The amendment should refer to section 608(d) which sets forth the anti-discrimination statutes specifically included in the PRWORA.
95. 42 U.S.C.A. § 603(a)(5)(I)(iv) (West 2004).
96. *City of New York*, 359 F.3d at 98 .

nondiscrimination provision does not offer the same protections from sexual harassment and other gender discrimination as are provided by Title VII.

Because WtW and TANF are separate programs,[97] the nondiscrimination provision in the 1997 Balanced Budget Act only applies to programs that are funded through the WtW program.[98] Thus, it does not apply to programs that receive TANF funding. The WtW program was established to supplement the TANF block grants given to the states.[99] In addition, WtW programs differ substantially from TANF programs.[100] For example, the U.S. Department of Labor administers the WtW program while the U.S. Department of Health and Human Services administers TANF.[101] States also have much more autonomy in implementing TANF programs. WtW legislation, on the other hand, is very specific about who is eligible to receive WtW funds and how those funds should be used.[102]

Also, the WtW nondiscrimination provision does not provide the same level of protection as Title VII because states are given the discretion to devise their own policies and to create their own grievance procedures. This means that there is no uniform, federal standard as there is under Title VII.

Under Title VII, a victim of discrimination files a charge of discrimination with the EEOC.[103] Once the charge has been filed, the EEOC notifies the employer of the charge.[104] The EEOC will then investigate the charge to determine whether it is likely that a violation has occurred.[105] If the charging party and the employer agree, the EEOC can settle the charge, often though mediation.[106] If the charge is not settled and the EEOC determines that a violation did not occur, the

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97. Demetra Smith Nightingale, Nancy Pindus, & John Trutko, Mathematica Policy Research, Inc., *The Implementation of the Welfare-to-Work Grant Programs* vii (Aug. 2002), *available at* http://www.aspe.hhs.gov/hsp/wtw-grants-eval98/implem02/report.pdf [hereinafter *Implementation of the WtW Grant Programs*].

98. *Id. See* 42 U.S.C.A. § 603(a)(5)(I)(iii) (West 2004).

99. *Implementation of the WtW Grant Programs*, *supra* note 97, at 1. WtW funds are specifically intended to target high poverty areas where additional resources are needed to supplement TANF funds. *Id.* at 2. In addition, these funds are intended to target specific individuals who need intensive services including "long-term welfare recipients, high school drop-outs, substance abusers, and persons approaching their TANF time limits." *Id.*

100. *See* California Budget Project, *How Can Federal Welfare-to-Work Grants Help Move Californians from Welfare to Work* 1 (Nov. 1997), *at* http://www.cbp.org/-1997/bb971102.html.

101. *Implementation of the WtW Grant Programs*, *supra* note 97, at 4.

102. *Id.*

103. U.S. Equal Employment Opportunity Commission, *Filing a Charge of Employment Discrimination*, *at* http://www.eeoc.gov/charge/overview_charge_filing.html (last modified Aug. 13, 2003).

104. U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination Questions and Answers*, *at* http://www.eeoc.gov/facts/qanda.html (last visited July 29, 2003).

105. *Id.*

106. *Id.*

EEOC will issue a letter to that effect and close the case.[107] The charging party, however, may pursue a private lawsuit.[108] If the EEOC determines that a violation did occur, the EEOC will issue a letter of determination and try to find a remedy with the employer.[109] If the EEOC is unable to reach a resolution with the employer, the EEOC will decide whether the U.S. Department of Justice should file a federal lawsuit.[110] If the EEOC decides not to file a lawsuit, the charging party will be able to file a lawsuit on her own behalf.[111] In contrast, the WtW legislation provides general guidelines for the grievance procedures that each state must establish, but it gives the states the ability to provide less formal grievance procedures.

Title VII also provides victims of sexual harassment with greater remedies than are provided under the WtW's nondiscrimination provision. Under Title VII, the types of relief that may be granted include: "back pay, hiring, promotion, reinstatement, front pay, reasonable accommodation or other actions that would make the individual whole."[112] In addition, the individual may be entitled to attorneys' fees, expert witness fees and court costs.[113] Finally, she may also be able to receive compensatory and punitive damages.[114] These compensatory damages include compensation "for actual monetary losses, for future monetary losses and for mental anguish and inconvenience."[115] In contrast, the remedies granted under the nondiscrimination provision are limited to restatement of the employee with payment of lost wages and benefits and, if appropriate, other equitable relief.

There are also provisions in the Workforce Investment Act of 1998 (WIA)[116] that require programs that receive funds under WIA programs to provide employment law protections for participants. Similar to the nondiscrimination provision in the 1997 Balanced Budget Act, however, the provisions applying to WIA programs do not remove the need for Title VII protections for workfare participants. The WIA legislation only applies to programs receiving WIA funding. Similar to WtW, the WIA

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107. *Id.*

108. *Id.*

109. U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination Questions and Answers*, *at* http://www.eeoc.gov/facts/qanda.html (last visited July 29, 2003).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. U.S. Equal Employment Opportunity Commission, *Federal Laws Prohibiting Job Discrimination Questions and Answers*, *at* http://www.eeoc.gov/facts/qanda.html (last visited July 29, 2003).

115. *Id.*

116. 29 U.S.C.A. § 2801 (West 2004); 64 Fed. Reg. 18,680 (Apr. 15, 1999).

supplements TANF.[117] It is focused on improving employment and training.[118] Therefore, it also does not apply to all workfare participants. Furthermore, this nondiscrimination provision only protects those who are "employed" in WIA-funded activities.[119] Courts must still determine whether or not a workfare participant is employed under the economic realities test, [120] as will be discussed in Part III. Therefore, if a court determines that a workfare participant is not employed for purposes of the WIA, she will not receive protection from discrimination under Title VII.

Although the PRWORA does not explicitly extend Title VII protections to workfare participants, Congress has not amended the PRWORA to exclude workfare participants from Title VII. According to NOW Legal Defense Fund, by not approving proposed legislation that would preempt a U.S. Department of Labor guidance stating Title VII applies to workfare participants in the same way that it applies to other workers, Congress in effect ratified the Guidance.[121] On June 25, 1997, the House passed H.R. 2015, containing a provision that was intended to overturn the Department of Labor's Guidance.[122] This provision stated that the public assistance that was paid to workfare workers was not "compensation for work performed."[123] Certain House members spoke out against this amendment because it would deny workfare participants protections under Title VII and other anti-discrimination laws.[124] The amendment was ultimately not passed by Congress.[125]

Certain members of Congress have demonstrated support for explicitly extending Title VII protections to workfare participants. According to Congressman Stark, it is essential for Congress to include in TANF legislation "comprehensive anti-discrimination protections, and make clear that participants can invoke the protections of the anti-discrimination laws already in existence."[126] In connection with the 2002

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117. Burt S. Barnow & Christopher T. King, Rockefeller Institute of Government, *The Workforce Investment Act in Eight States: Overview of Findings from a Field Network Study, available at* http://www.openminds.com/indres/wia8.pdf (last visited Apr. 17, 2004).

118. *Id.*

119. 29 U.S.C.A. § 2931 (a)-(b) (West 2004).

120. *Employment Rights, supra* note 19, at 8. *See* 64 Fed. Reg. at 18,680.

121. Brief for Plaintiff-Appellant Norma Colon and Intervenor-Plaintiff-Appellant Tammy Auer at 38, United States v. City of New York, 359 F.3d 83 (2d Cir. 2004) (No. 02-6102(L)), *available at* http://www.nowldef.org/html/courts/colon.pdf. *See also* Brief for Plaintiff-Appellant United States of America at 48, United States v. City of New York, 359 F.3d 83 (2d Cir. 2004) (No. 02-6102(L)).

122. *See* H.R. REP. NO. 105-149 (1997).

123. H.R. CONF. REP. NO. 105-217, at 934 (1997) *reprinted in* 1997 U.S.C.C.A.N. 176.

124. Brief for Plaintiff-Appellant Norma Colon and Intervenor-Plaintiff-Appellant Tammy Auer at 35, United States v. City of New York, 359 F.3d 83 (2d Cir. 2004) (No. 02-6102(L), *available at* http://www.nowldef.org/html/courts/colon.pdf.

125. *Id.* 143 CONG. REC. S6144-S6145 (daily ed. June 25, 1997).

126. Congressman Pete Stark, *Work Without Worker Protections and Minimum Wage Defeats the Point*, http://www.house.gov (July 30, 1998).

> If we want to signal that we expect welfare recipients to move into the workplace—and we must—we must demonstrate that it pays to work. The

TANF reforms, Senators Bayh and Carper introduced legislation that would explicitly provide Title VII protection to TANF beneficiaries.[127] More broadly, the amendment would ensure that TANF beneficiaries are not denied the protections of federal, state or local workplace laws.[128] The proposed amendment specifically provides:

> (b) APPLICATION OF WORKPLACE LAWS TO WELFARE RECIPIENTS – Notwithstanding any other provision of law, workplace laws, including . . . Title VII of the Civil Rights Act of 1964 . . . shall apply to any individual who is a recipient of assistance under the temporary assistance to needy families program . . . in the same manner as such laws apply to other workers. The fact that an individual who is a recipient of assistance under the temporary assistance to needy families program is participating in, or seeking to participate in work activities under that program in satisfaction of the work activity requirements of the program, shall not deprive the individual of the protection of any Federal, State or local workplace law.[129]

Senator Rockefeller has also introduced legislation in both 2002 and 2003 that includes the same language.[130] Furthermore, Senators Wellstone, Kennedy and Corzine introduced a "HELP" letter that would codify the U.S. Department of Labor's determination that TANF beneficiaries are protected by the same workplace laws that apply to other workers.[131] Twenty-four Democratic senators, including members of the Health, Education, Labor and Pensions Committee, endorsed this "HELP" letter.[132]

> best way to do that is to provide a livable wage and decent working conditions, as we demand for all other workers, not by giving welfare recipients the badge of second class citizenship . . . [W]e must protect welfare workers from discrimination in the workplace. Participants who risk losing vital benefits if they do not go to work already face discriminating barriers that limit their job opportunities.

Id.

127. S. 2524, 107th Cong. (2002).

128. NOW Legal Defense and Education Fund, *Welfare Reauthorization 2002 Side-by-Side Comparison of Senate Proposals, available at* http://www.legalmomentum.org/issues/wel/WelfareSideBySide2002.pdf (last visited Apr. 5, 2004).

129. S. 2524, 107th Cong. § 112(b) (2002).

130. S. 2052, 107th Cong. § 603(b) (2002); S. 367, 108th Cong. § 603(b) (2003).

131. NOW Legal Defense and Education Fund, *Welfare Reauthorization 2002 Side-by-Side Comparison of Senate Proposals* 13, *available at* http://www.legalmomentum.org/issues/wel/welfaresidebyside2002.pdf (last visited Apr. 5, 2004).

132. Shawn Fremstad, *et al.*, Center for Law and Social Policy (CLASP) and Center on Budget and Policy Priorities, *Summary Comparison of TANF Reauthorization Provisions: Bills Passed by Senate Finance Committee and the House of Representatives, and Related Proposals* 1 (July 2, 2002), *available at* http://www.wrahc.org/publications/7-2-02tanf.pdf.

Therefore, the PRWORA and related legislation are somewhat unclear as to whether Title VII should apply to workfare participants. Congress must adopt legislation that explicitly provides this protection to workfare participants so that the ambiguity can be resolved. In the meantime, workfare participants will have to rely on the court's interpretation of the term, employee, to be protected under Title VII.

III. IS A WORKFARE PARTICIPANT AN EMPLOYEE?

A. AGENCY SUPPORT FOR TITLE VII TO APPLY TO WORKFARE PARTICIPANTS

Various administrative agencies have issued pronouncements stating that Title VII should protect workfare participants provided these workers are employees under Title VII. While the pronouncements of these administrative agencies are not controlling upon the courts, the courts can rely on agency rulings for guidance. As the U.S. Supreme Court said in *Skidmore v. Swift & Co.*, "[These pronouncements] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[133]

According to the EEOC, the agency charged with enforcing Title VII, "Welfare recipients participating in work related activities are protected by the federal anti-discrimination statutes if they are 'employees' within the meaning of the federal employment discrimination laws."[134] The analysis to determine coverage for workfare employees should be "the same analysis which is used to determine whether any worker is covered by the federal employment discrimination laws."[135] The fact that the employer does not pay the employee a salary is not determinative of whether there is an employment relationship.[136] In fact, in 1999, the EEOC determined that New York City's Human Resources Administration violated Title VII when it did not notify workfare participants of their rights under Title VII and did not provide a method for workfare participants to file a complaint under Title VII.[137]

Furthermore, the Office of Civil Rights of the U.S. Department of Health and Human Services, who is charged with enforcing certain provisions of the PRWORA, has issued guidelines stating that all federal anti-discrimination laws apply to welfare beneficiaries who are in an

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

134. *Enforcement Guidance: Application of EEOC Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, EEOC Notice Number 915.002, *available at* http://www.eeoc.gov/policy/docs/conting.html (Dec. 3, 1997).

135. *Id.*

136. *Id.*

137. Nina Bernstein, *City Must Shield Workfare Force on Harassment*, N.Y. TIMES, Oct. 1, 1999, at A1.

employment relationship "where the employer has the right to control the 'means and manner' of the individual's work, whether or not the employer pays the individual's salary."[138] "Federal civil rights laws, including . . . Title VII of the Civil Rights Act of 1964 . . . continue to apply to States and other recipients that provide funds, employment, training, food stamps and other benefits under the PRWORA."[139] Similarly, according to a guidance issued by the U.S. Department of Labor, who is also charged with enforcing provisions of the PRWORA, "Federal employment laws, such as . . . anti-discrimination laws, apply to welfare recipients as they apply to other workers. The new welfare law does not exempt welfare recipients from these laws."[140]

Although these pronouncements support the position that workfare participants should be considered employees for purposes of Title VII, "these pronouncements are not as clear cut as they seem. These administrative rulings tend to guarantee participants in workfare programs the same level of protections as others who can establish an 'employment' relationship protected under the federal statutes."[141] However, in order to determine if an employment relationship exists, the court must apply a fact-specific analysis to determine whether there is direct evidence that retaliation was a motive for any adverse actions.[142] Thus, unless Congress explicitly states that Title VII applies to workfare participants, a workfare participant will still need to convince a court via some evidence that she is an employee under Title VII before she can receive Title VII protection.

B. WHO IS AN EMPLOYEE?

The question remains whether a workfare participant is an "employee" under Title VII. To determine if someone is an employee, the courts first look at the definition of employee under the applicable

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138. *Technical Assistance for Caseworkers on Civil Rights Law and Welfare Reform,* OCR Guidance (Aug. 27, 1999), *available at* http://www.hhs.gov/ocr/ta4.htm (last revised Aug. 30, 1999); 45 C.F.R. § 260.35 (West 2004); 64 Fed. Reg. 17,881 (Apr. 12, 1999).

139. U.S. Department of Heath and Human Services, *Technical Assistance for Caseworkers on Civil Rights Laws and Welfare Reform, at* http://www.hhs.gov/ocr/tal.htm (last revised Aug. 30, 1999).

140. U.S. Department of Labor, *How Workplace Laws Apply to Welfare Recipients, at* http://www.dol.gov/asp/w2w/welfare.htm#HOW (May 1997 (Rev'd Feb. 29, 1999)) [hereinafter *Workplace Laws*]. The guidance does state that it "is for general information and should not be considered in the same light as statements of position contained in Interpretative Bulletins published in the Federal Register and the Code of Federal Regulations, or in official opinion letters of the Department of Labor." *Id.*

141. *Employment Rights, supra* note 19, at 2. For example, the Department of Labor states, "Welfare recipients in 'workfare' arrangements, which require recipients to work in return for their welfare benefits, must be compensated at the minimum wage if they are classified as 'employees' under the FLSA's broad definition." *Workplace Laws, supra* note 140.

142. EEOC Directives Transmittal No. 915.003, at § 8-III(1), *available at* http://www.eeoc.gov/policy/docs/retal.html (May 20, 1998).

statute.[143] Title VII merely defines an employee as someone who is "employed by an employer."[144] An employer is defined 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."[145] Because the statute does not provide a clear definition of the term "employee," the courts apply a fact-based inquiry to determine if someone is an employee under Title VII. First, a court will determine if an employment relationship exists between the alleged employer and the alleged employee. Once an employment relationship has been established, the court will apply one of three tests to determine if the worker is an employee.[146]

When analyzing an alleged employment relationship, the courts are careful to apply the factors without relying heavily on the labels the parties place on the work relationship.[147] Although the courts consider the intent of the parties, intent is not controlling because the courts will not allow workers to contract out of Title VII protections.[148] Furthermore, by looking at the relationship rather than just the labels attached to the relationship, courts are protecting workers with weak bargaining power against manipulation by employers. "If labels trumped, employers could escape their Title VII obligations by unilaterally declaring payment not to be 'compensation,' or by conditioning the opportunity to work on a worker's stipulation that the job was something other than 'employment.'"[149] For example, in *Vizcaino v. Microsoft Corporation*, the Ninth Circuit held that it did not matter that workers had signed a contract stating that they were independent contractors.[150] The court said that it needed to look at the actual employment relationship.[151] Likewise, in *Tony & Susan Alamo Foundation v. Secretary of Labor*, the Supreme Court found an employment relationship where the "employees" did not consider

143. Armbruster v. Quinn, 711 F.2d at 1339 (6th Cir. 1983). *See also Employment Rights*, *supra* note 19, at 15.

144. 42 U.S.C.A. § 2000e(f) (West 2004).

145. 42 U.S.C.A. § 2000e(b) (West 2004).

146. *See* Owens v. S. Dev. Council, Inc., 59 F. Supp. 2d 1210, 1214 (M.D. Ala. 1999) ("[F]or an individual to be an 'employee' under Title VII, the 'payroll method' and the traditional agency-law definition of 'employee' must be satisfied. The failure to satisfy either element precludes a finding that an individual is an 'employee.'") Under the "payroll method" a person is an employee if she appears on the alleged employer's payroll. *See* Walters v. Metro. Educ. Enter., Inc., 519 U.S. 202, 206 (1997).

147. Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 292-94 (1985) (holding that "associates" were employees under the FLSA because they participated in activities in exchange for compensation).

148. Spirides v. Reinhardt, 613 F.2d 826, 832 (D.C. Cir. 1979). *See also* McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir. 1972); Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 117 (2d Cir. 2000); *Tony & Susan Alamo Found.*, 471 U.S. at 302.

149. Brief of Amici Curiae AFL-CIO and New York State AFL-CIO, et al. in support of Appellants and Urging Reversal, at 19, United States v. City of New York, 359 F.3d 83 (2d Cir. 2004) (No. 02-6102(L)), *available at* http://www.nelp.org/docuploads/pub172.pdf.

150. Vizcaino v. Microsoft Corp., 97 F.3d 1187, 1198 (9th Cir. 1996).

151. *Id.*

themselves to be employees, and they did not receive cash payments for their work because the employees received benefits, including food, clothing and shelter, for their work.[152] Similarly, in *Donovan v. New Floridian Hotel*, the Eleventh Circuit said that whether or not the parties intended to establish an employment relationship is not relevant; "it is sufficient that one person suffer or permit (another) to work."[153] Therefore, it is important to look at the realities of the relationship rather than the definitions used by the parties.

1. ESTABLISHING AN EMPLOYMENT RELATIONSHIP

a. THE REMUNERATION REQUIREMENT

The court must first establish that an employment relationship exists between the putative employer and the putative employee.[154] To do this, various courts have required the alleged employee to establish that she receives remuneration from the alleged employer.[155] The plaintiff must show that the employer is compensating her for the work she is performing.[156]

Remuneration is an element of an employment relationship because Title VII does not protect volunteers who do not receive

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152. *Tony & Susan Alamo Found.*, 471 U.S. at 292, 301.

153. Donovan v. New Floridian Hotel, 676 F.2d 468, 471 (11th Cir. 1982).

154. Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990) (holding that there was no employment relationship because there was no compensation flowing from the organization to its members, and the members had no duty of service to the organization. "Compensation by the putative employer to the putative employee in exchange for [her] services . . . is an essential condition to the existence of an employer-employee relationship."); *see also* Owens v. S. Dev. Council Inc., 59 F. Supp. 2d 1210, 1214 (M.D. Ala. 199) ("In order for an individual to be an 'employee,' . . . she must have an 'employment relationship' with her employer.").

155. *See* O'Connor v. Davis, 126 F.3d 112, 115-16 (2d Cir. 1997) ("[A] prerequisite to considering whether an individual is [an employee or an independent contractor] under common-law agency principles is that the individual have been hired in the first instance. That is, only where a 'hire' has occurred should the common-law agency analysis be undertaken."), *cert. denied*, 522 U.S. 1114 (1998); *see also* Llampallas v. Mini-Circuits Lab, Inc., 163 F.3d 1236, 1243 (11th Cir. 1998) ("[O]nly individuals who receive compensation from an employer can be deemed 'employees' under the statute."); Walters v. Metro. Educ. Enter., Inc., 519 U.S. 202, 206 (1997) (holding that the "payroll method" should be used to determine if someone has an employment relationship with an employer). An employment relationship is found if the person appears on the employer's payroll. *Id.*

156. *O'Connor*, 126 F.3d at 115-16 (citing *Graves*, 907 F.2d at 73 ("Where no financial benefit is obtained by the purported employee from the employer, no 'plausible' employment relationship of any sort can be said to exist because although 'compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, . . . it is an essential condition to the existence of an employer-employee relationship."). *See also* Haavistola v. Cmty. Fire Co., 63 F.3d 211, 220 (4th Cir. 1993) (holding that a volunteer firefighter was an employee because she received some benefits in connection with her volunteer position); *O'Connor*, 126 F.3d at 115-16 (holding that a hospital intern was not an employee because she did not receive remuneration from the hospital where she worked). The payment she received was through the work-study program at her college. *Id.*

economic rewards in connection with their positions. For example, the Tenth Circuit in *McGuinness v. University of New Mexico School of Medicine*, found that a medical student was not an employee of the school unless he received remuneration for the work he performed.[157] His education alone did not satisfy this requirement.[158] Similarly, the Eighth Circuit held that a graduate student researcher was not an employee because Title VII does not protect volunteers who donate their labor for an educational experience but who do not receive economic rewards.[159] The court did not support the plaintiff's argument that the research she obtained for her dissertation was compensation.[160] Likewise, the Second Circuit in *O'Connor v. Davis* determined that a college intern working at a hospital was not an employee because she was not hired by the hospital, and she did not receive compensation from the hospital for her services.[161] Instead, the school paid her compensation.[162]

Similar to volunteers, trainees are also not covered by Title VII. This is because the employer must also benefit from the employment relationship.[163] For example, in *St. Germain v. Simmons Airline*, the Northern District Court of Texas held that a flight attendant trainee was not an employee because "students do not perform any services for the airlines; consequently, their work cannot be an integral part of [their] business."[164]

The compensation received by the employee, however, does not need to be ordinary wages. An employment relationship can exist provided the employee receives benefits from the employer.[165] In *York v. Association of the Bar of the City of New York*, the Second Circuit Court of Appeals said that the question is whether the employee received a financial benefit such as a "salary or other wages; employee benefits, such as health insurance; vacation; sick pay; or the promise of any of the foregoing."[166] The Second Circuit in *Pietras v. Board of Fire*

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157. 170 F.3d 974, 979 (1998). *See also* Jacob-Mua v. Veneman, 289 F.3d 517, 521 (8th Cir. 2002); York v. Ass'n of the Bar of N.Y., 286 F.3d 122, 126 (2d Cir. 2002); *O'Connor*, 126 F.3d at 116.

158. *McGuinness*, 170 F.3d at 979.

159. *Jacob-Mua*, 289 F.3d at 521.

160. *Id.*

161. *O'Connor*, 126 F.3d at 115.

162. *Id.* at 113.

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

164. St. Germain v. Simmons Airline, 930 F. Supp 1144, 1147 (N.D. Tex. 1996).

165. Pietras v. Bd. of Fire Comm'rs, 180 F.3d 468, 473 (2d Cir. 1999) ("[T]he question of whether someone is or is not an employee under Title VII usually turns on whether he or she has received 'direct or indirect remuneration' from the alleged employer . . . [A]n employment relationship within the scope of Title VII can exist even when the putative employee receives no salary as long as he or she gets numerous job related benefits."). *See also* York v. Ass'n of the Bar of New York, 286 F.3d 122, 125 (2d Cir. 2002), *cert. denied*, 537 U.S. 1089 (2002); Haavistola v. Cmty Fire Co., 63 F.3d 211, 221-222 (4th Cir. 1993).

166. *York*, 286 F.3d at 125-26 ("In the absence of a clear contractual employer-employee relationship, a party claiming to be an employee under Title VII must come forward with substantial

Commissioners found that a volunteer firewoman could be considered an employee under Title VII because she received insurance and retirement benefits in exchange for her work.[167] Similarly, in *United States v. City of New York*, the Second Circuit said that the benefits the workfare participants received, including transportation and childcare expenses and eligibility for workers' compensation, were substantial benefits that satisfied the remuneration requirement.[168] However, the benefits received by the employee must be more than merely incidental to the job performed.[169] Therefore, a workfare participant would need to receive tangible benefits more than merely job experience in order to establish herself as an employee under this test.

Applying this remuneration analysis, many courts have found employment relationships where there is not an explicit employment contract or where the parties themselves do not view themselves as employer and employee.[170] Because only the Second Circuit Court of Appeals and the District Court for the Southern District of New York have addressed whether workfare participants are employees under Title VII, it is helpful to look at analogous situations. Those situations include prisoners in work-study programs, students in work-study programs, and workers that are supposedly employed by a temporary agency or other intermediary other than the agency where they work.[171]

For example, in *Baker v. McNeil Island Corrections Center*, the Ninth Circuit found that a prison inmate working in a prison library may be an employee under Title VII because the position paid a salary and provided training.[172] The court emphasized that the most important factor to be considered was "the extent of the employer's right to control the means and the manner of the worker's performance."[173] Similarly, in *Ivan v. Kent State University*, the Northern District of Ohio held that a graduate assistant was an employee under Title VII because the graduate student received a stipend for her work and "the economic realities of [the] graduate assistantship demonstrate that she was in a position to

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benefits not merely incidental to the activity performed in order to satisfy this Circuit's remuneration test.").

167. *Pietras*, 180 F.3d at 473.

168. 359 F.3d 83, 92 (2d Cir. 2004).

169. *York*, 286 F.3d at 126.

170. *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 301-02 (1985). *But see* Williams v. Stickland, 87 F.2d 1067, 1064 (9th Cir. 1996) (finding that a worker with the Salvation Army was not an employee under the FLSA because his "relationship with the Salvation Army was solely rehabilitative"). This was distinguished from the situation in *Tony & Susan Alamo Foundation* where the "associates' work contemplated both rehabilitation and compensation." *Williams*, 87 F.3d at 1067. The Salvation Army worker did not receive in-kind benefits from his work, but rather, received self-worth that did not qualify him as an employee. *Id.* at 1067.

171. *Employment Rights*, *supra* note 19, at 14-15.

172. Baker v. McNeil Island Corr. Ctr., 859 F.2d 124 (9th Cir. 1988). *See also* Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995).

173. *Baker*, 858 F.2d at 128.

suffer discriminatory treatment."[174] Likewise, in *Bagley v. Hoopes*, the District Court in Massachusetts held that work-study students are employees protected by Title VII because they received compensation for the services they rendered.[175] This compensation was paid through an agreement between the school and the federal government.[176] Even though the government paid the students and the students were working for the school, they were still found to be employees.[177]

Workfare participants receive remuneration for the work they perform. Although these workers receive welfare benefits, not a salary, "what determines 'employment' under Title VII is the receipt of remuneration for one's work, not the labels attached to that work or the guise in which the payment comes."[178] As discussed above, courts have found the remuneration test to be satisfied in unconventional employment relationships without ordinary wages.[179] In the workfare situation, there is a connection between the work performed and the benefits received. Welfare recipients are paid for the work that they do. They would not perform these jobs if they did not receive remuneration for the work. If they do not work, they are not paid. This is what should satisfy the remuneration requirement. Some courts, however, have found that welfare benefits are not remuneration. The Maine Supreme Court has held that "recipients of general assistance are not receiving remuneration for services. The work requirement has neither changed the nature of payments, nor made them subject to any other incidents of wages."[180]

Furthermore, even if a court finds the benefits are remuneration, the court may determine that the benefits are not coming from the agency where the workfare participant is actually working. For example, a workfare participant may be placed into a job where the city is paying the welfare benefits, but the worker is working for a non-city agency.

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174. Ivan v. Kent State Univ., 863 F. Supp. 581, 585-86 (N.D. Ohio 1994) (holding that cash payments were remuneration no matter how they were paid), *aff'd*, 92 F.3d 1185 (6th Cir. 1996). *But see* Pollack v. Rice Univ., 28 Fair Empl. Prac. Cas. 1273, 1274 (S.D. Tex. 1982) (holding that a rejected graduate student candidate was not an employee under Title VII where the services to be performed for remuneration were completely incidental to the scholastic program), *aff'd mem.*, 690 F.2d 903 (1982), *cert. denied*, 459 U.S. 1175 (1983). *See also* Marshall v. Regis Educ. Corp., 666 F.2d 1324, 1328 (10th Cir. 1981) (holding that resident assistants are not employees under the FLSA because considering the totality of the circumstances the "RA's at Regis were legally indistinguishable from athletes and leaders in student government who received student aid").

175. Bagley v. Hoopes, No. 81-1126-Z, 1985 WL 17643, at *4 (D. Mass. Aug. 6, 1985).

176. *Id.*

177. *Id. See also* Seattle Opera v. NLRB, 292 F.3d 757, 762, 765 (D.C. Cir. 2002) (holding that workers of opera were employees under the FLSA because they received an honorarium and the opera had the right to control the workers).

178. Brief of Amici Curiae AFL-CIO and NY State AFL-CIO, et al. in support of Appellants and Urging Reversal, at 6, United States of America v. City of New York, 359 F.3d 83 (2d Cir. 2004) (No. 02-6102(L)), *available at* http://www.nelp.org/docuploads/pub172.pdf.

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

180. Radvanovsky v. Maine Dept. of Manpower Affairs Employment Sec. Comm'n, 427 A.2d 961, 963 (Me. 1981).

Although the employer benefits from the workfare participant's work, the remuneration is not coming directly from the employer. In this situation, courts may be willing to find that the workfare participant has two employers, both the city paying the welfare and the agency where the participant is working. However, there is also a risk that a court might hold that the remuneration requirement was not met and find that the plaintiff has no claim under Title VII.

The Second Circuit Court's opinion in *United States v. City of New York* will have no impact on this determination because in that case the court was considering a workfare situation where the workfare participants were working for the same agency that paid their welfare benefits, namely the City of New York.[181] The Second Circuit did not address a welfare situation where the workfare participants worked for one organization but received welfare benefits from a different agency.

b. THE REMUNERATION REQUIREMENT AS APPLIED IN *UNITED STATES V. CITY OF NEW YORK*

In *United States v. City of New York*, on March 8, 2002, the District Court for the Southern District of New York declared that welfare benefits were not remuneration.[182] Therefore, according to this court, the workfare participants were not employees under Title VII.[183] For this reason, the District Court granted the City of New York's motion to dismiss the case on the grounds that there was no federal claim upon which relief could be granted.[184] On February 13, 2004, the Second Circuit Court of Appeals vacated and remanded the District Court's opinion and found that the workfare participants in question were in fact employees of the City of New York because they worked for the City of New York and the City of New York paid their welfare benefits.[185]

The U.S. Department of Justice[186] brought suit under Title VII against the City of New York on behalf of five women for sexual and

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181. United States v. City of New York, 359 F.3d 83, 94 (2d Cir. 2004).

182. United States v. City of New York, No. 01 CV 4604 (RCC) (S.D.N.Y. Mar. 8, 2002), *vacated and remanded by* United States v. City of New York, 359 F.3d 83 (2d Cir. 2004); Colon v. City of New York, No. 01 CV 8797, at 13 (LTS) (S.D.N.Y. Mar. 8, 2002), *vacated and remanded by* United States v. City of New York, 359 F.3d 83 (2d Cir. 2004).

183. *Id.*

184. *Id.* at 14.

185. *City of New York*, 359 F.3d at 94. In its opinion, the Second Circuit did comment that in addition to the welfare benefits, the workfare participants were receiving other substantial benefits in connection with their work such as transportation, childcare expenses and eligibility for workers compensation; the Second Circuit said these substantial benefits would satisfy the remuneration test articulated in O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997), *cert. denied*, 522 U.S. 1114 (1998), Pietras v. Bd. of Fire Comm'rs, 180 F.3d 468 (2d Cir. 1999), and York v. Ass'n of the Bar of the City of New York, 286 F.3d 122 (2d Cir.), *cert. denied*, 537 U.S. 1089 (2002). *City of New York*, 359 F.3d at 92.

186. In a statement before the Senate Judiciary Committee, Assistant Attorney General Ralph F. Boyd, Jr., said,

racial harassment they were subjected to while participating in the City's Work Experience Program that was set up under TANF.[187] These women were placed in clerical and maintenance jobs in certain New York City parks, offices and housing developments.[188]

The City of New York argued that these women were not entitled to bring a lawsuit under Title VII because they were not employees as defined by Title VII.[189] The City argued that the PRWORA and its statutory history demonstrate that Congress did not intend for Title VII to apply to sexual harassment claims of workfare participants.[190] In support of the City's position, a City representative said that Title VII should not apply because the City needs to protect taxpayers from Title VII claims of this type.[191] For these reasons, the plaintiffs should only be able to bring private law suits against their harassers.[192]

District Court Judge Richard Conway Casey granted the City's motion to dismiss and held that these women were not employees under Title VII.[193] Although the women did work for the city in exchange for their welfare benefits, they were not legal employees of the city.[194] The judge found it persuasive that the women were assigned to the city and were not hired by the city as are regular employees.[195] Furthermore, because their compensation was so low and their benefits were so small, they did not fall into the definition of an employee.[196] Although they received workers' compensation, it was not at the same level as salaried employees.[197] They also did not receive disability, survivors' benefits,

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> One of the new and precedent-setting cases filed by this Administration involves the application of Title VII to participants in workfare programs under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. In this case, the Division took the position that Title VII applied to women who were participants in workfare programs and who were allegedly subjected to sexual harassment. Although the district court disagreed with our position, I have authorized an appeal of this case to the United States Court of Appeals for the Second Circuit.

Statement by Ralph F. Boyd, Jr., Assistant Attorney General, Before the Committee on the Judiciary, United States Senate, Concerning Oversight of the Department of Justice, Civil Rights Division, U.S. Department of State (May 21, 2002).

187. *City of New York*, 359 F.3d at 87-89.

188. *Id.*

189. *Id.* at 90.

190. *Id.* at 90, 91.

191. Nina Bernstein, *City Must Shield Workfare Force on Harassment*, N.Y. TIMES, Oct. 1, 1999, at A1.

192. *Id.*

193. United States v. City of New York, No. 01 CV 4604 (RCC) (S.D.N.Y. Mar. 8, 2002), *vacated and remanded by* United States v. City of New York, 359 F.3d 83 (2d Cir. 2004); Colon v. City of New York, No. 01 CV 8797, at 10, 14 (LTS) (S.D.N.Y. Mar. 8, 2002), *vacated and remanded by* United States v. City of New York, 359 F.3d 83 (2d Cir. 2004).

194. *Id.* at 10.

195. *Id.* at 12.

196. *Id.* at 13. *See also* Jill Nelson, *These Women Work, But Aren't Protected*, USA TODAY, Mar. 22, 2002, at 15A.

197. United States v. City of New York, No. 01 CV 4604 (RCC) (S.D.N.Y. Mar. 8, 2002), *vacated and remanded by* United States v. City of New York, 359 F.3d 83 (2d Cir. 2004); Colon v.

group life insurance, or scholarships for their dependents at their death.[198] The court said that the cash payments, workers' compensation and other benefits received by the women did not qualify as remuneration because "[e]very benefit plaintiffs received resulted from their status as welfare recipients."[199] Furthermore, even though their welfare benefits would be cut off if they did not perform their work requirements, the court was persuaded by the fact that workfare participants would still receive benefits for any dependent children.[200] Therefore, the District Court for the Southern District of New York found that these women did not satisfy the remuneration requirement, and they were not employees under Title VII.[201]

The Second Circuit Court of Appeals vacated the judgment of the district court.[202] The Second Circuit disagreed with the district court's opinion that the workfare participants were not "hired" because they did not receive payment for their work.[203] Instead, the Second Circuit found that the workfare participants received substantial benefits as a result of their work that would satisfy the remuneration requirement.[204] Because each workfare participant needed to work to receive her share of her family's welfare grant, "[a] functional commonsense assessment of the plaintiffs' alleged relationship with the city results in the conclusion that they were employees."[205] In addition, the workfare participants received benefits such as eligibility for workers' compensation and reimbursement for travel expenses because of the work they performed.[206] These benefits were not received because the women were welfare recipients; these benefits were received because these women worked in city agencies.[207]

In *United States v. City of New York*, the Second Circuit Court of Appeals found that the workfare participants received remuneration from their employer because the entity that was paying the welfare benefits

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City of New York, No. 01 CV 8797, at 13 (LTS) (S.D.N.Y. Mar. 8, 2002), *vacated and remanded by* United States v. City of New York, 359 F.3d 83 (2d Cir. 2004).

198. *Id.* It is interesting to note that the Bureau of Labor found that in 2003, 49% of blue-collar workers in private industry had no health insurance and 16% had no paid vacation. Bureau of Labor, *Employee Benefits in Private Industry, 2003*, *at* http://bls.gov-/news.release/ebs2.to3.html (last modified Dec. 16, 2003). Thus, the fact that the workfare participants did not receive scholarships for their dependents upon death should hardly justify the court stating that did not receive adequate compensation to qualify as employees.

199. United States v. City of New York, No. 01 CV 4604 (RCC) (S.D.N.Y. Mar. 8, 2002), *vacated and remanded by* United States v. City of New York, 359 F.3d 83 (2d Cir. 2004); Colon v. City of New York, No. 01 CV 8797, at 13 (LTS) (S.D.N.Y. Mar. 8, 2002), *vacated and remanded by* United States v. City of New York, 359 F.3d 83 (2d Cir. 2004).

200. *Id.*

201. *Id.*

202. United States v. City of New York, 359 F.3d 83 (2d Cir. 2004).

203. *Id.* at 92.

204. *Id.*

205. *Id.*

206. *Id.*

207. *City of New York*, 359 F.3d at 83.

was the same entity that was receiving the benefit of the women's work.[208] The City of New York paid the welfare benefits to the women, and the women worked in city-owned facilities.[209] Therefore, in this case, the remuneration received by the women, although called welfare benefits, was payment from the employer to the employee for the work that was performed. As discussed in Section B(1)(a) above, satisfying the remuneration requirement is more difficult in situations where the workfare participant is working for a private entity and the city is paying the welfare benefits.

2. DETERMINING IF A WORKER IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR

Once a court has determined that an employment relationship exists, the court will apply one of three tests to determine if a worker is an employee under Title VII. These tests are: (1) the common-law agency test as applied, for example, by the U.S. Supreme Court in *Community for Creative Non-Violence v. Reid*[210] and *Nationwide Mutual Insurance Co. v. Darden*;[211] (2) the hybrid economic realities/common-law test as applied, for example, by the D.C. Circuit Court in *Spirides v. Reinhardt*;[212] and (3) the economic realities test as applied, for example, by the Sixth Circuit in *Armbruster v. Quinn*.[213]

Recent Supreme Court decisions make it clear that the Supreme Court believes that the common-law agency test is the appropriate test to apply in situations like Title VII where the statute does not provide guidance in construing the meaning of the term, "employee."[214] As the

208. *Id.* at 94.

209. *Id.*

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

211. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 118 (1992).

212. Spirides v. Reinhardt, 613 F.2d 826 (D.C. Cir. 1979).

213. Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983).

214. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (holding that in cases where the statutory definition of employee is circular and the statute does not give any other guidance as to how the term should be applied, the common-law test of agency should be used). In *Darden*, the Supreme Court was applying the term, "employee," under ERISA, which uses the same definition as Title VII. 29 U.S.C. § 1002(6). The Supreme Court rejected its prior holdings in NLRB v. Hearst Publications, 322 U.S. 111, 120 (1944), and United States v. Silk, 331 U.S. 704, 713 (1947), in which the Supreme Court had applied an economic realities-type test and defined employee "in light of the mischief to be corrected and the end to be attained." *Darden*, 503 U.S. at 325 (citing *Silk*, 331 U.S. at 713, quoting *Hearst*, 322 U.S. at 124). The Supreme Court overturned these prior decisions because it said that Congress had amended the applicable statute after each court decision to show that the common-law meaning was what it had intended as opposed to the Court's definition that was broader than common law. *Darden*, 403 U.S. at 324-25. *See also* Walters v. Metro. Educ. Enter., Inc., 519 U.S. 202, 211 (1997) (suggesting that the common law agency test should be applied to find an employment relationship under 42 U.S.C. § 2000e(b)). The Supreme Court applied the same reasoning more recently in Clackamas Gastroenterology Assoc., P.C. v. Wells, 123 S. Ct. 1673, 1675 (2003), where the Court applied the common-law agency test to determine if the plaintiff was an employee under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101-02 , which also does not provide guidance on the definition of the term, "employee."

Supreme Court said in *Reid*, "In the past, when Congress used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."[215] Furthermore, although the Supreme Court did not explicitly state that the common-law agency test from *Reid* and *Darden* is the appropriate test for a Title VII inquiry, in *Walters v. Metropolitan Educational Enterprises, Inc.*,[216] the Supreme Court suggested that the common-law agency test from *Darden* would be the correct test to apply to determine if a person was an employee under Title VII. Therefore, it seems certain that the common-law agency test should govern Title VII decisions. Even without an explicit determination from the Supreme Court, lower courts, including the Second Circuit Court of Appeals in *United States v. City of New York*, have been applying the common-law test for Title VII inquiries since *Darden*.[217]

a. COMMON-LAW AGENCY TEST

The Supreme Court articulated the factors of the common-law agency test in *Community for Creative Non-Violence v. Reid*.[218] In *Reid*, the Supreme Court used the common-law agency test to determine if a sculptor was an employee or an independent contractor under the Copyright Act of 1976, 17 U.S.C. §101 and 201(b).[219] In *Reid*, the Supreme Court considered the factors set forth in the Restatement (Second) of Agency and articulated the following factors:

> (1) the hiring party's right to control the manner and means by which the product is accomplished . . .; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship

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215. *Reid*, 490 U.S. at 739-40. *See also Darden*, 503 U.S. at 322-23.

216. *Walters*, 519 U.S. at 211.

217. *See* Wilde v. County of Kandiyohi, 15 F.3d 103, 105-06 (8th Cir. 1994). If the economic realities test is applied, it will result in coverage of more people than are allowed through the agency test set forth in *Darden*. *See also* Simpson v. Ernst & Young, 850 F. Supp. 648, 655 (S.D. Ohio 1994) ("Because ADEA, Title VII, and AWDA also lack FLSA's 'expansive' definition of the verb 'employ,' *Darden* indicates that the Sixth Circuit's use of the economic reality test in employment discrimination cases may be in error."); Frankel v. Bally, Inc., 987 F.2d 86, 90 (2d Cir. 1993) ("Since the ADEA does not contain this expansive definition of the term 'employ,' *Darden* mandates the application of the common-law agency test.").

218. *Reid*, 490 U.S. 730 (1989).

219. *Id.*

> For the purposes of [Title VII], a decision on whether a worker is an "employee"—or whether he or she is merely and independent contractor—requires the application of the common-law of agency . . . In turn, whether a hired person is an employee under the common-law of agency depends largely on the thirteen factors articulated by the Supreme Court in *Reid*.

Eisenberg v. Advance Relocation & Storage, Inc., 237 F.2d 111, 113-14 (2d Cir. 2000).

> between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party.[220]

In making the termination, none of the factors alone is determinative and only the relevant factors should be considered.[221] When applying these factors, the Second Circuit in *Eisenberg* stated that the first factor, namely the hiring party's right to control the manner and means of employment, should be given the most weight.[222]

b. APPLYING THE COMMON-LAW AGENCY TEST TO A WORKFARE PARTICIPANT

Assuming a workfare participant can establish an employment relationship, the court will then apply the factors of the common-law agency test to determine if she is an employee. Although each situation will be factually different, there are some characteristics that many workfare placements share.

With respect to the first factor of the common-law agency test, the hiring party's right to control the manner and means of the labor, the agency where the participant is working will most likely control the means and manner of the work completed. Often a supervisor or other manager at the workplace will dictate what work the worker does and how the job will be performed. With respect to the second factor, the skill required, this will depend on the particular placement and the worker's qualifications. With respect to the third and fourth factors, the source of the instrumentalities and the location of the work, usually the agency where the workfare participant is working will control the work environment including the equipment that is used and any safety aspects. With respect to the fifth factor, the duration of the relationship between the parties, the welfare agency probably controls that factor, unless there is a job performance issue. With respect to the sixth and seventh factors, the hiring party's right to assign additional projects and the hired party's discretion over when to work, the agency controls the work assigned and

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220. *Reid*, 490 U.S. at 751-52.

221. *Id.* at 752.

222. Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 114 (2d Cir. 2004). ("[C]ourts ordinarily should place particular weight on the extent to which the hiring party controls the manner and means by which the worker completes her assigned tasks, rather than on how she is treated for tax purposes or whether she receives benefits." *Id.* at 112.)

when the work should be completed. The eighth factor, the method of payment, is not controlled by the agency since the participant receives welfare benefits for the work she performs. The ninth factor, the hired party's role in hiring and paying assistants, is most likely not relevant to most workfare placements. The tenth factor, whether the work is part of the regular business of the hiring party, is satisfied in the workfare context. This is demonstrated by the fact that workfare participants are replacing regular employees in the workforce. The eleventh factor, whether the hiring party is in business, is not relevant to workfare. The twelfth and thirteenth factors, the provision of employee benefits and the tax treatment of the hired party, weigh against a workfare participant being defined as an employee. As a result, the common-law test is more difficult for a worker to satisfy than the economic realities test, which is discussed below. Although a court may determine that a workfare participant satisfies the test and is an employee under Title VII, Congress should enact legislation to ensure that all workfare participants receive Title VII protection.

c. OTHER TESTS THAT COURTS HAVE APPLIED

i. ECONOMIC REALITIES/RIGHT TO CONTROL TEST

The economic realities/right to control hybrid test applies common-law agency principles to the economic realities test. In other words, the courts "weigh the 'economic realties' of the relationship, with the primary emphasis placed upon the degree of control exercised over the alleged employee."[223] The test examines whether the employer has "the right to control the manner and means by which the product is accomplished."[224] This test, as articulated by the D.C. Circuit Court in *Spirides*, considers all aspects of the relationship.[225] The most important factor to be considered is the extent to which the employer controls the employee.[226] The other factors to be considered are:

> (1) the kind of occupation, with reference to whether the work is usually 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

223. Norman v. Levy, 767 F. Supp. 1441, 1444 (N.D. Ill. 1991) (citing Spirides v. Reinhardt, 613 F.2d 826, 831-32 (D.C. Cir. 1979)).

224. *Reid*, 490 U.S. at 751.

225. *Spirides*, 613 F.2d at 831.

226. *Id.*

> during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated, *i.e.* by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.[227]

A number of courts have held that the hybrid test is basically the same as the common-law agency test established by the Supreme Court in *Reid*.[228] This is because the Supreme Court in *Reid* added additional economic factors to the common-law agency test.[229] Since these tests arguably have the same outcome, a court that finds a workfare participant to be an employee under the hybrid test would likely find the same result under the common-law test. Similarly, if a court finds that a workfare participant is not an employee under the hybrid test, the same result is likely under the common-law test.

ii. ECONOMIC REALITIES TEST

The economic realities test is the easiest test for a plaintiff to satisfy because it applies a broad definition of the term "employee." The economic realities test focuses on the remedial purpose of the statute. A worker is an employee if "as a matter of economic reality, [she] is dependent upon the business to which [she] render[s] service."[230] Under this test, Title VII applies to any person who is "in a position to suffer the harm the statute is designed to prevent, unless specifically excluded. Were there any doubt or ambiguity in the matter, we would resolve it in favor of coverage."[231] The factors that are considered in the economic realities test are: (1) who has the power to hire and fire the worker; (2)

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227. *Id.* at 832.

228. *See* Lambertsen v. Utah Dep't of Corrections, 79 F.3d 1024 (10th Cir. 1996) (The Second, Eighth, Ninth and Tenth Circuits have held that there "is little discernible difference between the hybrid [approach] and the common-law agency [approach]." *Id.* at 1028, quoting Frankel v. Bally, 897 F.2d 86, 90 (2d Cir. 1993)). *See also* Wilde v. County of Kandiyohi, 15 F.3d 103, 106 (8th Cir. 1994) ("We see no significant difference between the hybrid test and the common-law test articulated by the Supreme Court in *Darden* . . . Under both tests, all aspects of the working relationship are considered.").

229. *Wilde*, 15 F.3d at 106.

230. Hickey v. Arkla Indus. Inc., 699 F.2d 748, 751 (5th Cir. 1983) (citing Mednick v. Albert Enterprises, Inc., 508 F.2d 297 (5th Cir. 1975), quoting Bartels v. Birmingham, 332 U.S. 126 (1947)).

231. Armbruster v. Quinn, 711 F.2d 1332, 1341 (6th Cir. 1983). "[O]ne must examine the economic realities underlying the relationship between the individual and the so-called principal in an effort to determine whether an individual is likely to be susceptible to the discriminatory practices that the act was designed to eliminate." *Id.* at 1340.

who controls the worker's schedule; (3) who determines the rate and method of pay; and (4) whether or not employment records are maintained.[232]

Because the economic realities test is so inclusive, it would be relatively easy for a workfare participant to argue that she was an employee under Title VII.[233] Workfare participants are clearly in a position where they are subjected to the type of harm that Title VII was intended to prevent. Therefore, when the Supreme Court in its *Reid*, *Darden*, and *Wells* decisions stated that the economic realities test is not the appropriate test to apply in situations where Congress has not defined the term employee, the Supreme Court made it more difficult for a workfare participant to argue successfully to a court that she is an employee under Title VII.[234]

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232. *Employment Rights*, *supra* note 19, at 14. In Knight v. United Farm Bureau Mutual Insurance, 950 F.2d 377, 378-79 (7th Cir. 1991), the Seventh Circuit articulated the factors to be:

> (1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work; (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace; (3) responsibility for the costs of operation . . .; (4) method and form of payment and benefits; and (5) length of job commitment and/or expectations.

233. *But see* Johns v. Stewart, 57 F.3d 1544, 1558 (10th Cir. 1995) where the court applied a variation of the economic realties test and held that workfare participants are not employees under the FLSA. The Tenth Circuit defined the relationship between the workfare participants and the government as an assistance relationship rather than an employment relationship. *Id.* at 1558. The court was also persuaded by the fact that the workfare participants did not go through the same application process and were not paid through the state payroll. *Id* They applied for public assistance, not the job itself, and taxes were not withheld from their paychecks. *Id.* The court followed its earlier holding in Klaips v. Bergland, 715 F.2d 477, 483 (10th Cir. 1983), where the court had found that workfare participants are not employees and therefore were not entitled to benefits under the Food Stamp Act of 1964, 7 U.S.C. § 2011-36. In making this decision, the court considered the fact that workfare participants did "not receive the same salary, safe working conditions, job security, career development, Social Security, pension rights, collective bargaining or grievance procedures as do the actual employees." *Klaips*, 715 F.2d at 483. In addition, the court followed its holding in Marshall v. Regis Educ. Corp., 666 F.2d 1324 (10th Cir. 1981), in which the court held that student workers were not employees under the FLSA because looking at the totality of the circumstances, the primary relationship was one of education, not employment. *Id.* at 1327-28.) *See* United States v. City of New York, 359 F.3d 83, 94 (2d Cir. 2004) (declining to follow *Johns* because *Johns* was not a Title VII case, the plaintiffs in *Johns* may not have received the same benefits as the plaintiffs in United States v. City of New York, and *Johns* mistakenly held that a person could not be both a welfare recipient and an employee).

234. The economic realities test is still used by the court to determine if a worker is an employee under the Fair Labor Standards Act (FLSA), 29 U.S.C.A. § 203(e)(1) (West 2004). The reason Title VII uses a different standard than the FLSA

> is that there is no statement in the [Civil Rights] Act or legislative history of Title VII comparable to one made by Senator Hugo Black (later Justice Black) during the debates on the Fair Labor Standards Act, that the term "employee" in the FLSA was given "the broadest definition that has ever been included in any one act." 81 Cong. Rec. 7657.

Cobb v. Sun Papers, Inc., 673 F.2d 337, 340 (11th Cir. 1982). *See also Knight*, 950 F.2d at 380 ("[T]he definition of 'employee' is given a broader interpretation under the FLSA than under Title VII.").

C. MULTIPLE EMPLOYERS

Based on the tests applied by the courts, it is possible that a workfare participant may be found to have multiple employers. Typically, the employer is the entity where the participant is working. In a workfare situation, however, the employee may have two employers, namely the state or city agency as well as the actual place where she is working.[235] This is because work assignments are controlled both by the welfare agency and the actual work placement.[236]

In workers' compensations cases, for example, courts have found workfare participants to be employees and to have multiple employers. In *Kemp v. City of Hornell*, the court held that both the City and the County were liable for the workfare participant's workers' compensation claim.[237] In this case, the County administered the workfare program and paid the welfare benefits, however, the workfare participant was working for the City at the time of his accident. The court found the City partially responsible.

> Candidates for workfare jobs were selected by the City from a pool of workfare participants . . . [and] besides controlling claimant's day-to-day activities, the City chose and completely controlled the worksite, determined claimant's work assignments and provided him with tools and materials. Further, jointly with the County, the City retained the right to terminate the employment of any workfare participant.[238]

Thus, even though the County paid the benefits, the City was partially responsible for the worker's claim.

Similarly, in *County of Los Angeles v. Workers' Compensation Appeals Board*, the California Supreme Court found that a workfare participant was an employee under the California Workers' Compensation Act.[239] The court found that "a workfare recipient is in a position no different from that of any other employee covered by workers' compensation. He or she performs services in order to earn a living, and encounters all of the risks of employment faced by other employees."[240] "It seems much more reasonable to distinguish between those who work for their support and those who do not work for their

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235. *Employment Rights*, *supra* note 19, at 15.

236. NOW Legal Defense and Education Fund, *Welfare & Poverty: Civil Rights Law and Welfare*, http://www.nowlegaldefense.org (1999).

237. Kemp v. City of Hornell, 672 N.Y.S.2d 537, 538 (N.Y. App. Div. 1998).

238. *Id.*

239. County of Los Angeles v. Workers' Comp. Appeals Bd., 637 P.2d 681, 690 (Cal. 1982).

240. *Id.*

support than to distinguish between laborers engaged in the same work, [and] paid at the same rate . . . ."[241] The court stated that both the County and the School District where the worker worked would be jointly liable for the workfare participant's workers' compensation claim because both of them controlled his work.[242] Two New York state court cases also support the idea that a workfare participant could be an employee of the agency where she was working depending on "the right to control, the method of payment, the right to discharge and the relative nature of the work."[243]

Furthermore, the liable employer under Title VII does not necessarily have to be the employer of the plaintiff in question. Title VII provides remedies to all "persons aggrieved." It does not apply solely to those with a direct employment relationship.[244] A "person aggrieved" includes those "who do not stand in a direct employment relationship with an employer."[245] "The use in 42 U.S.C. § 2000e-5 of the language 'a person claiming to be aggrieved' shows a congressional intention to define standing as broadly as is permitted by Article III of the Constitution."[246]

In *Sibley Memorial Hospital v. Wilson*, the D.C. Circuit Court found that a private duty nurse who was placed into the hospital through a private agency was an employee under Title VII.[247] The hospital had argued that he was not an employee of the hospital because he was placed with patients in the hospital by an agency, not by the hospital itself.[248] The court, however, took an expansive definition of "employer" because "one of Congress' main goals was to provide equal access to the job market for both men and women."[249] The court determined that the private duty nurse had two employers in this case, namely the agency that had placed him with the patient and the hospital.[250] The court held that the nurse was an employee of the hospital for purposes of Title VII

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241. *Id.* at 687 (quoting Indus. Comm'n of Ohio v. McWhorter, 193 N.E. 620, 622-23 (Ohio 1934)).

242. *County of Los Angeles*, 637 P.2d at 690.

243. Adams v. Ostego County Dep't of Soc. Serv., 702 N.Y.S.2d 698, 698 (N.Y. App. Div. 2000). *See also* Quick v. Steuben County Self-Insurance Plan, 662 N.Y.S.2d 608, 610 (N.Y. App. Div. 1997) (holding that the County was the primary employer and thus responsible for the payment of workers' compensation benefits for a workfare participant placed at the Salvation Army. The court considered "the right to control, the method of payment, the furnishing of equipment, the right to discharge and the relative nature of the work" in its determination.) *But see* Alcozer v. N. County Food Bank, 635 N.W.2d 695, 702 (Minn. 2001) (holding that a workfare participant was not an employee of the agency where he worked for purposes of Minnesota's workers' compensation laws because he had not sought employment with the agency and the agency did not pay him).

244. Raccah, *supra* note 20, at 73.

245. *See* Sibley Mem'l Hosp. v. Wilson., 488 F.2d 1338, 1341 (D.C. Cir. 1973) (holding that Title VII applies to a private duty nurse because he fell into the category of "persons aggrieved." An employer is prohibited from violating Title VII even if it is not the employer of the plaintiff).

246. Hackett v. McGuire Bros., 445 F.2d 442, 446 (3d Cir. 1971).

247. *Sibley Mem'l Hosp.*, 488 F.2d at 1340-42.

248. *Id.* at 1340.

249. *Id.* at 1341.

250. *Id.*

because it would not make sense for the hospital to be able to avoid Title VII liability when the agency could not.[251]

Thus, it might not be necessary to establish that the employer employed the specific plaintiff if it can be shown that the employer is an employer of other workers and is therefore subject to statutory coverage.[252] However, in the workfare context, the workfare participant would seemingly need to establish a relationship with some employer "if not the one charged with discrimination, since the field of employment is what is at issue under the statute."[253] In other words, the court may be willing to hold a party liable under Title VII even if it is not technically the employer of the plaintiff, but the plaintiff probably needs to establish that she was employed by some party.[254]

IV. WHY TITLE VII SHOULD APPLY TO WORKFARE PARTICIPANTS

A. TITLE VII PROTECTION FOR WORKFARE PARTICIPANTS SATISFIES THE GOALS OF TITLE VII AND THE PRWORA

Explicitly extending Title VII protection to workfare participants upholds the intent of Title VII. Title VII was enacted to protect the powerless from discrimination in the workplace. Workfare participants are arguably the least empowered class of workers in the workforce. They are in greater need of protection because of their weak bargaining power and lack of employment mobility.[255] A workfare participant is, most likely, on welfare because she has been unable to locate non-relief employment.[256] She will lose her welfare benefits if she does not show up for work or if she does not perform adequately at her job. Therefore, her livelihood and the livelihood of her family depend upon her working each day. She cannot afford to quit her job because of sexual harassment she experiences in the workplace.

Workfare participants are not like independent contractors, who have the ability to move from one job to another if they are sexually

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251. *Id.*

252. *Employment Rights*, *supra* note 19, at 15.

253. *Id.* at 35.

254. *See* Norman v. Levy, 767 F. Supp. 1441, 1444 (N.D. Ill. 1991) ("[A]lthough a Title VII plaintiff alleging interference with employment opportunities need not have been employed by the defendant, he or she must at least have been engaged in an employment relationship with a third party.").

255. Vadim Mahmoudov, *Are Workfare Participants 'Employees'?: Legal Issues Presented by a Two-Tiered Labor Force*, 1998 ANN. SURV. AM. L. 349, 385 (1998). *See also* Nancy E. Hoffman, *Workfare Implications for the Public Sector*, 73 ST. JOHN'S L. REV. 769, 784 (1999) ("A workfare participant who is entirely reliant on her benefits may be especially vulnerable to an exploitive work environment including sexual harassment, which will be exacerbated if laws prohibiting sexual harassment do not apply.").

256. Benjamin L. Weiss, *Single Mothers' Equal Right to Parent: A Fourteenth Amendment Defense Against Forced-Labor Welfare "Reform,"* 15 LAW & INEQ. 215, 220 (1997).

harassed in the workplace. Workfare participants do not decide where they work or the terms of their employment.[257] A workfare participant is assigned to a workplace by the welfare agency. Unless she notifies her placement director of the sexual harassment and the placement director is sympathetic to her complaints and moves her to another placement, she must continue to be a victim of sexual harassment.

Similarly, workfare participants are not volunteers. A volunteer chooses to spend her time doing the activity she is engaged in. A workfare participant does not have such an option. "They work because TANF requires them to do so in order to continue receiving benefits."[258] Furthermore, workfare participants are not merely trainees[259] who do not contribute to, and can even hinder, their employers' businesses while they are being trained. While there may be an on-the-job training aspect in workfare positions, workfare participants are working side-by-side with other non-relief employees who are receiving the same training.[260] Furthermore, workfare participants are displacing non-relief employees indicating that they are contributing to their employers' businesses.

Therefore, workfare participants must receive Title VII protection. If not, they are forced to work with non-relief workers who have these benefits. Clearly, the discrepancy makes the workfare recipient at greater risk for sexual harassment. There is more of an incentive for supervisors to harass a workfare participant than to harass a protected employee. Although remedies other than Title VII may be available for these workers, such as private lawsuits against the harassers, it is important that these workers are able to seek redress under Title VII. By offering workfare participants the protection of Title VII, supervisors and other employees would be told that sexual harassment of workfare participants is not permitted. Without this protection, there is a clear message that workfare participants are not as valued as regular employees. Therefore, extending Title VII protection to workfare participants ensures that the broad, remedial purpose of Title VII is satisfied.

Furthermore, through the PRWORA, the federal government has told welfare recipients that welfare benefits are no longer a privilege of

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257. *See* Raccah, *supra* note 20, at 76.

258. Kevin J. Miller, *Welfare and the Minimum Wage: Are Workfare Participants 'Employees' Under the Fair Labor Standards Act*, 66 U. CHI. L. REV. 183, 201 (1999).

259. The PRWORA allows for a certain percentage of a workfare participant's hours requirement to be devoted solely to training. While the participant is in pure training, as opposed to on-the-job training, the workfare participant would not be covered by Title VII. In these situations, Title VII protections would only pertain to the employment role of the workfare participant. Title VII would not extend to the welfare recipient/trainee role. *See* Stilley v. Univ. of Pittsburgh, 968 F. Supp. 252, 261 (W.D. Pa. 1996) (holding that a graduate student could only bring allegations of Title VII violations in connection with her paid research work for the university, stating, "All issues pertaining to the completion of plaintiff's dissertation pertain to the plaintiff's role as a student and not as an employee.").

260. Miller, *supra* note 258, at 202.

their economic standing. Instead, welfare recipients are told that they must earn their benefits by entering the workforce. If the federal government is going to require welfare recipients to work, it should, in return, give them the benefit of Title VII protection.

Extending Title VII protection to workfare participants also satisfies the objectives of the PRWORA. One of the goals of the PRWORA was to promote employment among welfare recipients.[261] In addition to providing work experience, this was to help the self-esteem of those on welfare.[262] However, there is little dignity in being a victim of sexual harassment. Permitting workfare participants to be subjected to sexual harassment without federally granted protection reinforces the idea that these workfare participants are not valued members of the workforce. Denying these workers the protections that other workers receive reinforces the message that workfare participants are "social failures rather than productive members of society."[263] When workplace rights are enforced, however, it sends a message to workfare participants that they are important.[264] Granting Title VII protection to these workers will remove some of the stigma that is associated with being a workfare participant.[265]

When these rights are not enforced, however, workfare participants are not given an incentive to enter the workforce. Although some have argued that not extending employment benefits, such as minimum wage, to workfare participants will act as an incentive to force them off welfare and into the regular workforce,[266] this is a faulty argument. If these welfare recipients could find regular jobs, many of them would do so.[267] In addition, it would be more beneficial to show them the benefits of employment by providing them with equal treatment as offered to non-relief workers. This reveals the benefits of employment rather than

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261. *TANF Reauthorization*, *supra* note 16, at 1.

262. *See* Diller, *supra* note 18, at 28 n.130. ("The idea that work accords dignity was voiced repeatedly during the debates over the PRWORA. *See, e.g.*, 141 Cong. Rec. H3578 (Mar. 23, 1995) (statement by Rep. Fowler that 'there is dignity in work—not dependency'); *id.* at H3579 (statement by Rep. Knollenberg that '[i]t is wrong to deprive individuals of the dignity of work'); *id.* at H3712 (statement by Rep. Seastrand that the 'current system robs people [of] the dignity of work'); *id.* at S13789 (statement by Senator Gramm quoting Theodore Roosevelt's comment that '"far and away the best prize that life offers is the chance to work hard at work worth doing."').). *See also* Brief for Plaintiff-Appellant Norma Colon and Intervenor-Plaintiff-Appellant Tammy Auer at 29, United States v. City of New York, 359 F.3d 83 (2d Cir. 2004) (No. 02-6102(L)) ("[B]y preventing, deterring, and remedying sexual harassment and other forms of employment discrimination, enforcement of Title VII reduces the likelihood that TANF's work promotion goal will be undermined."), *available at* http://www.nowldef.org/html/courts/colon.pdf (last visited Apr. 17, 2004).

263. Diller, *supra* note 18, at 29.

264. Peter Cove, founder of America Works, *as quoted in* Jason DeParle, *White House Calls for Minimum Wage in Workfare Plan*, N.Y. TIMES, May 16, 1997, at A1.

265. Diller, *supra* note 18, at 28.

266. Sander Levin, *Real Work for Real Wages*, WASH. POST, Aug. 21, 1997, at A19.

267. Weiss, *supra* note 256, at 220.

reinforcing the idea that they hold unequal status as workforce participants.[268]

Finally, extending Title VII protections to workfare participants will also help ensure the job security of non-workfare workers. There is already a trend towards replacing regular workers with cheaper, federally-subsidized TANF workers. If these workfare participants also do not receive employment protections, they become an even less expensive workforce. This will further encourage employers to replace existing employees with workfare participants, thereby endangering the job stability and security of non-workfare workers.[269]

B. EQUAL PROTECTION ARGUMENT FOR TITLE VII COVERAGE

The Fourteenth Amendment of the U.S. Constitution provides that "No State . . . shall deny to any person within its jurisdiction the equal protection of the laws."[270] In other words, all similarly situated people must be treated similarly, unless there is a constitutionally valid reason for the discrepancy.[271] Arguably, workfare participants are similarly situated to non-relief workers performing the same job, yet they are denied Title VII protection that the non-relief workers receive.

Courts, however, will not strike down policies "where a classification burdens neither a suspect group nor a fundamental interest."[272] Since the Supreme Court has not found welfare benefits to be a fundamental right, and it has not recognized classifications based on economic status to be suspect, the rational basis test will apply "when measuring classifications created by a public welfare benefits scheme against the equal protection clause."[273] Under this analysis, the government would only need a rational basis to justify distinguishing between workfare participants and non-relief workers with respect to Title VII protection. "Legislation that unfairly and arbitrarily targets a politically unpopular group, however, will not withstand equal protection scrutiny."[274]

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268. County of Los Angeles v. Workers' Comp. Appeals Bd., 637 P.2d 681, 687 (Cal. 1982) (quoting Indus. Comm'n of Ohio v. McWhorter, 193 N.E. 620, 622-23 (Ohio 1934) ("It seems to this court more in harmony with the spirit of work-relief legislation to hold the claimant to be an employee than to hold him to be a pauper or a ward.")).

269. *See* Noelle M. Reese, *Workfare Participants Deserve Employment Protections Under the Fair Labor Standards Act and Workers' Compensation Laws*, 31 RUTGERS L.J. 873, 907 (2000) ("Employment protections are necessary not only to prevent the exploitation of workfare participants, but also to thwart the displacement of regular public workers with lower paid workfare workers."); *see also* Mahmoudov, *supra* note 255, at 365.

270. U.S. CONST. amend. XIV, § 1.

271. Hull v. Rose, Schmidt, Hasley & DiSalle, P.C., 700 A.2d 996, 1003 (Penn. 1997).

272. Gregory v. Ashcroft, 501 U.S. 452, 470-71 (1991).

273. Alcozer v. N. Country Food Bank, 635 N.W.2d 695, 715 (Minn. 2001) (Anderson, J., dissenting). *See* Mahmoudov, *supra* note 255, at 380-81.

274. *Alcozer*, 635 N.W.2d at 715 (Anderson, J. dissenting).

Although it was not in the Title VII context, in *State ex rel. Patterson v. Industrial Commission of Ohio*, the Ohio Supreme Court held that it was an equal protection violation for the state to pay less death benefits to the widow of a deceased work-relief worker than it did to widows of non-relief workers.[275] The court found that the state was not treating similarly situated employees similarly, and therefore, the state was violating the Equal Protection Clause of the Fourteenth Amendment.[276] The court applied a test similar to the rational basis test and struck down the policy because the only governmental purpose for the policy offered by the state was the preservation of the state's financial resources.[277] The court found this justification to be unacceptable under Ohio law.[278] The court was also not persuaded by the state's argument that "providing lesser benefits to dependents of deceased [workfare participants] would somehow discourage reliance on public assistance."[279] As the court said, the statute discriminated against "those who are less fortunate, simply because they are less fortunate."[280]

It is unlikely that a court would uphold an equal protection challenge to the current status of workfare participants. A court may find that the government's justifications for distinguishing between workfare and non-workfare workers satisfy the rational basis test. In *United States v. City of New York*, for example, the City of New York argued that it was important not to give Title VII protections to welfare recipients in order to protect the taxpayers from the financial burden of such claims.[281] This may be sufficient to satisfy the rational basis test.[282]

Another potential equal protection challenge focuses on gender discrimination issues that are raised by the PRWORA.[283] Workfare disproportionately affects women because women constitute the majority of welfare recipients.[284] Any gender classification receives intermediate scrutiny under the Fourteenth Amendment. Thus, the classification must serve "important governmental objectives" and be "substantially related

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275. State *ex rel.* Patterson v. Indus. Comm'n of Ohio, 672 N.E.2d 1008, 1013 (Ohio 1996).

276. *Id.* at 1013.

277. *Id.* at 1011-12.

278. *Id.* at 1012.

279. *Id.*

280. *State ex rel. Patterson*, 672 N.E.2d at 1012.

281. Bernstein, *supra* note 137.

282. Garrett v. Lyng, 877 F.2d 472, 476 (6th Cir. 1989) (upholding a challenge to a federal Food Stamp regulation that denied workfare participants the unearned income deduction that was provided to other forms of income. The court applied a rational basis test and upheld the policy because the state's rationale to reduce costs and to give the food stamp recipients an incentive to get off welfare was sufficient to satisfy the rational basis test); Klaips v. Bergland, 715 F.2d 477, 485 (10th Cir. 1983) (upholding a policy that distinguished between workfare and non-workfare workers under a rational basis analysis, finding that avoiding administrative burdens was a sufficient justification for the policy).

283. Weiss, *supra* note 256, at 222-23.

284. The fourth TANF Annual Report to Congress stated that 90 percent of all TANF recipients are women. Luchina Fisher, NOW, *NYC Agrees to Education for Welfare Recipients*, *available at* http://www.now.org/eNews/aug2003/082203welfare.html (Aug. 22, 2003).

to the achievement of those objectives."[285] In addition, since such a large percentage of workfare participants are racial minorities,[286] the PRWORA disproportionately affects Blacks and Hispanics. Any race classification receives a higher level of scrutiny under the Fourteenth Amendment. Because of the heightened level of scrutiny under either a gender or race-based challenge, such a challenge potentially would be more successful than a challenge based on the unequal treatment of relief versus non-relief workers.

V. THE NEED FOR CONGRESS TO PROVIDE EXPLICIT TITLE VII PROTECTION TO WORKFARE PARTICIPANTS

Federal legislation must ensure that Title VII protection is granted to workfare participants. This can be done in two ways. One option would be for Congress to amend Section 603(d) of the PRWORA to include Title VII protection for workfare participants, as certain members of Congress have suggested.[287] Alternatively, Congress could enact federal legislation to provide a uniform definition of employer and employee that would include workfare participants.[288] The common-law definition focuses too narrowly on the employer's payment of remuneration to the employee. It would be better to focus on the remedial purpose of the statute.[289] By amending the definition of the term "employee" to include workfare participants, Congress will ensure that the remedial purpose of Title VII is satisfied.[290]

By explicitly granting Title VII protection to workfare participants, Congress will ensure that victims of sexual harassment are able to seek redress through the same channels as non-relief workers.[291] Although extending Title VII protection to workfare participants will mean that additional potential litigants have access to the court system, the cost of allowing these women to pursue this remedy should not preclude

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285. Mahmoudov, *supra* note 255, at 381 (citing United States v. Virginia, 518 U.S. 515, 531, 533 (1996)).

286. In 2002, in the City of New York, approximately sixty-eight percent of the welfare recipients were women. Eighty percent of these women are Hispanic or non-Hispanic black. Brief for Plaintiff-Appellant Norma Colon and Intervenor-Plaintiff-Appellant Tammy Auer at 4, United States v. City of New York, 359 F.3d 83 (2d Cir. 2004) (No. 02-6102(L)), *available at* http://www.nowldef.org/html/courts/colon.pdf (last visited Apr. 17, 2004). Calculated from data in Human Resources Association (HRA), New York City Public Assistance Fact Sheet, *at* http://www.nyc.gov/html/hra/pdf/ncyfact_oct2001.pdf (June 2003). The HRA website does not report gender specifically for those public assistance recipients who are WEP workers.

287. *See* S. 2052, 107th Cong. (2002); S. 367, 108th Cong. (2003).

288. *See* Sharon Dietrich, Maurice Emsellem, and Catherine Ruckelshaus, *Work Reform: The Other Side of Welfare Reform*, 9 STAN. L. & POL'Y REV. 1, 53, 60 (1998).

289. *See id.* at 60-61.

290. The is a broader solution, however, because it will guarantee workfare participants are entitled to other employee protections in addition to Title VII, such as protection under the FLSA.

291. *See Welfare Reforming the Workplace*, *supra* note 41, at 21. *See also* National Center on Poverty Law, *Employment Law, Poverty Law Manual for the New Lawyer*, *available at* http://www.povertylaw.org/legalresearch/manual.index.cfm (Oct. 2002).

Congress from extending this protection to them. The public interest of providing protection arguably outweighs any additionally required resources. As these women are similarly situated to non-relief workers who are given the protections of Title VII, Congress should also protect workfare participants by explicitly offering them Title VII protection.

Although workfare participants can pursue a private tort action against the alleged sexual harassers without Title VII explicit protections, workfare participants, more than any other class of worker, cannot afford the time and cost of litigation. They need to have access to the EEOC through Title VII. Furthermore, the state grievance procedures established under the nondiscrimination provision of the PRWORA are not sufficient. State lawmakers have too much discretion in determining the procedures. Congress should establish a federal minimum standard by guaranteeing Title VII protection to workfare participants.

Certain states have already legislated to provide workplace protections for workfare participants. For example, Ohio's subsidized employment plan requires that workers are considered "regular employees of the employer, entitled to the same employment benefits and opportunities for advancement and affiliation with employee organizations that are available to other regular employees."[292]

Even though certain states have provided these protections for workfare participants, without the mandates of a universal federal law, other states may choose not to provide these protections. For example, in the argument about whether workfare participants should receive minimum wage, New York's Governor Pataki has argued that paying minimum wage to workfare participants would make the welfare program too costly.[293] If legislators are challenging the mere provision of minimum wage to workfare participants, they are likely to resist offering protection from employment discrimination. Therefore, it is imperative that the federal government enacts legislation to ensure that workfare participants receive the benefits of Title VII. This can be done either by amending the PRWORA to provide that Title VII applies to workfare participants or by providing a uniform definition of employer and employee that includes workfare participants.

VI. CONCLUSION

As a result of the PRWORA, welfare recipients are required to work in order to receive their welfare benefits. In exchange for the requirement that workfare participants work, Congress needs to provide explicit Title VII protections to workfare participants. Although the

292. Ohio Rev. Code Ann. § 5107.52(D)(1) (Baldwin 2004).

293. Rachel L. Swarns, *Pataki Assails White House on Workfare*, N.Y. TIMES, May 17, 1997, at § 1, at 21.

legislative intent of the PRWORA suggests that it should apply to workfare participants and the agency interpretations implementing the PRWORA suggest that federal anti-discrimination laws apply to workfare participants, there is too much ambiguity in the legislation allowing courts to find that workfare participants are not entitled to Title VII protection. The workers are performing the same jobs as non-relief workers and are increasingly replacing many non-relief workers in jobs. Just as non-relief workers need to work to earn a salary, workfare participants need to work to maintain their workfare benefits. Furthermore, workfare participants do not have the ability to choose the conditions or the location of their jobs as independent contractors do.

Although Congress has demonstrated its desire to give the states the majority of the control over workfare programs, it is important that the goals of Title VII and the PRWORA not be undermined. Workfare participants must be protected from sexual harassment under Title VII. Although courts may follow the Second Circuit Court of Appeals and find that workfare participants are employees under Title VII, Congress should remove any question in the minds of the courts either by amending the PRWORA to state explicitly that Title VII applies to workfare recipients, or by providing a universal definition of employer and employee that includes workfare participants. Only by explicitly extending employment protection to workfare participants will Congress begin to send the message that workfare participants are valued members of the workforce. This, in turn, will encourage workfare participants to enter the regular workforce so that they are no longer dependent on public assistance.