LOWERY V. KLEMM: A FAILED ATTEMPT AT PROVIDING UNPAID INTERNS AND VOLUNTEERS WITH ADEQUATE EMPLOYMENT PROTECTIONS

I. INTRODUCTION

O'Connor v. Davis highlights the inadequate employment protections facing unpaid interns and volunteers.[1] In *O'Connor*, a doctor nicknamed a student-intern "Miss Sexual Harassment;" suggested that because she appeared tired, "she and her boyfriend must have had 'a good time' the night before;" advised the intern that she should partake in an orgy with other women, and asked the intern to "remove her clothing in preparation for a meeting."[2] Despite the student's complaints, her supervisor did not take remedial action.[3] The court dismissed the student's Title VII sexual harassment claim because, as an unpaid intern, she was not an "employee."[4]

As *O'Connor* demonstrates, courts do not provide unpaid interns and volunteers with employment protections because, as unpaid workers, they are not statutory employees.[5] This reasoning cheapens the priceless role unpaid interns and volunteers play in our communities.[6] Undoubtedly, "our nation benefits immeasurably from the many non-profit and charitable organizations that depend upon volunteer help."[7] Without employment protections, unpaid interns and volunteers do not have adequate legal defenses to protect themselves from employment discrimination.[8]

Prior to the recent Massachusetts Appellate Court decision *Lowery v. Klemm*, courts that addressed unpaid interns' or volunteers' employment discrimination

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

[2] *Id.* at 114.

[3] *Id.*

[4] *Id.* at 116.

[5] *Id.* at 115-16 (collecting cases).

[6] *See* Leda E. Dunn, Note, *"Protection" of Volunteers Under Federal Employment Law: Discouraging Voluntarism?*, 61 FORDHAM L. REV. 451, 472 (1992).

[7] *Id.*

[8] *See* David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 217 (2002); Dunn, *supra* note 6. *See generally* Craig J. Ortner, Note, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613 (1998).

allegations failed to provide adequate protections.[9] In *Lowery*, the appellate court turned the tide by extending a state anti-harassment law to unpaid interns and volunteers.[10] Unfortunately, the Supreme Judicial Court of Massachusetts stifled the lower court's progress by reversing its decision.[11]

This Note discusses why courts or legislatures should follow the Massachusetts Appellate Court's lead and provide unpaid interns and volunteers with employment protections through anti-discrimination laws. Part II highlights the common law decisions underlying existing inadequate employment protections. Part III demonstrates how the Massachusetts Appellate Court properly veered from the common law and how the Supreme Judicial Court of Massachusetts thwarted the appellate court's progress. Part IV argues that the courts or legislatures should follow the Massachusetts Appellate Court's lead and provide unpaid interns and volunteers with employment protections through anti-discrimination laws.

II. BACKGROUND

A. Federal Employment Laws

Courts have addressed Title VII of the Civil Rights Act of 1964, as amended, ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act ("ADA") in unpaid intern and volunteer employment cases.[12]

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[9] *See* Pietras v. Bd. of Fire Comm'r, 180 F.3d 468 (2d Cir. 1999); *O'Connor*, 126 F.3d 112; Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71 (8th Cir. 1990); Blankenship v. City of Portsmith, 372 F. Supp. 2d 496 (E.D. Va. 2005); Tawes v. Frankford Volunteer Fire Co., No. 03-842, 2005 U.S. Dist. LEXIS 786 (D. Del. January 13, 2005); Bucklen v. Rensselaer Polytechnic Inst., 166 F. Supp. 2d 721 (N.D.N.Y. 2001); York v. Ass'n of the Bar, No. 00 Civ. 5961, 2001 U.S. Dist. LEXIS 9457 (S.D.N.Y. July 11, 2001); Neff v. Civil Air Patrol, 916 F. Supp. 710 (S.D. Ohio 1996); Hall v. Delaware Council on Crime & Justice, 780 F. Supp. 241 (D. Del. 1992); Tadros v. Coleman, 717 F. Supp. 996 (S.D.N.Y. 1989); Shoenbaum v. Orange County Ctr. for Performing Arts, Inc., 677 F. Supp. 1036 (C.D. Cal. 1987); Smith v. Berks Cmty. Television, 657 F. Supp. 794 (E.D. Pa. 1987); Beverley v. Douglas, 591 F. Supp. 1321 (S.D.N.Y. 1984); Mendoza v. Town of Ross, 128 Cal. App. 4th 625 (Cal. Ct. App. 2005); Thomas v. Parker, 3 Mass. L. Rptr. 163 (Mass. Super. Ct. 1994); City of Fort Calhoun v. Collins, 500 N.W.2d 822 (Neb. 1993). *But see* Haavistola v. Cmty. Fire Co., 6 F.3d 211, 221-22 (4th Cir. 1994) (extending employment law protections to volunteers who received extensive benefits). Despite *Haavistola*, however, unpaid interns and volunteers are still inadequately protected because (1) most unpaid interns and volunteers do not receive extensive benefits, and (2) courts have rarely called volunteers that receive benefits employees. *See* discussion *infra* Part II.A.

[10] Lowery v. Klemm, 825 N.E.2d 1065, 1070-71 (Mass. App. Ct. 2005).

[11] Lowery v. Klemm, 845 N.E.2d 1124 (Mass. 2006).

[12] *See Pietras*, 180 F.3d at 473 (addressing Title VII); *O'Connor*, 126 F.3d at 112 (addressing Title VII); *Graves*, 907 F.2d at 71 (addressing Title VII); *Blankenship*, 372 F. Supp. 2d at 498-501 (addressing ADEA); *Tawes*, 2005 U.S. Dist. LEXIS at 786 (addressing

Title VII prevents employment discrimination based on "race, color, religion, sex, or national origin."[13] The law defines an "employer" as "a person . . . who has fifteen or more employees . . . and any agent of such a person."[14] An "employee" is "an individual employed by an employer."[15] The ADEA and ADA, which protect employees from age and disability discrimination, similarly define the terms "employer" and "employee."[16] Despite the laws' circular definitions, courts have defined an employee as a person that works for compensation (even though the laws do not provide such a limitation) and, therefore, have denied unpaid interns and volunteers federal employment protections.[17]

Courts have not, however, specified how much compensation or what kind of compensation one must receive to be an employee. For instance, in *Haavistola v. Community Fire Co.* and *Pietras v. Board of Fire Commissioners*, the court extended employment protections to volunteers who received "significant" benefits aside from pay.[18] Yet in *Neff v. Civil Air Patrol*, the court did not consider a

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ADA); *Bucklen*, 166 F. Supp. 2d at 721 (addressing Title VII); *Shoenbaum*, 677 F. Supp. 1036 (addressing ADEA); *Smith*, 657 F. Supp. at 794 (addressing Title VII); *Beverley*, 591 F. Supp. at 1321 (addressing Title VII).

[13] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2004).

[14] *Id.* § 2000e(b).

[15] *Id.* § 2000e(f).

[16] Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1) (2004); Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a) (2004). The ADEA states, an "employer" is "a person . . . who has twenty or more employees . . . [and] any agent of such a person." 29 U.S.C. § 630(b). The law continues, "The term 'employee' means an individual employed by any employer." 29 U.S.C. § 630(f). According to the ADA, "the term 'employer' means a person . . . who has 15 or more employees . . . and any agent of such person." 42 U.S.C. § 12111(5)(A). The law defines an "employee" as "an individual employed by an employer." 42 U.S.C. § 12111(4).

[17] *Graves* summarizes the courts' interpretations of statutory employees. 907 F.2d at 71-74 (stating that employees are people that receive compensation from an employer). *See* Ortner, *supra* note 8, at 2632, 2634. *See also* Dunn, *supra* note 6, at 459-60; *Pietras*, 180 F.3d at 473; *O'Connor*, 126 F.3d at 116; *Blankenship*, 372 F. Supp. 2d at 498-501; *Tawes*, 2005 U.S. Dist. LEXIS 786 at *15-17; *Bucklen*, 166 F. Supp. 2d at 724-26; York v. Ass'n of the Bar, 2001 U.S. Dist. LEXIS 9457, *8 (S.D.N.Y. July 11, 2001); Neff v. Civil Air Patrol, 916 F. Supp. 710, 712 (S.D. Ohio 1996); Hall v. Delaware Council on Crime & Justice, 780 F. Supp. 241, 244 (D. Del. 1992); Tadros v. Coleman, 717 F. Supp. 996, 1001-06 (S.D.N.Y. 1989); *Shoenbaum*, 677 F. Supp. at 1038-39; *Smith*, 657 F. Supp. at 795-96; *Beverley*, 591 F. Supp. at 1326-28; Mendoza v. Town of Ross, 128 Cal. App. 4th 625, 636-37 (Cal. Ct. App. 2005); Thomas v. Parker, 3 Mass. L. Rptr. 163 (Mass. Super. Ct. 1994); City of Fort Calhoun v. Collins, 500 N.W.2d 822, 825-26 (Neb. 1993).

[18] Haavistola v. Cmty. Fire Co., 6 F.3d 211, 221-22 (4th Cir. 1994); *Pietras*, 180 F.3d at 471, 473. In *Haavistola*, the court deemed a volunteer firefighter, who received benefits including "[(1) a] state-funded disability pension . . . [(2)] survivors' benefits for dependents . . . [(3)] scholarships for dependents upon disability or death . . . [and (4)] group life insurance," an employee because she received extensive benefits. *Haavistola*, 6 F.3d at 221-22. Similarly, in *Pietras*, the court determined a volunteer firefighter was an employee because he "was entitled to numerous firefighter benefits . . . [which] included: (1) a

worker who received death benefits, free flight training, and discounts on airplane use to be an employee.[19]

As *Neff* reveals, *Haavistola* and *Pietras* have not meaningfully improved employment protections for unpaid interns and volunteers. Most interns and volunteers do not receive material benefits, and courts, such as in *Neff*, may deny protection to those that receive fairly extensive benefits. Additionally, courts remain unwilling to recognize "indispensable work experience" or giving back to one's community, which motivate interns and volunteers to work without pay, as compensation.[20]

1. Title VII

Courts have rejected unpaid interns' and volunteers' Title VII claims.[21] In *Beverly v. Douglass*, a court threw out a medical student's Title VII claim where a hospital denied a student voluntary admitting privileges due to her race and sex because "the relationship between the [h]ospital . . . and the voluntary staff [was] not one of employment."[22] The court conveniently ignored the fact that the hospital's denial interfered with the student's educational pursuits and employment opportunities.[23] Similarly, in *Tadros v. Coleman*, a court focused on a college faculty member's volunteer status to decide he was "not entitled to bring an action under Title VII" for national origin discrimination despite the fact that the college benefited from the volunteer's work as it would from a paid faculty member.[24] Also, in *York v. Ass'n of the Bar*, a court dismissed a volunteer attorney's sexual harassment claims where she "worked for the defendant" at least in part, "with the expectation that she would receive . . . employment opportunities," because she "was merely a volunteer."[25]

These inadequate employment protections are particularly detrimental to students pursuing careers in "glamour industries," such as entertainment, because unpaid internships and volunteer work in these industries help students develop the connections necessary to break into these businesses.[26] For instance, in *Smith v.*

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retirement pension, (2) life insurance, (3) death benefits, (4) disability insurance, and (5) some medical benefits." *Pietras*, 180 F.3d at 471, 473.

[19] *Neff*, 916 F. Supp. at 715.

[20] *See* Ortner, *supra* note 8, at 2640.

[21] *See Pietras*, 180 F.3d 468; *O'Connor*, 126 F.3d 112; *Graves*, 907 F.2d 71; *Bucklen*, 166 F. Supp. 2d 721; *York*, 2001 U.S. Dist. LEXIS 9457; *Tadros*, 717 F. Supp. 996; *Smith*, 657 F. Supp. 794; *Beverley*, 591 F. Supp. 1321. The courts have determined that unpaid interns and volunteers are not employees because they are not compensated. *See* discussion *supra* Part II.A.

[22] *Beverly*, 591 F. Supp. at 1323, 1327, 1331.

[23] *Id.*

[24] *Tadros*, 717 F. Supp. at 999, 1003.

[25] *York*, 2001 U.S. Dist. LEXIS 9457 at *3, *11, *13.

[26] Yamada, *supra* note 8, at 219. *See* Ortner, *supra* note 8, at 2617-18; Steven Ginsberg, *Soar Spot: Why Internships Are Increasingly Crucial; Workers Gain Experience and*

Berks Community Television, the court denied a television station volunteer's Title VII claim because volunteers "receive[] no financial remuneration . . . and contribute assistance on a purely voluntary basis," which does not make them "employees within the meaning of the Act."[27]

2. ADEA & ADA

Unpaid interns and volunteers face similar obstacles under the ADEA and ADA.[28] In *Shoenbaum v. The Orange County Center for Performing Arts*, a volunteer alleged that an employer denied him a position because of his age, but the court held that the ADEA did not protect volunteers.[29] In *Blankenship v. City of Portsmith*, the court dismissed a 63-year old volunteer sheriff's age discrimination and retaliation claims where the department removed him "from the criminal apprehension unit due to his age" because he was not an employee.[30] Similarly, the court in *Tawes v. Frankford Volunteer Fire Co.* determined that an injured volunteer firefighter was not an employee and therefore was "not entitled to relief under" the ADA where "the [f]ire [c]ompany revoked [the volunteer's] membership [in the company] for failure to complete" a training exercise that he could not complete due to his injury.[31]

B. State Employment Laws

Courts have been equally unwilling to extend state employment protections to unpaid interns and volunteers.[32] In *City of Fort Calhoun v. Collins*, the court decided that a group of female applicants, "the first and only women who had ever applied for membership in the volunteer Fire Department[,]" did not qualify as employees under the Nebraska Fair Employment Practice Act, which "is patterned after Title VII," because they "receive[d] no pay for their services."[33]

Contacts, While Employers Get a Chance to Try Before Letting Someone Fly, WASH. POST, June 1, 1997, at H4; Mary Beth Marklein, *Interns Invest Time in Future*, USA TODAY, June 7, 1995, at 5D.

[27] Smith v. Berks Cmty. Television, 657 F. Supp. 794, 794-96 (E.D. Pa. 1987).

[28] Blankenship v. City of Portsmith, 372 F. Supp. 2d 496, 497 (E.D. Va. 2005); Tawes v. Frankford Volunteer Fire Co., 2005 U.S. Dist. LEXIS 786 (D. Del. January 13, 2005); Shoenbaum v. Orange County Ctr. for Performing Arts, Inc., 677 F. Supp. 1036, 1037 (C.D. Cal. 1987).

[29] *Shoenbaum*, 677 F. Supp. at 1037-39.

[30] *Blankenship*, 372 F. Supp. 2d at 497, 500.

[31] *Tawes*, 2005 U.S. Dist. LEXIS 786 at *2, *17.

[32] Lipphold v. Duggal Color Projects, 1998 U.S. Dist. LEXIS 335 (S.D.N.Y. January 15, 1998) (New York State and City Human Rights Laws); Mendoza v. Town of Ross, 128 Cal. App. 4th 625 (Cal. Ct. App. 2005) (California Fair Employment and Housing Act); Thomas v. Parker, 3 Mass. L. Rptr. 163 (Mass. Super. Ct. 1994) (MASS. GEN. LAWS ch. 214, § 1C (2002)); City of Fort Calhoun v. Collins, 500 N.W.2d 822 (Neb. 1993) (Nebraska Fair Employment Practice Act).

[33] *City of Fort Calhoun*, 500 N.W.2d at 824-27. *See* Nebraska Fair Employment Act,

Consequently, the court denied the women's sex discrimination claims.[34] Similarly, in *Mendoza v. Town of Ross*, the court concluded that the California Fair Employment and Housing Act, which protects employees from disability discrimination, did not protect a disabled community service volunteer because, as an unpaid worker, he was not an employee.[35]

Courts have also denied unpaid interns and volunteers employment protections under state laws that provide more extensive protections than their federal counterparts.[36] In *Lipphold v. Duggal Color Projects*, the court dismissed a Board of Education-appointed student's claim against an employer under the New York State and City Human Rights Laws.[37] While modeled after Title VII, the New York State Human Rights law contains a clause that states, "It shall be an unlawful discriminatory practice for *any person* to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so."[38] This section can be "used to impose liability upon the individual supervisors of a plaintiff who are not 'employers' but who engage in the discriminatory conduct."[39]

Despite the law's broader language, the court dismissed the student's sexual harassment claim where the supervisor "touched [the student's] breasts and buttocks, frequently rubbed his body against hers in the darkroom, . . . made sexual remarks to her[,] . . . put numerous raunchy nude photos on the walls of offices where [the student] worked[,] . . . [and] refused to sign her time sheets and evaluations on time [since she rebuffed] his advances," because, as an unpaid intern, she was not an employee.[40] The court did state that the intern's supervisor "may be held liable as aiding and abetting the Board of Education, provided that the latter is subsequently found liable for discrimination under the Human Rights Law."[41]

Assuming the Board of Education is found liable under the Human Rights Law, the court's holding is still inadequate. First, many organizations offer unpaid internships independent from the Board of Education. Second, since the Board of Education is not the employer in these cases, employers escape liability, which may limit their incentive to prevent discriminatory behavior.[42] Third, such a holding greatly limits the remedies available to unpaid interns and volunteers since they probably cannot recover as much from the state or a supervisor as they could from a private employer.[43]

NEB. REV. STAT. § 48-1104 (1988).

[34] *Id.*

[35] *Mendoza*, 128 Cal. App. 4th at 628, 630-37. *See* California Employment and Housing Act, CAL. GOV'T CODE § 12900 et seq.

[36] *Lipphold*, 1998 U.S. Dist. LEXIS 335 at *11; *Thomas*, 3 Mass. L. Rptr. at 163.

[37] *Lipphold*, 1998 U.S. Dist. LEXIS 335 at *6.

[38] *Id.* at *7 (emphasis added). *See also* N.Y. EXEC. LAW § 296(6) (McKinney 1993).

[39] *Lipphold*, 1998 U.S. Dist. LEXIS 335. at *7.

[40] *Id.* at *3, *6-7.

[41] *Id.* at *9.

[42] The employer in *Lipphold* escaped liability. *Id.*

[43] "State governments are insulated from both legal and equitable suits under § 1983 by

Like the New York law, Massachusetts General Law chapter 214 § 1C ("G.L. c. 214, § 1C"), which protects employees from sexual harassment, applies to "all persons," not just employees.[44] Despite the law's broad language, the court in *Thomas v. Parker* denied an unpaid radio station volunteer's sexual harassment claims because G.L. c. 214, § 1C "has never been interpreted to apply to volunteers who do not work for pay."[45]

III. *LOWERY V. KLEMM*: TURNING THE TIDE?

More than a decade after *Thomas*, the Massachusetts Court of Appeals decided the revolutionary *Lowery v. Klemm*.[46] In *Lowery*, a swap shop worker sexually harassed a volunteer.[47] Despite the volunteer's request that her co-worker leave her alone, the co-worker continued to harass her.[48] Soon after, the swap shop director "issued a no trespass order barring [the volunteer] from the landfill and ending her volunteer services."[49] After the town refused to take remedial action, the volunteer sought protection under G.L. c. 214, § 1C.[50] The court held that the law "provides

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the doctrine of sovereign immunity as embodied in the eleventh amendment." SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW 197 (2d ed., West Group 2000). Additionally, supervisors may not have as much money as their employers and may be insolvent.

[44] Thomas v. Parker, 3 Mass. L. Rptr. 163, 164 (Mass. Super. Ct. 1994).

[45] *Id.* at 164. *But see* Lowery v. Klemm, 825 N.E.2d 1065, 1070-71 (Mass. App. Ct. 2005) (applying this law to protect unpaid interns and volunteers).

[46] *Lowery*, 825 N.E.2d 1065. The court considered the interplay between G.L. ch. 214, § 1C and Massachusetts General Law chapter 151B. The latter is an anti-discrimination employment law that covers statutory employees. Its sexual harassment provision states, "It shall be an unlawful practice . . . [f]or an employer, personally or through its agents, to sexually harass any employee." *Id.* at 1067 n.2. In *Green v. Wyman-Gordon Co.* the court held:

> [W]here G.L. c. 151B applies to discriminatory conduct, including sexual harassment, the administrative procedure specified in c. 151B may not be bypassed; in such cases, G.L. c. 214, § 1C, does not have independent force and does not confer a private right of action. "Where . . . c. 151B applies, its comprehensive remedial scheme is exclusive, in the absence of an explicit legislative command to the contrary." . . . Conversely, in instances where c. 151B does not apply, G.L. c. 214, § 1C, "provides exclusive jurisdiction in the Superior Court for any sexual harassment claim that is brought in the courts . . . [if] either (a) the employer is not covered by c. 151B; or (b) the claimant has satisfied the procedural prerequisites for a c. 151B claim and has chosen to pursue the case in court."

Lowery, 825 N.E.2d at 1067-68 (quoting Green v. Wyman-Gordon Co., 664 N.E.2d 808 (Mass. 1996)).

[47] *Id.* at 1066.

[48] *Id.*

[49] *Id.*

[50] *Id.* MASS. GEN. LAWS ch. 214, § 1C "preserves the right of a 'person' to be 'free from sexual harassment,' and confers jurisdiction on the Superior Court to enforce that right in

a private statutory right of action to a volunteer worker who is sexually harassed."[51] The court explained:

> [T]o construe the statute as inapplicable to a volunteer toiling in a workplace would give rise to unfair and absurd results: unpaid volunteer workers, serving the community, could be subjected to sexual harassment but would not be covered by the panoply of statutorily based rights of action (which provide greater protections and grant a broader array of remedies and tools for enforcement than are available at common law).[52]

Accordingly, the appellate court's extension of G.L. c. 214, § 1C to unpaid workers would have provided unpaid interns and volunteers with necessary employment protections.

However, the Supreme Judicial Court of Massachusetts reversed the appellate court's decision in an opinion riddled with contradictions. While the court stated that "[a] statute must be interpreted to give effect 'to all its provisions, so that no part will be inoperative or superfluous,'" the court failed to meet this very standard.[53]

G.L. c. 214, § 1C states, "A *person* shall have the right to be free from sexual harassment, as defined in chapter[s 151B and 151C]."[54] General Law chapter 151B ("G.L. c. 151B") defines sexual harassment as:

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instances where other employment-related statutes . . . may not be applicable." *Id.* The plaintiff in *Thomas* sought protection from the same law. Thomas v. Parker, 3 Mass. L. Rptr. 163 (1994).

[51] *Lowery*, 825 N.E.2d at 1066.

[52] *Id.* at 1070-71. The court continued,

> Similar examples abound, e.g., the unpaid volunteer law school intern, working and sitting next to the compensated employed law clerk; the elementary school unpaid volunteer teacher's assistant, helping a student in joint sessions with a compensated employed special reading teacher; the unpaid volunteer in the town library, shelving books next to a compensated employed shelving assistant.

Id. at 1071.

> Recent situations in Washington D.C. involving interns also have brought these matters into the spotlight. Although neither the scandal involving White House intern Monica Lewinsky and President Bill Clinton, nor the relationship between Congressional intern Chandra Levy (now deceased) and U.S. Representative Gary Condit, involved allegations of sexual harassment or gender discrimination, both have raised disturbing questions about predatory work environments that target younger individuals, especially women.

Yamada, *supra* note 8, at 220.

[53] Lowery v. Klemm, 845 N.E.2d 1124, 1128 (Mass. 2006) (quoting Bankers Life & Cas. Co. v. Comm'r of Ins., 691 N.E.2d 929 (Mass. 1998) (quoting Norman J. Singer, STATUTES AND STATUTORY CONSTRUCTION § 46:06 (West Group 6th ed. 2000)).

[54] MASS. GEN. LAWS ch. 214, § 1C (2002). *See also Lowery*, 845 N.E.2d at 1125 n.1 (emphasis added).

> [S]exual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when . . . (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with *an individual's work performance* by creating an intimidating, hostile, humiliating or sexually offensive *work environment*.[55]

Massachusetts General Law Chapter 151C provides:

> The term "sexual harassment" means any sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when . . . (ii) such advances, requests or conduct have the purpose or effect of unreasonably interfering with *an individual's education* by creating an intimidating, hostile, humiliating or sexually offensive *educational environment*.[56]

Relying on this language, the court decided that G.L. c. 214, § 1C only protects "conduct occurring in the employment and academic contexts."[57] If G.L. c. 214, § 1C applied to unpaid interns and volunteers, the court believed, "[t]he [l]egislature could have provided a broader definition for sexual harassment . . . or it could have enacted provisions that would have explicitly protected [volunteers] from sexual harassment."[58]

The court's interpretation, however, ignores the fact that G.L. c. 214, § 1C protects "a person" from sexual harassment, not "an employee."[59] If the legislature intended "a person" to be only "an employee," the legislature "could have enacted provisions that would have explicitly protected" an employee.[60]

Moreover, General Law chapters 151B and 151C, to which G.L. c. 214, § 1C refers, may include unpaid interns and volunteers. The law protects individuals (not employees) in a work or educational environment (not an employment environment), which means unpaid interns and volunteers should be protected since all unpaid interns and volunteers are workers (and some are students too).[61]

The court argued that its denial of G.L. c. 214, § 1C to unpaid interns and volunteers will not create "[']unreasonable' consequences."[62] While the court believes unpaid interns and volunteers have adequate legal protections because "they may bring actions under other statutes, including the civil rights act," the court admitted that such statutes do not provide "protection as extensive as that granted" in G.L. c. 214, § 1C.[63] However, if one appreciates the importance of

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[55] MASS. GEN. LAWS ch. 151B, § 1(18) (2002) (emphasis added). *See also Lowery*, 845 N.E.2d at 1126 n.2.

[56] MASS. GEN. LAWS ch. 151C, § 1(e) (2002) (emphasis added). *See also Lowery*, 845 N.E.2d at 1126 n.2.

[57] *Lowery*, 845 N.E.2d at 1128.

[58] *Id.* (quoting Vicarelli v. Bus. Int'l, Inc., 973 F. Supp. 241, 245 (D. Mass. 1997)).

[59] MASS. GEN. LAWS ch. 214, § 1C. *See also Lowery*, 845 N.E.2d at 1125 n.1.

[60] *Lowery*, 845 N.E.2d at 1128 (quoting *Vicarelli*, 973 F. Supp. at 245).

[61] *Id.* at 1126 n.2.

[62] *Id.* at 1129.

[63] *Id.* at 1131.

unpaid internships and volunteer work, it is only reasonable that unpaid interns and volunteers receive the same protections as employees.[64]

The court held that extending G.L. c. 214, § 1C to unpaid interns and volunteers "would result in a statutory scheme that gives [unpaid interns and] volunteers greater rights than employees."[65] The court stated that while employees are precluded from bringing common law claims, "[i]f [the court] were to conclude that G.L. c. 214, § 1C, covered volunteers, then volunteers [unlike employees] could pursue common-law claims for injuries related to sexual harassment as well as claims under G.L. c. 214, § 1C."[66] In reaching this conclusion, the court narrowly relied on a Massachusetts federal district court decision which held that independent contractors, who are not covered by G.L. c. 214, § 1C, are free to bring common law claims.[67] The court failed to consider that G.L. c. 214, § 1C's protection of independent contractors, unpaid interns, or volunteers might preclude them from bringing common law claims.

Furthermore, the court speculated that the legislature "may have considered that employees . . . need greater protection from sexual harassment than [unpaid interns and] volunteers" because employees "generally depend on their jobs for their livelihood."[68] The court ignored the fact that unpaid internships and volunteer work are necessary for many to obtain employment.[69] Moreover, even if unpaid interns and volunteers would have greater protections than employees if G.L. c. 214, § 1C protected them, their temporary work status arguably necessitates greater protections. A supervisor or employee may be more likely to harass those workers he or she knows will soon leave an organization.

Finally, the court argued that the appellate court's decision "would have the peculiar effect of making it more difficult for employees to prove sexual harassment than nonemployees."[70]

> An employee alleging sexual harassment would be required to demonstrate that (1) a defendant made sexual advances, requested sexual favors, or engaged in other conduct of a sexual nature; *and* that (2) the employee's submission to this conduct was a term of employment or the basis of employment decisions; *or* that (3) this conduct created a hostile work environment. . . . nonemployees like the plaintiff would have to prove merely that the defendant made sexual advances, requested sexual favors, or engaged in other conduct of a sexual nature to establish their claim.[71]

The court seemed to exclude unpaid interns and volunteers from recovering under the second prong because they are not "employees" and under the third prong

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[64] *See* discussion *supra* Part I; *infra* Part IV.A.

[65] *Lowery*, 825 N.E.2d at 1129.

[66] *Id.* at 1130.

[67] *Id.* (citing Vicarelli v. Bus. Int'l, Inc., 973 F. Supp. 241, 245 (D. Mass. 1997)).

[68] *Id.* at 1131.

[69] *See* discussion *supra* Part I; *infra* Part IV.A.

[70] *Lowery*, 845 N.E.2d at 1130.

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

because it refers to a "work environment."[72] However, as mentioned, unpaid interns and volunteers perform their duties in a work environment so the third prong (not just the first) would apply. Consequently, it would actually be more difficult for an unpaid intern or volunteer to prove a case since he or she would have to prove the first *and* third prongs while employees would have the flexibility of proving either the second or third prong, along with the first.

Significantly, even if the Supreme Judicial Court upheld the appellate court's decision, such a judgment would not have fully resolved the problem facing unpaid interns and volunteers. *Lowery* only addresses sexual harassment, which leaves race, color, national origin, religion, age, and disability discrimination for unpaid interns and volunteers inadequately protected. Furthermore, the decision would have been binding only in Massachusetts.

IV. SOLUTIONS

Because unpaid interns and volunteers are becoming an increasingly important part of today's workforce,[73] the courts or the legislatures must provide them with adequate employment protections. The National Association of Colleges and Employers found "70% of 434 respondent employers (private and public sector) required 'new hires to have had internships or other job training.' . . . Of the 61% of respondents who offered summer internship programs, 98% 'said they use the programs to find permanent employees.'"[74] Undoubtedly, "an unpaid internship can represent a crucial step in an individual's pursuit of a livelihood."[75] The trend concerns graduate students as well.[76]

> A survey of recent law school graduates revealed that performance of a[n unpaid] "legal clerkship" while in law school has a "dramatic effect" on a law student's ability to obtain his or her first full-time legal position upon graduation.[77]

Accordingly, it is imperative that the courts or legislatures address the potentially detrimental effects of inadequate employment protections.

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[72] *Id.*

[73] *See* Dunn, *supra* note 6, at 472; Ginsberg, *supra* note 26, at H4; Ortner, *supra* note 8, at 2647; Yamada, *supra* note 8, at 217.

[74] Yamada, *supra* note 8, at 217. *See* Dawn Gilbertson, *Glamorous Internships With a Catch: There's No Pay*, N.Y. TIMES, Oct. 19, 1997, § 3, at 16; Ginsberg *supra* note 26, at H4.

[75] Ortner, *supra* note 8, at 2615.

[76] *Id.* at 2617-18. *See* Marklein, *supra* note 26, at 5D.

[77] Ortner, *supra* note 8, at 2617-18. *See* Gilbertson, *supra* note 74, at 16; Marklein, *supra* note 26, at 5D; Yamada, *supra* note 8, at 217 ("For students enrolled in graduate-level programs in law and business, internship experience is now regarded as an integral part of a professional education.").

A. *Judicial Solution*

Courts can protect unpaid interns and volunteers simply by including unpaid interns and volunteers in the definition of an employee.[78] As discussed above, Title VII vaguely defines an "employee" as "an individual employed by an employer," and the ADEA and ADA follow suit.[79] The courts, not the laws, define an employee as one that receives compensation.[80] When deciding who is an employee, courts should consider the non-tangible benefits unpaid interns and volunteers receive, the benefits they provide their employers and society, and their employers' intentions in hiring them.[81] Such an analysis would place unpaid interns and volunteers in a better position to bring employment discrimination claims and would be consistent with statutory language.

B. *Legislative Solution*

Ideally, Congress would pass a general anti-discrimination statute that protects *unpaid interns and volunteers* from workplace discrimination just as G.L. c. 214, § 1C protects *all persons* from sexual harassment. However, it is unlikely Congress will take such action in the near future, as Congress has not responded to the extensive case law mentioned above.

Alternatively, states should pass general anti-discrimination laws that protect unpaid interns and volunteers from employment discrimination. These laws should provide unpaid interns and volunteers with the same employment protections as statutory employees.[82] In states that already have general anti-discrimination statutes, the legislatures should amend the statutes so that they protect unpaid interns and volunteers from race, color, national origin, religion, sex, age, and disability discrimination.

Unpaid interns and volunteers should face the same burdens of proof that statutory employees face in order to ensure fair trials.[83] This ensures that such a

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[78] *See* discussion *supra* Part II.A.

[79] Title VII of the Civil Rights Act of 1964, at § 2000e(f) (2000). The ADEA states, "The term 'employee' means an individual employed by any employer." Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(f) (2000). The ADA defines an "employee" as "an individual employed by an employer." Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(4) (2000).

[80] *See* discussion *supra* Part II.A.

[81] *See* discussion *supra* Part I and Part II.A.

[82] For example, the Nebraska Fair Employment Practice Act, the California Fair Employment and Housing Act, the New York State Human Rights Law, and G.L. c. 214 § 1C should be amended to protect unpaid interns and volunteers from discrimination based on race, color, national origin, sex, religion, age, and disability.

[83] Accordingly, an unpaid intern or volunteer, like the complainant in a Title VII trial, would carry the initial burden of establishing a prima facie case of discrimination by showing (1) he or she belongs to a protected class, (2) he or she applied and was qualified for a job which the employer was seeking applicants, (3) despite his or her qualifications, the employer rejected him or her, and (4) after his or her rejection, the position remained open

system will not dissuade employers from hiring unpaid interns and volunteers.[84] The law should also afford unpaid interns and volunteers the same relief from which prevailing employees benefit because such relief would deter discrimination and make plaintiffs whole. That is, if an employer discriminates against an unpaid intern or volunteer because of his or her race, color, national origin, religion, or sex, the plaintiff should be entitled to compensatory damages, punitive damages, declaratory relief, attorneys' fees, and court costs.[85]

V. CONCLUSION

Unpaid interns and volunteers face inadequate employment protections.[86] The courts have denied them employment rights because they are not statutory employees.[87] This problem is significant because unpaid internships remain critical stepping stones for many students as they pursue employment[88] and because unpaid volunteers provide vital services to the community.[89] Accordingly, inadequate employment protections give "rise to unfair and absurd results."[90] However, many courts have denied unpaid interns and volunteers employment rights because they

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and the employer continued to seek applicants from people of the complainant's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

[84] Arguably, current federal and state employment laws dissuade employers from hiring employees more than a system that protects unpaid interns and volunteers would, since employees are entitled to lost salary if their employers are found liable for sexual harassment under existing laws.

[85] Except for lost salary, which is not an issue for unpaid interns and volunteers, these are the remedies available under Title VII, which protect employees from discrimination based on race, color, national origin, religion, or sex. *See* ESTREICHER & HARPER, *supra* note 43, at 1072-76. In accordance with Title VII, compensatory damages should be available for intentional discrimination if there is emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses. *Id.* Punitive damages should be available where (1) there is malice or reckless indifference, and (2) (a) an employer is liable through agency law and (b) an employer acted in bad faith, and (3) plaintiff cannot recover under § 1981. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999). Thus, even if an employer knows they are violating the law, the law should not impute punitive damages on the employer if the employer is making a good-faith effort to prevent the violation. If an employer discriminates against an unpaid intern or volunteer because of his or her age, the plaintiff should be entitled to declaratory relief, attorneys' fees, and court costs, in accordance with ADEA. *See* ESTREICHER & HARPER, *supra* note 43, at 1072-76. In a disability discrimination case, an unpaid intern or volunteer should be entitled to a reasonable accommodation, compensatory damages, punitive damages, declaratory relief, attorneys' fees, and court costs, in accordance with ADA. *Id.*

[86] *See* discussion *supra* Part II.

[87] *See* discussion *supra* Part II and *supra* note 5.

[88] *See* Yamada, *supra* note 8, at 215-18; Ortner, *supra* note 8, at 2647; Ginsberg, *supra* note 26, at H4.

[89] *See* Dunn *supra* note 6, at 472.

[90] *Lowery*, 825 N.E.2d at 1070-71.

are not statutory employees.[91]

Because Congress has not indicated that it plans to amend the federal employment statutes to cover unpaid interns and volunteers, states should pass general anti-discrimination statutes similar to G.L. c. 214, § 1C.[92] In states like Nebraska, California, New York, and Massachusetts, which have anti-discrimination statutes that protect people from specific forms of discrimination, the legislatures should amend those statutes so that they protect unpaid interns and volunteers from discrimination on the basis of race, color, national origin, religion, sex, age, and disability. Additionally, courts in these states should follow the Massachusetts Court of Appeals' decision and extend these general anti-discrimination provisions to unpaid interns and volunteers in the employment context. Historically, Massachusetts has been the birthplace for revolutionary ideas.[93] The Massachusetts Court of Appeals' *Lowery* decision should be the naissance of another ground-breaking movement.

James J. LaRocca

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[91] *See supra* note 5 and discussion *supra* Part II.A.

[92] *See generally* Yamada, *supra* note 8; Dunn *supra* note 6.

[93] Among other things, Massachusetts is home to the first Thanksgiving, college, American public library, regularly issued newspaper, woman to earn a Ph.D., and fire truck. *See* Commonwealth of Massachusetts, Interactive State House: Famous Firsts in Massachusetts, http://www.mass.gov/statehouse/famous_firsts.htm (last visited Feb. 1, 2007).