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MAKING THE CASE FOR INTERNS: HOW THE FEDERAL COURTS' REFUSAL TO PROTECT INTERNS MEANS THE FAILURE OF TITLE VII

Hannah Nicholes[†]

[†]B.A. History, University of Puget Sound (2010); J.D. Candidate, May 2015, Wake Forest University School of Law. Manuscripts Editor, 2014–2015, *Wake Forest Journal of Business and Intellectual Property Law*. The author thanks the faculty at Wake Forest for giving her the tools to write this article, as well as her friends, who keep her sane; and most importantly her family, without whom she would not be where she is.

I. INTRODUCTION, CASE IN POINT: WANG V. PHOENIX SATELLITE TELEVISION, US, INC.

In December of 2009, Lihuan Wang did something many of today's college and graduate students do:[1] she got an unpaid internship with the hopes of receiving both job training and an offer for permanent employment when she graduated.[2] Like most of today's interns,[3] Ms. Wang's responsibilities at the New York office of Phoenix Media Group (the Defendant in this case[4]) put her directly in the middle of the work environment, giving her the opportunity to experience what it meant to be an employee at Phoenix.[5]

Ms. Wang's internship came with something more than on-the-job experience, however, as she began to receive unwanted sexual attention from a supervisor, Mr. Liu.[6] From sexually explicit comments to unwanted touching, Mr. Liu took advantage of his supervisory position to sexually harass Ms. Wang.[7] When Ms. Wang made it clear that his advances were unwelcome,[8] Mr. Liu stopped harassing her, but he also stopped expressing an interest in hiring Ms. Wang after she graduated.[9] Instead, Mr. Liu began to tell Ms. Wang

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[1] *See* Eve Tahmincioglu, *Working for Free: The Boom in Adult Interns*, TIME (Apr. 12, 2009), http://content.time.com/time/magazine/article/0,9171,1977130,00.html (explaining that, in the midst of the "Great Recession" when the unemployment rate was near 10% there were an increasing number of people, including college graduates, who were willing to work for free in the hopes that it would lead to a permanent job).

[2] Wang v. Phoenix Satellite Television US, Inc., 976 F. Supp. 2d 527, 529 (S.D.N.Y. 2013). Within the first two weeks of her internship Ms. Wang asked her supervisor, Mr. Liu, about the possibility for permanent employment with Phoenix, and she later discussed this hope to other employees at Phoenix. *Id*.

[3] *See How Interns and Co-Ops Spend Their Time*, NAT'L ASS'N OF COLLEGES & EMPLOYERS (June 12, 2013), https://www.naceweb.org/s06122013/intern-co-op-time-on-the-job.aspx?terms=how%20interns%20spend%20their%20time [hereinafter *How Interns and Co-Ops*] (stating that in a survey of 306 organizations from November 15, 2012 – February 1, 2013, it was reported that interns spend 98.1% of their time doing essential functions).

[4] *Wang*, 976 F. Supp. 2d. at 527.

[5] *Id.* at 529. Ms. Wang assisted reporters, drafted scripts, edited video, proposed stories, and even appeared on camera to report her stories. *Id*.

[6] *Id*. at 530.

[7] *See id.* (stating that Ms. Wang felt compelled to remain in Mr. Liu's presence when he began to harass her "because he was her supervisor.").

[8] *Id.* (telling him to stop, that she did not want this, and then finally leaving his presence).

[9] *Id.* Although Mr. Wang stopped sexually harassing Ms. Liu for the remainder of her internship, in the summer of 2010, after her internship, Mr. Liu asked Ms.

continued . . .

that they would not be able to sponsor her[10] due to a timing issue related to the expiration of her student visa.[11] The detail regarding the timing issue was a fact that Mr. Liu had never before brought up when he and Ms. Wang had previously discussed the possibility of permanent employment.[12] Although Ms. Wang later sued Phoenix for employment discrimination under the New York State Human Rights Law[13] and the New York City Human Rights Law,[14] because Ms. Wang was an unpaid intern, and thus not an employee under employment discrimination statutes,[15] the District Court for the Southern District of New York dismissed the claim.[16]

Ms. Wang's unfortunate plight comes as the direct result of federal courts declaring that under Title VII of the Civil Rights Act of 1964[17] ("Title VII"), interns are not employees, and therefore Title VII does not apply to them.[18] The logic behind this declaration comes as a result of applying the agency definition of "employee" to Title VII cases.[19] At first glance, this theory makes sense: interns by definition are not employees, but rather individuals who are trying out the field for a few months. Furthermore, applying the same definition of "employee" across all of employment law creates consistency and predictability. However, upon closer inspection, this superficial logic falls apart and we find ourselves with individuals like Ms. Wang, who have been sexually harassed and who have suffered an adverse employment action, but who are left unprotected by Title VII.

This paper argues that applying the agency-based test when defining the meaning of intern under Title VII is contrary to the purposes of Title VII, and proposes that we instead look to the

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Wang to go to Atlantic City for the weekend with him, so that they could "discuss job opportunities." *Id.* at 531. Scared of what might happen, she told Mr. Liu she had other plans. *Id.*

[10] Because Ms. Wang was a Chinese citizen in America on a student visa, a necessary part of her employment process was to find a hiring company that would also be willing to sponsor her for a work visa. *Id.* at 529.

[11] *Id.* at 530.

[12] *Id.*

[13] N.Y. EXEC. LAW § 290 (McKinney 2013).

[14] N.Y. CIV. RIGHTS LAW § 8-101 (2013).

[15] Although Ms. Wang only sued under state law claims the district court looked to the similar language of Title VII of the Civil Rights Act of 1964 in order to determine whether an intern could be considered an employee. *Wang,* 976 F. Supp. 2d at 537. The district court found that because Title VII did not protect interns, the same was true for the New York equivalents, leaving Ms. Wang without a cause of action. *Id.* at 532.

[16] *Id*. at 532.

[17] 42 U.S.C. § 2000e (2012).

[18] O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997).

[19] *Id.* at 115.

purposes of Title VII for guidance. By using the modern intern as an example, one can see that when the court's focus is not on upholding the purpose of Title VII, which leads courts to conclude that interns should not be covered, Title VII fails. Part I of this paper looks to the purpose of Title VII, the current definition of employee under Title VII, and the problems that arise in applying this definition to Title VII cases; Part II looks specifically at the modern internship, and using the purposes of Title VII as guidance, determines whether interns ought to be covered. Using interns as an example, this paper finds that when courts ignore the purposes of Title VII and find that Title VII does not cover interns, discriminatory hiring practices and discriminatory workplaces are allowed to go unchecked, and Title VII fails to prevent future workplace discrimination.

II. OVERVIEW OF LEGAL LANDSCAPE

A. The Purpose of Title VII

1. Prohibition of Workplace Discrimination

Congress created Title VII of the Civil Rights Act of 1964 to: (1) eliminate discrimination in the workplace;[20] and (2) make the victims of such workplace discrimination whole.[21] In order to eliminate workplace discrimination, Congress sought, through Title VII, to ensure equal employment opportunities for all qualified applicants, regardless of the applicant's race, sex, color, religion or national origin.[22] Congress's intention was not to guarantee a job for all who applied, but rather to remove all arbitrary and artificial boundaries, no matter how subtle, that had been erected solely for the purpose of invidious discrimination on the basis of the applicant's race, sex, religion, color or national origin[23] (otherwise known as a person's protected trait). Congress did so by making it illegal for an employer or a potential employer to make decisions–intentionally or unintentionally–about hiring or firing; or otherwise changing the employee's compensation, terms, conditions or privileges of employment, based solely or partially on that person's protected trait.[24]

[20] Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).
[21] *Id.* at 418.
[22] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).
[23] *Id.* at 800-01.
[24] 42. U.S.C. § 2000e-2(a) (2012).

More than once the Supreme Court has stated that Title VII's prohibition is not limited to such discrimination that has an economic or otherwise readily tangible impact.[25] Instead, the Court has interpreted the phrase "terms, conditions or privileges" broadly, stating that it "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment."[26] In doing so, the Court extended the reach of Title VII to qualify "the creation or perpetuation of a discriminatory work environment" as an actionable harm.[27] Their intent was to prevent a workplace that is "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers[,]"[28] which would, by extension, alter the terms and conditions of employment, thereby violating Title VII's express language.[29] Included in this category of harm is sexual harassment that is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment."[30] Therefore, had the courts considered Ms. Wang an employee for the purposes of Title VII, she likely would have had a successful cause of action based on the sexual harassment to which Mr. Liu subjected her.

Employers become liable under Title VII when they knowingly or negligently allow a work environment to become "heavily charged" with discrimination.[31] Employers will be held directly liable for an employee's unlawful discriminatory harassment,[32] and vicariously liable when the harasser was the victim's supervisor.[33] In situations of supervisor harassment, Title VII holds the employer vicariously liable when it was the principal agent relationship shared by the supervisor and the employer that enabled the harassment.[34] Thus, in Ms. Wang's case, because Mr. Liu was her supervisor, and because he was arguably able to take the harassment as far as he did because he was

[25] Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (quoting Harris v. Forklift Sys, Inc., 510 U.S. 17, 21 (1993)).

[26] Harris v. Forklift Sys, Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

[27] Vance v. Ball State Univ., 133 S. Ct. 2434, 2440 (2013) (noting that the Supreme Court recognized the hostile environment claim in Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986)).

[28] *Id.* (quoting Rogers v. EEOC, 454 F.2d 234, 238 (1971)).

[29] *Id.* at 2441.

[30] *Faragher*, 524 U.S. at 786.

[31] *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971).

[32] *Vance*, 133 S. Ct. at 2441.

[33] *Id.*

[34] *Id.*

her supervisor,[35] Phoenix would likely have been held vicariously liable under Title VII for Mr. Liu's sexual harassment.

2. Deterring Future Discriminatory Actions

In passing Title VII, Congress intended to both eliminate discrimination on a case-by-case basis, and deter employers who may discriminate in the future.[36] Rather than rely on the threat of litigation alone to deter such employers, Congress instituted such remedies as injunctions and back-pay,[37] thereby making any employer think twice before engaging in discriminatory employment behaviors.

The "make whole" purpose of Title VII, done in part through the award of back-pay, serves two purposes: (1) to make the victim a whole; and (2) to penalize the employer in such a way as to deter further discriminatory actions.[38] The first purpose is both self explanatory and the most obvious result. However, it is the second purpose that serves Title VII's goal of eliminating discrimination in the workplace the most.[39] Back-pay under Title VII is not a remedy given randomly, but rather is a remedy given as "a matter of course,"[40] and the Supreme Court has made it clear that it should be "denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination" in the workplace.[41]

When a victim is awarded back-pay, the employer is required to pay the victim whatever she would have made, absent the discriminatory action.[42] Presumably, the victim is suing because she was passed over for a promotion, was not hired, was fired or was forced to quit for reasons based on unlawful discrimination; in any of these situations the employer likely promoted/hired another employee to take the victim's place. Thus, while an employer may have already paid one employee for the job, he must now pay the victim as well; in effect, discriminatory employers are required to pay twice as much as

[35] *See Wang*, 976 F. Supp. 2d at 530 (stating that Ms. Wang felt compelled to remain in Mr. Liu's presence when he began to harass her "because he was her supervisor.").

[36] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

[37] 42. U.S.C. § 2000e-5(g) (2012).

[38] *Moody*, 422 U.S. at 417-19.

[39] *See supra* Part. II A(a).

[40] *Moody*, 422 U.S. at 419.

[41] *Id.* at 421.

[42] *See id.* at 421 (quoting the portion of the Congressional record which describes the purpose of Title VII as, in part, to restore the victim of unlawful employment discrimination to "a position where they would have been were it not for the unlawful discrimination.").

they would have, had they chosen not to discriminate. It is back-pay's ability to place an actual price tag on discrimination that gives Title VII the most strength to prevent further discrimination.[43] Employers, faced with the "reasonably certain prospect of a backpay award"[44] are forced to "self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible" discrimination in the workplace.[45]

B. The Legal Definition of Employee Under Title VII

Title VII sought to eliminate discrimination in the workplace by protecting employees who were victims of such discrimination.[46] Congress defined the term "employee" under Title VII to mean, "an individual employed by an employer . . . ."[47] This definition, as the Supreme Court pointed out in *Nationwide Mut. Ins. Co. v. Darden*,[48] is "completely circular and explains nothing."[49] It fell, therefore, to the

[43] *See id.* at 418-19.

[44] *Id*. at 417.

[45] *Id.* at 418 (quoting United States v. N. L. Indus. Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

[46] *See* 42 U.S.C. § 2000e-2(a) (2012) (making it illegal for an employer to discriminate against his employees on the basis of race, color, religion, sex, or national origin).

[47] 42 U.S.C. § 2000e(f) (2012).

[48] 503 U.S. 318 (1992).

[49] *Id.* at 323. Although the Court in *Darden* is discussing the definition of employee in the Employee Retirement Income Security Program (ERISA), 29 U.S.C. § 1002(6), because the definition for employee is the same under ERISA and Title VII, every circuit court—save the eleventh, see Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1243–44 (11th Cir. 1998) (stating that "only individuals who receive compensation from an employer can be deemed 'employees under the statute.")—has applied the *Darden* Court's discussion regarding the meaning of employee, to Title VII cases. *See* Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 434 (5th Cir. 2013) (applying the *Darden* employee-definition analysis to a Title VII claim, and using the "completely circular and explains nothing" quote to describe Title VII's definition of employee); Mariotti v. Mariotti Bldg. Prod., Inc., 714 F.3d 761, 765 (3d Cir. 2013) (applying Clackamas Gastroenterology Assoc., P.C. v. Wells, 538 U.S. 440 (2003) which applies the *Darden* employee-definition analysis to a Title VII claim, and using the "completely circular and explains nothing" quote to describe Title VII's definition of employee); Bryson v. Middlefield Volunteer Fire Dep't Inc., 656 F.3d 348, 352 (6th Cir. 2011) (applying the *Darden* employee-definition analysis to a Title VII claim, and using the "completely circular and explains nothing" quote to describe Title VII's definition of employee); Murray v. Principal Fin. Grp., Inc., 613 F.3d 943, 945–46 (9th Cir. 2010) (applying the *Darden* employee-definition analysis to a Title VII claim); Lopez v. Mass., 588 F.3d 69, 83 (1st Cir. 2009) (applying the *Darden* employee-definition analysis to a Title VII claim, and using the "completely circular and explains

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court system to develop a more user-friendly definition.[50] The Court in *Darden* upheld the "well established principle"[51] that when Congress did not provide a meaningful definition of employee, it had intended to use the common law definition, based on agency's master–servant relationship.[52] In doing so, the Court adopted the common law test for determining who qualifies as an employee, which the Court had previously summarized in *Cmty. for Creative Non-Violence v. Reid*.[53] The common law test did not supply a simple formula, or a "magic phrase that can be applied to find the answer"; rather the Court insisted that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive."[54] The Court looked first to "the hiring party's right to control the manner and means by which the product is accomplished",[55] and then considered other relevant factors, including:

> [T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the

nothing" quote to describe Title VII's definition of employee); Smith v. Castaways Family Diner, 453 F.3d 971, 976 (7th Cir. 2006) (applying the *Darden* employee-definition analysis to a Title VII claim, and using the "completely circular and explains nothing" quote to describe Title VII's definition of employee); Zhengxing v. Nathanson, 215 F. Supp. 2d 114, 117 (D.D.C. 2002) (applying the *Darden* employee-definition analysis to a Title VII claim); Schwieger v. Farm Bureau Ins. Co. of Neb., 207 F.3d 480, 483 (8th Cir. 2000) (applying the *Darden* employee-definition analysis to a Title VII claim, and using the "completely circular and explains nothing" quote to describe Title VII's definition of employee); Cilecek, M.D. v. Inova Health Sys. Servs., 115 F.3d 256, 259 (4th Cir. 1997) (applying the *Darden* employee-definition analysis to a Title VII claim); *O'Connor*, 126 F.3d at 115 (applying the *Darden* employee-definition analysis to a Title VII claim and referring to the definition of employee in Title VII as "circular"); Lambertsen v. Utah Dep't of Corr., 79 F.3d 1024, 1028 (10th Cir. 1996) (applying the *Darden* employee-definition analysis to a Title VII claim).

[50] *See, e.g.*, Armbruster v. Quinn, 711 F.2d 1332, 1339-40 (6th Cir. 1983) (looking to the legislative history of Title VII to determine whom the definition of employee was intended to encompass), *abrogated on other grounds by* Arbaugh v. Y&Y Corp., 546 U.S. 500 (2006).

[51] *Darden*, 503 U.S. at 322. Although, as mentioned above, the 11th Circuit has chosen not to apply *Darden*, for the purposes of this paper the majority application of *Darden* will be the basis for the working definition of employee.

[52] *Id.* at 322-23.

[53] 490 U.S. 730, 751-52 (1989).

[54] *Darden*, 503 U.S. at 324 (quoting NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968)).

[55] *Id.* at 323.

> hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[56]

Some circuit courts and the Equal Employment Opportunity Commission (EEOC) have added the matter of remuneration to this analysis,[57] whereas other circuit courts have attached an economic realities test to the analysis.[58] The result is a definition that calls for a fact-based analysis for every case where it is not readily apparent that the plaintiff is in fact an employee.

1. The Origins for the Control-Based Test

Prior to Title VII, federal courts had a need to define who was and was not an employee—in other words, who was an employee and who could be characterized as an independent contractor—when dealing with vicarious liability cases in tort law. The reason for this is that, under the Restatement (First) of Torts, "the employer of an independent contractor is not subject to liability for bodily harm caused to another by a tortious act or omission of the contractor or his servants."[59] Otherwise, an employer was responsible for the actions of his employees, and could be held vicariously liable for the harm that his employee caused to another.[60] This theory continued with the publication of the Restatement (Second) of Torts.[61]

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[56] *Id.* at 323-24.

[57] *See* Bryson v. Middlefield Volunteer Fire Dep't Inc., 656 F.3d 348, 353 (6th Cir. 2011) (listing other circuit court decisions which include remuneration in their analysis and quoting a portion of the EEOC compliance manual which includes the matter of remuneration).

[58] *See, e.g.,* Schwieger v. Farm Bureau Ins. Co. of Neb., 207 F.3d 480, 484 (8th Cir. 2000) (stating that the *Darden* list is "nonexhaustive" and as such the court also weighs "the 'economic realities' of the worker's situation, including factors such as how the work relationship may be terminated and whether the worker receives yearly leave.").

[59] RESTATEMENT (FIRST) OF TORTS § 409 (1934).

[60] *See* RESTATEMENT (FIRST) OF TORTS § 877(c) (1939) (stating that a person will be liable for the tortious conduct of another if he "controls, or has a duty to use care to control . . . ."); RESTATEMENT (FIRST) OF TORTS § 317 (1934) (stating that an employer has a "duty to exercise reasonable care so to control his servant while acting outside the course of his employment . . . .").

[61] *See* RESTATEMENT (SECOND) OF TORTS §§ 317, 409 (1965); RESTATEMENT (SECOND) OF TORTS § 877(c) (1979).

As stated above, the Supreme Court has ruled that the definition of employee, when Congress has not provided one, is to be derived from the common law agency master–servant principle.[62] It is through this application of the master–servant definition that the common law theory carries over into employment law.[63] The definition used to delineate who is and who is not an employee—depending firmly on how much control the employer is able to exercise over the individual—reflects the common law tort origin of this definition.[64] It is this focus on the amount of control that the employer holds that leads to the control based three factor test outlined in the Restatements (First) and (Second) of Torts. The Restatements (First) and (Second) of Torts were not willing to hold employers vicariously liable for the actions of all people who may work for them; rather, the Restatements limited this liability to those employees: (1) over whom the employer had the power to "order," or "induce to work";[65] (2) whose work the employer "permits to work";[66] and (3) who the employer "controls, or has a duty to use care to control[.]"[67] When one analyzes the factors outlined by the *Darden* court, the same theme of "control" is present, with five of the ten factors referring to the control a hiring employer may have over the individual working for him.[68]

2. *The Problem of Applying the Control-Based Test to Title VII Claims*

The problem of relying on the agency control based definition for employee is that vicarious liability and Title VII have drastically

[62] Nationwide Mut. Ins. Co., v. Darden, 503 U.S. 318, 332–33 (1992).

[63] *See id.* at 322–23 (applying the agency definition of "employee" to employment law; by doing so the Court adopts the agency principle that an independent contractor is not an employee).

[64] *See id.* at 323–24 (listing the "hiring party's right to control" the potential employee as the first element the court should consider).

[65] RESTATEMENT (SECOND) OF TORTS § 877(a) (1979)*; see also* RESTATEMENT (FIRST) OF TORTS § 877(a) (1939) (using almost identical language to the language in the Restatement (Second)).

[66] RESTATEMENT (SECOND) OF TORTS § 877(b) (1979); *See also* RESTATEMENT (FIRST) OF TORTS § 877(b) (1939) (using almost identical language to the language in the Restatement (Second)).

[67] RESTATEMENT (SECOND) OF TORTS § 877(c) (1979); *See also* RESTATEMENT (FIRST) OF TORTS § 877(c) (1939) (using almost identical language to the language in the Restatement (Second)).

[68] *See Darden*, 503 U.S. at 323–24. The list includes: "the hiring party's right to control the manner and means by which the product is accomplished; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment"; and "the hired party's role in hiring and paying assistants." *Id.*

different purposes.[69] The agency definition ensures that only employers with the duty and ability to control the employees in question will be held vicariously liable for those employee's actions.[70] Thus, the agency definition serves to limit employer liability.[71] Title VII's purpose is to protect employees by eliminating workplace discrimination, be it in the form of a barrier to employment through the use of discriminatory hiring practices, or a source of problems in the workplace.[72] When courts apply the agency definition to Title VII cases, the focus therefore ceases to be on the need to eliminate workplace discrimination, and instead becomes an issue of how much control the employer had over the employee.[73]

The problem with this dramatic shift in focus emerges in discrimination cases where the victim is an intern. The primary case on the subject, *O'Connor v. Davis*,[74] concludes that an intern does not qualify as an employee for the purposes of Title VII protection.[75] Like the *Darden* court, the *O'Connor* court relied on the common law agency definition of employee in reaching this conclusion.[76] What the court ignores, or at the very least, fails to discuss,[77] is that the purpose of Title VII is not to limit employer liability for the actions of their employees, but rather to eliminate workplace discrimination.[78] The facts in *O'Connor* illustrate a work environment polluted with sexual harassment: the plaintiff stated that she was subject to sexually explicit

[69] *Compare* RESTATEMENT (SECOND) OF TORTS § 877(a)–(c) (1979) *with supra* Part II. A.

[70] *See* RESTATEMENT (SECOND) OF TORTS § 877 (1979) (limiting an employer's vicarious liability to those employees over whom an employer had power and control).

[71] *Id.*

[72] *See supra* Part II. A.

[73] *See Darden*, 503 U.S. at 323–24 (listing the agency based elements courts look to when considering whether a worker is an employee, focusing on the control the employer can exercise over the employee).

[74] 126 F.3d 112 (2d Cir. 1997); *see Wang*, 976 F. Supp. 2d at 535–36 (stating that since *O'Connor* courts have applied the two step test created in *O'Connor* to determine whether someone is an employee under Title VII when they are an intern).

[75] *O'Connor*, 126 F.3d at 116.

[76] *Id*. at 115. The Court in *O'Connor* never actually reached the question of whether the plaintiff was an employee based on the control factors, instead stopping their analysis with the issue of whether she was even hired. *Id*. However, the court's analysis is still framed in the traditional agency based understanding of what is an employee. *Id.* at 115–16.

[77] *See id*. at 114–16 (failing to discuss the purpose of Title VII when discussing whether the plaintiff was an employee).

[78] *See supra* Part II (A).

and inappropriate comments while in the workplace;[79] that she was not the only one subject to the harasser's sexually explicit and inappropriate comments;[80] and that when she filed complaints with her supervisors, these complaints went largely ignored.[81] However, the Court's entire discussion looks not to whether finding for the plaintiff would further the goals of Title VII, but rather focuses almost entirely on whether the plaintiff would be an employee under common law tort liability.[82] In doing so the court fails to uphold the purpose of Title VII, which is to eliminate the type of workplace discrimination taking place.[83]

When the *O'Connor* court looked to whether the plaintiff is covered under Title VII, its focus was not on eliminating discrimination but rather on determining whether the plaintiff is an employee under the agency-based control test.[84] As has been discussed, Title VII and vicarious liability have radically different purposes, and therefore it is of no great surprise that the test for one would not fulfill the needs of the other. Therefore, in this case, Title VII's purposes were not fulfilled simply because the court was asking the wrong questions when determining who Title VII should protect. To avoid this problem, courts need to stop looking to the control-based factors, and instead need to look to Title VII's express purposes: eliminating discriminatory hiring practices, workplace discrimination, and preventing further discrimination.[85] When applied to interns, it becomes clear that when courts do not consider interns employees under Title VII, Title VII fails to fulfill these purposes.

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[79] *Id*. at 113–14. The harasser referred to the plaintiff as "Miss Sexual Harassment"; made "inappropriate sexual remarks" about the plaintiff and her boyfriend; suggested that the plaintiff and the other women present engage in an orgy; and requested that the plaintiff remove her clothes before meeting with him. *Id*.

[80] *Id.* at 114. The harasser also commented about the appearance of several women who worked for the defendant employer and made both sexual jokes and "sexually suggestive noises" that were directed at the other female employees. *Id*.

[81] *Id*. Although the defendant finally investigated the allegations, it took four months for the plaintiff's direct supervisor to even report these complaints to her direct supervisor. *Id*. The case does not state the outcome of the investigation, leading one to conclude that the harasser was not in fact fired. *Id*.

[82] *O'Connor*, 126 F.3d at 114–16.

[83] *See Faragher*, 524 U.S. at 786 (1998) (stating that Title VII also protects employees against sexual harassment).

[84] *O'Connor*, 126 F.3d at 114–16.

[85] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

III. THE REALITIES OF INTERNS APPLIED TO THE PURPOSES OF TITLE VII

A. What Are Interns?

Interns have become a familiar part of the workplace.[86] However, that was not always the case, which helps to explain why courts have failed to treat them like the members of the workplace that they are.[87] The term "intern" originally applied only to individuals who had earned a medical degree, but were not yet licensed to practice medicine.[88]

Following the economic downturn in the mid-2000s, internships took on increased importance within the workforce, as employers began to see them as a way to fill positions that had once been held by full time hires.[89] For students, internships became a way to make themselves and their resumes stand out in an increasingly competitive job market.[90] Today, the term intern refers to individuals who are participating in something described as "pre-job training,"[91] "real-world experience,"[92] and an "opportunity to 'test drive' a career."[93] Gone are the days where internships were confined to one or two industries; today, internships take place within more than 20

[86] *See* Beth Braccio Hering, *Why Are Internships so Important?*, CNN (Apr. 13, 2010, 11:09 AM), http://www.cnn.com/2010/LIVING/worklife/04/14/cb.why.internships.important (stating that the number of internships is on the rise and that internships have become a key part of the economy); Meena Thiru, *How to Turn an Internship Into a Job*, BANKRATE.COM (May 29, 2012), http://www.bankrate.com/finance/jobs-careers/turn-internship-into-job-1.aspx (stating that as the unemployment rate remains at 13.2% for 20 to 24 year olds, internships have become an important part of getting a job); Alex Vejar, *Unpaid Internships: Are They Beneficial or Exploitative for College Students?*, THE SUNDIAL (November 14, 2013), http://sundial.csun.edu/2013/11/unpaid-internships-are-they-beneficial-or-exploitive-for-college-students (stating that internships continue to grow, and were projected to rise by 2% in 2013).

[87] *See O'Connor*, 126 F.3d at 117–18; *Wang*, 976 F. Supp. 2d at 537.

[88] Vejar, *supra* note 86.

[89] Hering, *supra* note 86.

[90] *See* Debra Auerbach, *The Value of Internships for Students: A Look at the University of Tennesse's Business Analytics Program*, THE WORKBUZZ (Oct. 14, 2013, 9:42 AM), http://www.theworkbuzz.com/find-the-job/value-of-internships-for-students/ (stating that because the competition for jobs has become so fierce, an internship is a valuable thing to have on one's resume); Susan Terry, *The Value of Internships*, UNIV. OF WASH.TRANSFER ENEWSLETTER, Winter 2009, http://depts.washington.edu/trnews/win09/article.php?ar_id=188.

[91] Vejar, *supra* note 86.

[92] Auerbach, *supra* note 90.

[93] Hering, *supra* note 86.

industries,[94] from legal[95] to finance, and from consulting[96] to zoology.[97]

Although the specific tasks that an intern performs will depend on the industry in which they are working—just as it varies for all other employees—the majority of these interns will all have three things in common: (1) they are also actively seeking employment upon graduation; (2) they represent future employees and (3) their internship places them square in the middle of the workplace. What this means for Title VII purposes, is that these interns: (1) are actively participating in the ongoing interview process known as an internship; (2) are possibly going to work for that employer in the future, and (3) are actively contributing to and participating in the workplace alongside all other employees.

B. Internships: The First Step In the Hiring Process

School career centers tell students that internships are a great way to "work with professionals in a chosen field" and "to showcase their talents and capabilities to a prospective employer."[98] Likewise, employers are sold on the idea of providing an internship based on the idea that an internship allows employers to "test-drive their employees before making a formal commitment."[99] Employers see internships as a way to "evaluate how an individual would fare in the actual workplace" before hiring them.[100] According to Paul King, the corporate director of talent acquisition at Caesars Entertainment Corp., having an internship program is similar to the "try before you buy approach."[101] In essence, internships allow both future employees and

[94] *See How Interns and Co-Ops*, *supra* note 3 (stating that in a survey of employers who had interns from 2012-2013, "more than 20 industries took part.").

[95] Laura Jerpi, *Legal Internship–Helping Students Become the Best Candidate for the Job*, SOUTH SOURCE (S. Univ., Savannah Ga.), June 2011, *available at* http://source.southuniversity.edu/legal-internships-helping-students-become-the-best-candidate-for-the-job-43116.aspx.

[96] Melissa Korn, *Internships are Increasingly the Route to Winning a Job: More Industries Pick From the Summer Talent, Raising the Stakes*, WALL ST. J. (June 5, 2013, 8:00 PM), http://online.wsj.com/news/articles/SB10001424127887324423904578525431344927240.

[97] *Zoology Internship: Genetic & Morphologic Structure in the Barred Owl*, THE FIELD MUSEUM, http://www.fieldmuseum.org/zoology-internship-genetic-morphologic-structure-barred-owl (last visited Sept. 14, 2014).

[98] Terry, *supra* note 90.

[99] Thiru, *supra* note 86.

[100] Hering, *supra* note 86.

[101] Korn, *supra* note 96 (internal quotations omitted).

future employers to see whether they are a good fit, and therefore serve as a screening process for both participants.

Finding, selecting, and training new employees takes time and resources. As such, companies want to know in advance if they can expect a return on that investment.[102] Although an internship program helps to provide that return through the work performed by interns, that return emerges in large part through the well-developed applicant pool that an internship program will create, and from which the employer can later hire employees already known to fit in well within the company.[103]

It is because of this internship-to-applicant pool ideal that today's students are told that the best way to land a job at the end of the summer is to "treat an internship as a 10-12 week job interview": if they perform well, they are more likely to land a job.[104] Based on the numbers, internships truly are the key to success, as most internships––particularly those within large companies—offer the possibility of later becoming a full time job.[105] According to the National Association of Colleges and Employers (NACE), in 2011 42% of new hires came from former internship programs.[106] NACE's study found that in 2012–2013 participating employers made full-time employment offers to 56.7% of former interns.[107] For some companies, this number is reported as high as 69%, according to a recent study from the Graduate Management Admission Counsel, and those numbers are even higher in specific markets such as consulting, finance, and

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[102] Hering, *supra* note 86.

[103] *Id.*

[104] *See* Jacquelyn Smith, *Turn Your Internship Into Your Job*, FORBES (May 21, 2012, 11:41 AM), http://www.forbes.com/sites/jacquelynsmith/2012/05/21/turn-your-internship-into-your-job (quoting Alex Taylor, former senior vice president and human resource manager at Bank of America).

[105] *See* Susan Adams, *American Companies with the Most Internships Now*, FORBES (May 16, 2012, 4:05 PM), http://www.forbes.com/sites/susanadams/2012/05/16/american-companies-with-the-most-internships-now.

[106] Thiru, *supra* note 86.

[107] *See* NAT'L ASS'N OF COLLEGES & EMPLOYERS, *Current Benchmarks*, in 2013 INTERNSHIP & CO-OP SURVEY (2013), *available at* https://www.naceweb.org/internships/benchmarks.aspx. This number only refers to paid interns at graduation and does not include numbers of post-graduation or unpaid interns. *Id*. Although the hiring rates for unpaid interns were much lower than it was for paid interns, NACE argues that this could be due to several factors, including the fact that NACE did not look at post-graduation hiring numbers. *Unpaid Internships: A Clarification of NACE Research*, NAT'L ASS'N OF COLLEGES & EMPLOYERS (Oct. 16, 2013), https://www.naceweb.org/s10162013/paid-internship-full-time-employment.aspx.

accounting.[108] In a study of internship-to-employment rates in 2012 for students attending the University of Chicago Booth School of Business, Columbia Business School, Harvard School of Business, University of Virginia Darden School of Business, and Duke University Fuqua School of Business, between 30-50% of students took full-time jobs with their summer internship employer.[109] In some fields, these numbers increase; for example, in the field of finance, an estimated 80-90% of new Wall Street hires in 2012 were interns from the previous summer.[110]

These numbers all make a very clear point: if you do not get an internship with a company over the summer, your chances of later getting a full time job with that company goes down.[111] Although not stated in these studies, it would stand to reason that if you were to get an internship, but were unable to keep it–perhaps because you were forced to quit after your boss made sexually or racially charged comments–you too would be less likely to later get a full time job at that company. The reason for this assumption is based on the rationale that employers are using to employ interns: it allows them to test out future employees before making a firm commitment.[112] Therefore quitting mid-summer or semester would seem to indicate a lack of compatibility with the company, which the company would likely see as a reasonable excuse for not later hiring the individual.

Therefore, when interns go to work for the summer, not only are they gaining valuable work experience, but they are also 'trying out' for a job. It is because of this "try out" element that internships have become an active part of the hiring practice. If the majority of firms and companies hire from a pool of former interns, then the internship is itself part of the hiring process, used to evaluate applicants in the same manner that an employer would evaluate a future employee during a job interview. One employer even goes so far as to call internships a "working interview."[113] The difference from ordinary interviews, of course, is that this interview does not take hours, but weeks.

One of Title VII's express purposes is to eliminate discriminatory hiring practices.[114] Internships, in their capacity as a multi-week

[108] Korn, *supra* note 96.
[109] *Id*.
[110] *Id.*
[111] *See id*. (stating that in areas such as finance, consulting, and technology in particular, getting a job at a company is tough if the student did not first spend a summer interning there).
[112] Thiru, *supra* note 86.
[113] Korn, *supra* note 96.
[114] *McDonnell Douglas Corp*., 411 U.S. at 800–01.

interview, can allow employers to engage in two potential discriminatory hiring practices, the types of which Congress intended Title VII to prevent. So long as internships are not covered by Title VII, these problems will continue to emerge, thereby preventing Title VII from fulfilling its purpose of eliminating discriminatory hiring practices.

The first discriminatory hiring issue that can emerge within an internship is during the initial process of choosing the intern. Although this sort of selection process is the type of barrier that Title VII seeks to eliminate,[115] because Title VII does not cover interns, it is unlikely that an intern could sue for not being selected for the internship.[116] Therefore, a company that did not want to employ African Americans, Christians, women, people of Chinese descent, or Buddhists, could ask questions during the interview process that would normally be prohibited because they would serve as a discriminatory hiring barrier. Furthermore, companies could deny interviews based on race, religion, or sex, and the applicants would have no recourse under Title VII because the courts do not consider interns protected under Title VII. Later, when the company hires primarily from its intern pool–as the statistics above indicate it will likely do—it will have a legitimate, and arguably nondiscriminatory, reason for hiring patterns that would otherwise appear quite discriminatory. It is in part because of this glaring loophole in the process that would allow a company to hire in such a discriminatory fashion, that interns should be covered under Title VII.

The second discriminatory hiring problem emerges during the internship itself, when the intern is subject to discriminatory comments or harassment. If a company is one that does not like a specific race, color, religion, or sex, that company can choose to target interns by harassing them and by making discriminatory comments. The interns who find themselves at the center of this discriminatory attention have three options: ignore the comments or harassment, confront the harasser, or quit. When the intern does either of the latter two, their chances of later getting a job will likely drop, based on reasons discussed above.

If an intern quits mid way through their internship, the company will have a valid reason for not hiring that person based on the idea that it did not work out during the internship—otherwise the intern would not have quit—so why should the company invest time and

[115] *Id.*

[116] Although there is no case law on the subject, there is no reason to believe that courts would handle this situation any differently than they have handled intern Title VII cases in the past.

effort into hiring this person, when it is just as likely not to work out when the person works there full time.[117] If the intern confronts the harasser, like Ms. Wang did in *Wang v. Phoenix Satellite Television, US, Inc.*,[118] it is likely that the situation will work out in the same fashion as it did in *Wang*: the employer will come up with a seemingly valid reason why the company will not hire the intern. The probable result is that, at the end of the summer, the interns who were the focus of the discriminatory behavior will either not get a full time job because they quit or confronted their harasser, or will not apply for the job at all. Thus, the only individuals who are likely to apply and get the job will be those former interns who were not discriminated against, or those who were, but were willing to "tough it out."

It is this weeding out of interns through the presence of workplace discrimination that demonstrates how Title VII fails when it does not protect interns. As discussed, one of the goals of Title VII is to act in a preventative capacity.[119] Interns, if successful, are the future employees of a company, and therefore when Title VII does not protect interns from discrimination, it is also not preventing future discriminatory practices from occurring in the workplace. The reason for this is that if a supervisor discriminates against an intern, why would that supervisor stop discriminating simply because an intern is hired as a full time employee. Therefore, if Title VII is truly going to fulfill its potential, discriminatory practices need to be stopped when they start to protect interns.

Therefore, it is because internships have become such a crucial part of the hiring process, making or breaking a person's chance of later getting a job, that Title VII ought to cover interns. When Title VII ignores interns, it fails to fulfill its goals of eliminating discriminatory hiring practices, and from preventing future discrimination in the workplace.

C. Internships: A Window into the Workplace

Schools advertise internships not only as an essential part of getting a job, but also as a way to bolster resumes by gaining valuable work experience.[120] The reason for this: because employers are using internships as a tool through which to develop a pool of candidates for

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[117] Thiru, *supra* note 86.

[118] *Wang*,,976 F.Supp.2d at 530.

[119] *See supra* text accompanying notes 31–49.

[120] *See* Terry, *supra* note 90 (listing the opportunity to gain "authentic work experience," and to help "build a strong resume" among the many reasons why a student should get an internship during college).

full-time employment,[121] they often fully immerse their interns within the workplace.[122] Although employers may have once used interns for the sole purpose of coffee and mail,[123] in NACE's 2013 survey, employers reported that interns only spend 1.9% of their time doing what is characterized as "non-essential functions."[124] The other 98.1% of the time, interns were busy working "on meaningful tasks,"[125] which included: Admin/Clerical work (8.9%); Communications work (19.1%); Logistics work (12.2%); Analytical/Problem Solving (35.9%) and Project Management work (22%).[126] Assuming that interns are not working on made up projects, these numbers would imply that 98.1% of the time interns are working with other full-time employees. Therefore, 98.1% of the time interns are working within the same work environment as any other full-time employee who is completing similar work.

As evidenced above, interns once more become relevant to fulfilling the purposes of Title VII; one of Title VII's purposes is to eradicate workplace discrimination, including the type of discrimination that creates a toxic work environment.[127] Because internships immerse individuals within the workplace, whenever interns are subject to discrimination or harassment, the workplace as a whole is impacted. Ignoring interns thus creates two problems under Title VII: the ignored existence of a toxic work environment, and the possibility of further unreported discrimination.

Title VII prohibits workplace discrimination that serves to create a toxic work environment.[128] As discussed above, the Supreme Court has extended Title VII's reach to employees who are forced to work in a "discriminatorily hostile or abusive environment"[129] that is "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."[130]

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[121] *See supra* text accompanying notes 98–119.

[122] *See* Auerbach, *supra* note 90 (stating that "[i]nternships provide students with real-world experience in their field"); Terry, *supra* note 90 (stating that "[i]nternships give students opportunities to work with professionals in a chosen field," which would suggest that interns are not working in an isolated bubble, but amongst the full time employees working for the employer).

[123] *See* Hering, *supra* note 86 (implying that making coffee runs in the morning used to be the norm).

[124] *How Interns and Co-ops*, *supra* note 3.

[125] *Id.*

[126] *Id.*

[127] *See supra* Part II(A)(a).

[128] *See id.*

[129] Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

[130] *Vance*, 133 S. Ct. at 2240 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (1971)).

Because interns are part of the workplace, the discrimination and harassment that they experience also becomes part of the workplace, and therefore when interns are ignored, so too is the impact that the discrimination they face has on the workplace.

Title VII cannot be successful in its goal to prevent the creation of a discriminatory work environment so long as interns are not covered. This argument is based on the reasonable conclusion that the discrimination interns face becomes part of the workplace environment as a whole. Just as interns do not work within an isolated bubble in the workplace, interns are not harassed and discriminated against in an isolated bubble. Therefore, when an intern faces discrimination, it impacts the entire workplace and can lead to "the creation or perpetuation of a discriminatory work environment"[131] that Title VII was created to prevent.

The second way in which Title VII cannot successfully complete its goal of eliminating workplace discrimination when interns are ignored is based on the argument that, when interns are discriminated against, it is likely that they are not the only ones being targeted. Because interns are so immersed in the workplace, their experiences, arguably, reflect the experiences of the full time employees within the workplace. Employees may not feel comfortable stepping forward and filing a formal complaint, but their interests are, by extension, represented by the lone intern, like Ms. Wang, who does step forward.

This argument becomes more likely when one considers that, in several cases where interns complained of harassment, they were not the only ones experiencing such harassment.[132] In *O'Connor v. Davis*, the Second Circuit Court of Appeals found that the plaintiff—an intern—was not the harasser's "only target;"[133] the other victims of the harasser's sexual harassment were employees who worked for the defendant.[134] Therefore, not only was the plaintiff's experience reflective of the experience of other employees, it was also reflective of how the defendant-employer handled such harassment cases.[135] One can assume that, just as the plaintiff's complaints to her direct supervisor regarding such harassment were not reported,[136] so too was the case for any employee who also complained of the harassment (if any employee in fact did), based on the fact that the harasser was still

[131] *Id.*

[132] *See O'Connor*, 126 F.3d at 114; *see also* Doe v. Lee, 943 F. Supp. 870, 875 (N.D. Ill. 2013) (stating that the plaintiff was not the only one to experience sexual harassment while working for the defendant employer).

[133] *O'Connor*, 126 F.3d. at 114.

[134] *Id.*

[135] *See id.*

[136] *Id.*

employed and still engaging in discriminatory behavior.[137] When the Court held that Title VII did not apply to the plaintiff, it allowed for the continuation of workplace discrimination, thereby failing to uphold the purposes of Title VII. Therefore, by not acknowledging that interns offer a window into the workplace as a whole, and that the discrimination they experience is either the same discrimination other employees are experiencing or lending itself to the creation of a discriminatory workplace, Title VII is not able to succeed.

IV. CONCLUSION: WHEN WE IGNORE THE PURPOSES OF TITLE VII, TITLE VII FAILS

Although the arguments for applying the agency-based control definition of employee to Title VII are well reasoned—it allows for consistency, and that is the most oft cited legal definition of employee—the application of this definition is leading to the failure of Title VII. Interns provide the perfect example of such: here is a group not legally considered an employee under the agency-based definition and therefore not covered by Title VII. Yet, when interns face workplace discrimination and courts ignore their plight, workplace discrimination, the exact thing Title VII was enacted to prevent, is allowed to flourish. So long as Title VII does not cover interns and other workers like them, Title VII will be unable to complete its goal of preventing employment discrimination based on protected status.

[137] *See id.* (explaining that the defendant had a history of harassing employees in the past, but making no mention of any disciplinary actions taken in response to this fact).