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CIVIL RIGHTS/ANTI-DISCRIMINATION—I DIDN'T VOLUNTEER FOR THIS: A SOLUTION FOR PROTECTING VOLUNTEERS FROM DISCRIMINATION IN MASSACHUSETTS

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CIVIL RIGHTS/ANTI-DISCRIMINATION—I DIDN'T VOLUNTEER FOR THIS: A SOLUTION FOR PROTECTING VOLUNTEERS FROM DISCRIMINATION IN MASSACHUSETTS

*Joseph D. Greenhalgh**

Many have volunteered in some way or another. Volunteers seek to help others and to improve themselves. Unfortunately, if volunteers are discriminated against due to membership in a protected class, whether actual or perceived, they have very limited protections afforded to them.

Few jurisdictions have examined what, if any, protections against discrimination should be available to volunteers. Federal circuit courts are conflicted regarding the circumstances under which volunteers should be protected pursuant to Title VII of the Civil Rights Act of 1964. A small number of states have examined whether volunteers should be protected under state public accommodation anti-discrimination statutes, with an even smaller number concluding that they should be protected under limited circumstances. Nevertheless, none of these solutions would be sufficient in Massachusetts because the protections they provide are so narrowly applied.

Massachusetts has not examined whether anti-discrimination protections should be expanded for volunteers. When someone is not allowed to volunteer, he is denied multiple benefits he would receive by volunteering. This Note argues that when someone is not allowed to volunteer at a place of public accommodation because of his membership or perceived membership in a protected class, he should be protected under the Massachusetts public accommodation anti-discrimination law without the limitations that are present in other states.

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INTRODUCTION

Imagine the following scenario: John and Jim are walking past the local food pantry and see a sign asking for volunteer help. The two men enter the food pantry to volunteer their time and serve meals to the homeless. The manager of the food pantry, believing John and Jim are a couple, tells them that the food pantry does not allow gay men to volunteer. John and Jim neither admit nor deny that they are a couple, but the manager nevertheless does not allow them to volunteer.

Having benefited from the food pantry's services in the past, the men are upset and still want to help. While leaving the building, they see a notice stating that donations are always accepted. The next day, John and Jim bring five bags of non-perishable foods and a check for \$200.00 to donate to the food pantry. The manager of the food pantry refuses John and Jim's donation because the homosexual lifestyle is against her personal belief. John and Jim are upset because they were denied the ability to volunteer and make a donation; they seek legal help to determine their possible options for responding.

Nearly half of all Americans claim to have engaged in some kind of volunteer effort,¹ and about 25 percent of Massachusetts residents volunteer.² In Massachusetts, there are three possible statutes under which a victim of discrimination may bring a claim: the Massachusetts civil rights statute, the Massachusetts employment anti-discrimination statute, and the Massachusetts public accommodation anti-discrimination statute.³ Unfortunately, volunteers are currently unable to bring discrimination claims under the Massachusetts employment anti-discrimination statute, as case law has restricted its scope.⁴ Massachusetts courts have not yet addressed whether a volunteer can bring a claim under the public accommodations anti-discrimination statutes.⁵ Elsewhere, the few states that have ruled on whether volunteers can bring claims under public accommodation anti-discrimination statutes vary in their holdings.⁶

1. ROBERT D. PUTNAM, *BOWLING ALONE* 118 (2000).

2. *Volunteering and Civic Engagements in Massachusetts*, CORP. FOR NAT'L & COMMUNITY SERV., <http://www.volunteeringinamerica.gov/MA> [<https://perma.cc/77ZQ-KYJY>] [hereinafter *Volunteering in MA*].

3. See MASS. GEN. LAWS ch. 12, §§ 11H-I (2016); MASS. GEN. LAWS ch. 151B, § 4 (2016); MASS. GEN. LAWS ch. 272, § 92A (2016).

4. *Comey v. Hill*, 438 N.E.2d 811, 814 (Mass. 1982).

5. MASS. GEN. LAWS ch. 272, §§ 92A, 98 (2016).

6. See generally *Quinnipiac Council, Boy Scouts, Inc. v. Comm'n on Human Rights & Opportunities*, 528 A.2d 352 (Conn. 1987) (holding Connecticut's public accommodation anti-discrimination statute does not cover someone offering her own services); *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999) (holding that an openly homosexual male not allowed to be a scout leader can bring a claim under public accommodation anti-discrimination law), *rev'd for First Amendment concerns*, 530 U.S. 640 (2000); *Johnson v. Plasma All.*, No. C2-99-1261,

Volunteers in Massachusetts are currently limited to common law remedies and potential claims under the Massachusetts civil rights statute.⁷ Therefore, Massachusetts greatly limits the protections and avenues for recourse available to John and Jim.

In federal courts, circuits are split with regard to when a volunteer would be protected under Title VII of the Civil Rights Act of 1964.⁸ The First Circuit, which encompasses Massachusetts, has not yet made a determination with regard to when Title VII protections would extend to volunteers.⁹ Regardless of the First Circuit's determination, the protections of Title VII would have limited reach, as they would apply only to volunteers who offer their services and who assume the status of "employee."¹⁰ Because courts have held that Title VII applies to employers discriminating against employees, it would only protect those volunteers who receive employee status, excluding volunteers who do not receive employee status or who donate money or goods.¹¹ Therefore, receiving the benefits of Title VII is contingent upon the context in which the volunteering occurs.¹²

For the purposes of this Note, volunteers are divided into two classes: service volunteers and donor volunteers. John and Jim exemplified service volunteers when they offered to help serve food, and donor volunteers when they attempted to give money and non-perishables. Service volunteers are those who offer their time and services. Donor volunteers, in contrast, are those who make donations. Both types of volunteers receive benefits for their efforts, including physical, mental,

2000 Minn. App. LEXIS 502 (Minn. Ct. App. May 23, 2000) (analyzing whether a plasma donation center discriminated against a donor under a public accommodation anti-discrimination ordinance); *Shepherdstown Volunteer Fire Dep't v. State ex rel West Va. Human Rights Comm'n*, 309 S.E.2d 342 (W. Va. 1983) (holding a volunteer fire department refusing to allow a female volunteer violated the public accommodation anti-discrimination statute).

7. *See Lowery v. Klemm*, 845 N.E.2d 1124, 1131 (Mass. 2006); *see also* MASS. GEN. LAWS ch. 12, §§ 11H-I (2016) (protecting constitutional rights from being interfered with using threats, intimidation, or coercion, or attempted threats, intimidation, or coercion).

8. 42 U.S.C. §§ 2000e-2000e-17 (2014). Title VII of the Civil Rights Act of 1964 was implemented to provide employees with federal protections against employment discrimination based on race, color, national origin, religion, and sex. *See generally id.* Michael H. Rubenstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 171 (2006). *Compare Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431 (5th Cir. 2013) (requiring a threshold remuneration test before analyzing whether a volunteer should be granted employee status), *with Bryson v. Middlefield Volunteer Fire Dep't, Inc.*, 656 F.3d 348 (6th Cir. 2011) (considering remuneration as one of multiple factors equally weighed when determining whether a volunteer should be granted employee status).

9. Keiko Rose, *Volunteer Protection under Title VII: Is Remuneration Required?*, 2014 U. CHI. LEGAL F. 605, 625 (2014).

10. *Id.* at 607.

11. *See id.* at 608-09.

12. *See id.* at 607-09.

emotional, sociological, professional, and financial benefits.¹³ If someone is denied the ability to volunteer due to discriminatory animus, he is also denied these benefits. This Note argues that the Massachusetts public accommodation anti-discrimination statute should provide protections to anyone who is denied the opportunity to volunteer in a place of public accommodation based on actual or perceived membership in a protected class, because denial of the benefits a volunteer would receive equates to denial of advantages and privileges afforded to others outside the protected class.¹⁴ Public policy supports increased protections for volunteers, given that volunteers not only receive benefits themselves, but they also provide benefits to the community.¹⁵

Part I of this Note provides background information exploring how federal courts could apply Title VII to protect volunteers from discrimination. This part first addresses the general rule that volunteers are not afforded the protections of Title VII in federal jurisdictions due to lack of standing, because volunteers are not employees. Part I then examines the exception to the general rule and the circuit split regarding the test used when determining whether a volunteer should receive employee status. This part explains why neither approach—requiring remuneration or considering remuneration as part of a balancing test in determining whether someone is an employee—provides sufficient protection for volunteers in Massachusetts.

13. See, e.g., Mark Horoszowski, *5 Surprising Benefits Of Volunteering*, FORBES (Mar. 19, 2015, 1:22 PM), <http://www.forbes.com/sites/nextavenue/2015/03/19/5-surprising-benefits-of-volunteering/#3bddb14f7c76> (click next to progress through list) [hereinafter Horoszowski, *5 Surprising Benefits*] [<http://perma.cc/Z6R5-QH9F>]; Alan Feigenbaum, *Benefits From Giving*, FORBES (June 18, 2007, 1:00 PM), http://www.forbes.com/2007/06/18/donations-charity-taxes-pf-education-in_af_0618soapbox_inl.html [<http://perma.cc/A7A5-BJPL>].

14. See MASS. GEN. LAWS ch. 272, § 98 (2016). Massachusetts prohibits discrimination in a place of public accommodation “on account of race, color, religious creed, national origin, sex, sexual orientation, . . . any physical or mental disability or ancestry . . .” *Id.* Discrimination on the basis of gender identity, which includes transgender status, has fallen under the category of sex discrimination for purposes of Title VII. *Sex-Based Discrimination*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/laws/types/sex.cfm> [<https://perma.cc/BV6Y-4Q5W>]. Additionally, sexual harassment is considered a form of sex discrimination for purposes of Title VII. *Facts About Sexual Harassment*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/publications/fs-sex.cfm> [<https://perma.cc/ZF3T-PMSW>].

15. See, e.g., Gae-Lynn Woods, *Why Is it Important to Do Volunteer Work?*, LIVESTRONG.COM (May 31, 2015), <http://www.livestrong.com/article/190888-why-is-it-important-to-do-volunteer-work/> [<https://perma-archives.org/warc/YC9B-FL22/http://www.livestrong.com/article/190888-why-is-it-important-to-do-volunteer-work/>]; *Community Service: Top 10 Reasons to Volunteer*, U.C. SAN DIEGO, <https://students.ucsd.edu/student-life/involvement/community/reasons.html> (last updated Aug. 2, 2016) [<https://perma.cc/F9B8-2UAA>].

Part II of this Note examines the differing views among states with regard to whether state public accommodation anti-discrimination statutes afford protections to volunteers against discrimination. Next, this part looks at the varied holdings of the four state courts that have addressed this question. This part also explores why none of these approaches on their own would be adequate solutions in Massachusetts.

Part III of this Note presents a solution that ensures all volunteers in Massachusetts are properly protected from discrimination. This part begins with an analysis of what constitutes a place of public accommodation in Massachusetts. Part III also addresses what protections the Massachusetts public accommodation anti-discrimination statutes provide. Next, this part examines the various benefits that volunteers receive as a result of their efforts, and explains why the discriminatory denial of these benefits may amount to a violation of the Massachusetts public accommodation anti-discrimination statutes. Finally, this part addresses why allowing volunteers to bring claims under the public accommodation anti-discrimination statutes is in the best interest of the Commonwealth for public policy reasons.

I. CIRCUMSTANCES WHERE VOLUNTEERS ARE PROTECTED UNDER TITLE VII

Congress implemented Title VII to combat workplace discrimination.¹⁶ Generally, Title VII does not protect volunteers due to lack of standing on the grounds that they are not employees, and, therefore, are outside the scope of the statute.¹⁷ However, in some circumstances, volunteers have been deemed to have employee status, thus falling within the scope of Title VII protections.¹⁸ Title VII circularly defines “employee” as “an individual employed by an employer.”¹⁹ Title VII defines “employer” as “a person who is engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person.”²⁰ *Black’s Law Dictionary* defines “employer” as “[a] person, company, or organization for whom someone works”²¹

16. Rose, *supra* note 9, at 607.

17. *Id.*; see also *Standing*, BLACK’S LAW DICTIONARY (10th ed. 2014). Standing is “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” *Id.* “To have standing in federal court, a plaintiff must show (1) that the challenged conduct has caused the plaintiff actual injury, and (2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question.” *Id.*

18. Rose, *supra* note 9, at 607.

19. 42 U.S.C. § 2000e(f) (2014).

20. 42 U.S.C. § 2000e(b) (2014). An agent is “[s]omeone who is authorized to act for or in place of another; a representative[.]” *Agent*, BLACK’S LAW DICTIONARY (10th ed. 2014).

21. *Employer*, BLACK’S LAW DICTIONARY (10th ed. 2014).

Thus, should Title VII apply to volunteers, it would likely apply solely to service volunteers and not donor volunteers.²²

A. *General Rule for Determining Whether a Volunteer is Considered an Employee under Title VII*

To determine whether a volunteer is an employee under Title VII, courts have adopted the common law agency test presented in *Community for Creative Non-Violence v. Reid*.²³ Because Title VII does not apply to independent contractors, the Court in *Reid* applied the common law agency test in determining whether an artist would be considered an employee or an independent contractor.²⁴ The question of employment was pertinent in determining whether the artist was considered an employee for purposes of the Copyright Act of 1976.²⁵ The artist was not a regular employee of the company that commissioned him for a sculpture, but the Court analyzed whether the artist should be considered an employee for purposes of the Copyright Act, and therefore, whether the sculpture was a work made for hire.²⁶

In determining whether a hired party is an employee under the common law agency test, the Court in *Reid* considered various factors, which are useful in determining whether a volunteer is granted employee status.²⁷ These factors included whether the hiring party had control over how tasks were accomplished, what skills were required to complete the tasks, and the source of the tools used in completion of the tasks.²⁸ The Court also looked at the length of the relationship between the hiring party and the worker; whether the hiring party was able to assign additional

22. See 42 U.S.C. § 2000e(f) (2014) (defining employee); 42 U.S.C. 2000e(b) (2014); *Employer*, BLACK'S LAW DICTIONARY (10th ed. 2014).

23. See *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989); Rubenstein, *supra* note 8.

24. *Reid*, 490 U.S. at 751. *Accord* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992); *cf.* *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 385 (2d Cir. 2015) (“[Regarding whether interns are employees,] the proper question is whether the intern or the employer is the primary beneficiary of the relationship . . .”).

25. 17 U.S.C. §§ 101, 201(b) (2014); *Reid*, 490 U.S. at 732–733. While *Reid* examined whether someone was an employee for purposes of the Copyright Act of 1976, the test used could also be used in other cases where it is important to determine whether someone is an employee. See *id.*

26. *Reid*, 490 U.S. at 738. “A ‘work made for hire’ is . . . prepared by an employee within the scope of his or her employment; or . . . specially ordered or commissioned for use as a contribution to a collective work.” 17 U.S.C. § 101 (2014). Additionally, in other specific situations, a work could be considered a “work made for hire” when a written instrument is signed by the parties showing an agreement that the work is to be considered a work made for hire. *Id.*

27. See *id.* at 751.

28. *Id.*

tasks to the worker; whether the worker could determine how long he worked; and how the worker was paid.²⁹ Finally, the Court factored in whether the worker could hire and pay an assistant; whether the work being done was part of the hiring party's normal type of business; whether the worker received employee benefits as a result of his working for the hiring party; the tax treatment of the worker; and whether the hiring party was still in business.³⁰

After weighing the factors, the Court determined the artist was an independent contractor and not an employee.³¹ Although *Reid* provided a test for determining whether a hired party is an employee under Title VII, there is disagreement regarding one key component of the test.³²

B. *Circuit Split Regarding Whether Remuneration is a Threshold Factor to Overcome before Applying the Common Law Agency Test*

Circuits are split with regard to whether remuneration is a factor to consider in the common law agency test for employee status, or whether the question of remuneration is a threshold that must be surpassed before the test is considered.³³ "Remuneration" is defined as "[p]ayment; compensation, esp[ecially] for a service that someone has performed."³⁴ Whereas a small number of circuits consider remuneration as a factor in the common law agency test, the majority of circuits consider remuneration as a threshold test that must be overcome before considering the common law agency test.³⁵

*Bryson v. Middlefield Volunteer Fire Department, Inc.*³⁶ serves as an example of how the minority of circuits view remuneration in relation to the common law agency test.³⁷ *Bryson* addressed whether workers who only receive *de minimis* benefits are considered employees under Title VII.³⁸ Marcia Bryson, an employee for the Middlefield Volunteer Fire Department, filed charges alleging discrimination on the basis of sex and

29. *Id.*

30. *Id.* at 751–52.

31. *Id.* at 752.

32. *See* Rose, *supra* note 9, at 607.

33. *See id.*

34. *Remuneration*, BLACK'S LAW DICTIONARY (10th ed. 2014).

35. Rose, *supra* note 9, at 607. "The Second, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits have adopted a . . . threshold-remuneration test." *Id.* at 615. "The Sixth and Ninth Circuits . . . view remuneration as only one, non-dispositive factor in conjunction with the other common law agency test factors." *Id.* at 623.

36. 656 F.3d 348 (6th Cir. 2011).

37. *See* Rose, *supra* note 9, at 623.

38. *Bryson*, 656 F.3d at 351.

retaliation.³⁹ The firefighters in the department were considered volunteer members as opposed to employees.⁴⁰ Bryson originally joined the department as a volunteer member, but later was hired as an employee in the role of administrative assistant.⁴¹ In determining whether to consider the firefighters as employees for purposes of Title VII, the district court viewed compensation as a necessary requirement before considering the common law agency test.⁴² As a result, the district court granted partial summary judgment for the fire department, concluding the department did not have enough employees to support a Title VII claim.⁴³ The Sixth Circuit Court of Appeals reversed the granting of summary judgment, determining that while remuneration is a factor that must be considered, it should only be weighed as a factor in the common law agency test and should not be an initial hurdle for plaintiffs to overcome.⁴⁴

In contrast, *Juino v. Livingston Parish Fire District No. 5*⁴⁵ exemplifies the majority view among circuits, finding that a volunteer must receive remuneration before the court will look to the common law agency test.⁴⁶ Rachel Juino was a volunteer firefighter who filed charges under Title VII alleging sexual harassment and retaliation.⁴⁷ Because the Fifth Circuit had not previously adopted a test for determining whether a volunteer should be granted employee status, the district court opted for the threshold remuneration test.⁴⁸ The court of appeals considered both approaches for determining whether a volunteer should receive employee status; ultimately, the court of appeals agreed with the district court and adopted the threshold remuneration test.⁴⁹ The Fifth Circuit Court of Appeals concluded Juino was not an employee under Title VII because she “failed to make a threshold showing of remuneration.”⁵⁰ The court of appeals further stated that it is Congress’s prerogative to provide a remedy to volunteers in Juino’s position if it wishes to do so, thereby allowing for protection under Title VII; it is not for the court to provide the remedy.⁵¹

39. *Id.* at 350.

40. *Id.*

41. *Id.*

42. *Id.* at 351. The issue of whether Bryson’s claim would fall under Title VII hinged on whether the volunteer members were considered employees, as Title VII requires a business to have fifteen employees. *See id.* at 350.

43. *Id.* at 351.

44. *Id.* at 355–56.

45. 717 F.3d 431 (5th Cir. 2013).

46. *See Rose, supra* note 9, at 615.

47. *Juino*, 717 F.3d at 432.

48. *Id.* at 433.

49. *Id.* at 439.

50. *Id.* at 440.

51. *Id.* at 439.

The First Circuit has not made a decision regarding whether remuneration should be a threshold requirement when applying the common law agency test to volunteers.⁵² Nevertheless, the First Circuit has used the common law agency test in cases not involving volunteers.⁵³ For example, in *Lopez v. Massachusetts*, the court used the common law agency test to determine whether the Massachusetts Human Resources Division is an employer of municipal police officers.⁵⁴ The issue arose after minority police officers brought a claim of disparate impact under Title VII.⁵⁵ Because the police officers brought suit against the Commonwealth, it was necessary to determine whether the officers were employees of the Massachusetts Human Resources Division.⁵⁶ The First Circuit Court of Appeals recognized that the United States Supreme Court had stated, when a statute containing the term “employee” does not define the term, “a court must presume that Congress has incorporated traditional agency law principles for identifying ‘master-servant relationships.’”⁵⁷ In applying the common law agency test, the court concluded that the Massachusetts Human Resources Division is not the plaintiffs’ employer for purposes of Title VII.⁵⁸

In contrast, the court in *Mahoney v. Morgan* examined whether the defendant was an employer under the Americans with Disabilities Act.⁵⁹ Mahoney worked for Morgan in a veterinary hospital and alleged that Morgan failed to provide reasonable accommodations to help alleviate symptoms of Mahoney’s disability while she was working.⁶⁰ Morgan eventually terminated Mahoney’s employment.⁶¹

Morgan argued that she did not have enough employees to support a

52. Rose, *supra* note 9, at 625. “The First, Third, and Seventh Circuits have not yet ruled on this issue.” *Id.*

53. See generally *Lopez v. Massachusetts*, 588 F.3d 69 (1st Cir. 2009); *Mahoney v. Morgan*, No. 08-10879-MBB, 2010 U.S. Dist. LEXIS 97224 (D. Mass. Sept. 16, 2010).

54. *Lopez*, 588 F.3d at 83.

55. *Id.* at 72. Disparate impact is “[t]he adverse effect of a facially neutral practice . . . that nonetheless discriminates against persons because of their [membership in a protected class] and that is not justified by business necessity.” *Disparate Impact*, BLACK’S LAW DICTIONARY (10th ed. 2014).

56. *Lopez*, 588 F.3d at 72.

57. *Id.* at 83 (citing, *inter alia*, *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 444–47 (2003)). In this context, “master-servant” refers to an employer-employee relationship. *Id.* at 83 n.13.

58. *Id.* at 85.

59. 42 U.S.C. § 12112(b)(5)(B) (2014); *Mahoney v. Morgan*, No. 08-10879-MBB, 2010 U.S. Dist. LEXIS 97224, at *16 (D. Mass. Sept. 16, 2010). The definitions of “employee” and “employer” are substantially similar under both Title VII and the Americans with Disabilities Act. *Id.* at *17.

60. *Mahoney*, 2010 U.S. Dist. LEXIS 97224, at *6–7.

61. *Id.* at *7.

claim under the Americans with Disabilities Act.⁶² For that reason, the court applied the common law agency test to multiple workers in order to determine whether they were employees under the Americans with Disabilities Act, and consequently, whether Morgan was an employer under the Americans with Disabilities Act.⁶³ In its analysis, the court addressed how the common law agency test does not present a clear formula for determining employee status, and therefore “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.”⁶⁴ The court ultimately determined a reasonable jury using the common law agency test could find that many of the workers were employees,⁶⁵ and, as a result, denied Morgan’s motion for summary judgment.⁶⁶

Whereas *Lopez* and *Mahoney* do not address whether remuneration should be a threshold test when determining a volunteer’s employee status in the First Circuit, the cases nevertheless may indicate how courts in the First Circuit might rule on the matter in the future.⁶⁷ In *Lopez*, the court emphasized that employee status “under Title VII must be determined by the ‘actual circumstances of the person’s relationship’ with the defendant and not just the label.”⁶⁸ This statement emphasizes the view that a worker need not be labeled as an employee to obtain employee status.⁶⁹ Similarly, the court in *Mahoney* said “lack of evidence of payment . . . is not necessarily a bar to a determination of employee status A volunteer may be covered . . . if he is receiving benefits.”⁷⁰ This implies the First Circuit would not require a threshold remuneration test prior to applying the common law agency test for volunteers.⁷¹

C. *Whichever Test the First Circuit Adopts, the Protections for Volunteers in Massachusetts Will Still Be Insufficient*

Whichever determination the First Circuit makes on this issue, it will

62. *Id.* at *16–17. Both Title VII and the Americans with Disabilities Act define an employer as having fifteen or more employees. 42 U.S.C. § 12111(5)(A) (2014).

63. *Mahoney*, 2010 U.S. Dist. LEXIS 97224 at *20–30.

64. *Id.* at *20 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992)).

65. *Id.* at *29–30.

66. *Id.* at *33.

67. *See generally* *Lopez v. Massachusetts*, 588 F.3d 69 (1st Cir. 2009); *Mahoney*, 2010 U.S. Dist. LEXIS 97224.

68. *Lopez*, 588 F.3d at 86 (quoting *Serapion v. Martinez*, 119 F.3d 982, 987 (1st Cir. 1997)).

69. *See id.* at 86.

70. *Mahoney*, 2010 U.S. Dist. LEXIS 97244 at *23 (citing U.S. EQUAL EMP. OPPORTUNITY COMM’N, NEW COMPLIANCE MANUAL, ¶ 7110, § 2-III (A)(1)(c) (2009)).

71. *See id.* (citing U.S. EQUAL EMP. OPPORTUNITY COMM’N, NEW COMPLIANCE MANUAL, ¶ 7110, § 2-III (A)(1)(c) (2009)).

not provide a satisfactory solution for volunteer protections in Massachusetts, because the common law agency test would only apply to service volunteers.⁷² Regardless of whether the First Circuit applies the threshold remuneration test or consider remuneration solely as a factor in the common law agency test, potential Title VII protection would not apply to donor volunteers because they cannot satisfy the common law agency test elements.⁷³

Additionally, should the First Circuit adopt either test for determining employment status under Title VII, the test would not likely extend to state laws in Massachusetts.⁷⁴ Massachusetts has intimated that in state courts, volunteers cannot bring a discrimination claim under the Massachusetts employment anti-discrimination laws.⁷⁵ In *Comey v. Hill*, the Massachusetts Supreme Judicial Court determined whether Massachusetts law considers an independent contractor an employee.⁷⁶ *Comey* brought a claim alleging age discrimination under the Massachusetts employment anti-discrimination statute.⁷⁷ *Comey* contested the superior court judge's instruction that distinguished an independent contractor from an employee with regard to the scope of the Massachusetts employment anti-discrimination law.⁷⁸

The Massachusetts Supreme Judicial Court stated that “[i]n the absence of any indication to the contrary, we will not assume that the Legislature intended to cover relationships outside the traditional common law employer-employee relationship.”⁷⁹ This holding is significant because a volunteer would not fit into the traditional employer-employee relationship.⁸⁰ Therefore, regardless of the First Circuit's eventual determination on how to ascertain whether a volunteer should be granted employee status, the solution would be inadequate as it would only be functional in federal courts and would not extend into the Massachusetts state courts.

II. ABILITY OF VOLUNTEERS TO BRING DISCRIMINATION CLAIMS UNDER STATE PUBLIC ACCOMMODATION ANTI-DISCRIMINATION

72. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989).

73. *See id.*

74. *See* *Comey v. Hill*, 438 N.E.2d 811, 814 (Mass. 1982).

75. *See* MASS. GEN. LAWS ch. 151B, § 4 (2016); *Comey*, 438 N.E.2d at 814.

76. *Comey*, 438 N.E.2d at 814.

77. *Id.* at 812–13.

78. *Id.* at 813–14.

79. *Id.* at 814.

80. *See id.* “We will not depart from the common law definition of employee absent a legislative substitute.” *Id.*

STATUTES

Various states have implemented public accommodation anti-discrimination laws for the purpose of preventing discrimination in places of public accommodation.⁸¹ Massachusetts defines a place of public accommodation as “any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public”⁸² Five states do not have laws preventing discrimination in places of public accommodation: Texas, Mississippi, Alabama, Georgia, and North Carolina.⁸³ Only three states—Connecticut, New Jersey, and West Virginia—have judicial opinions reflecting whether a volunteer can bring a discrimination claim under statutes governing discrimination in a place of public accommodation are Connecticut, West Virginia, and New Jersey.⁸⁴ These states’ holdings have encompassed decisions both disallowing the claims⁸⁵ and allowing volunteers to bring claims under the public accommodation anti-discrimination statutes.⁸⁶ Additionally, Minnesota has examined whether a volunteer can bring a discrimination claim under a city ordinance governing discrimination in a place of public accommodation.⁸⁷

A. *Service Volunteers in Connecticut*

Connecticut analyzed whether a service volunteer could bring a claim under the public accommodation anti-discrimination statute in *Quinnipiac Council, Boy Scouts, Inc. v. Commission on Human Rights & Opportunities*.⁸⁸ Catherine Pollard volunteered with the Boy Scouts in

81. *Discrimination in Public Accommodations*, FINDLAW, <http://civilrights.findlaw.com/enforcing-your-civil-rights/discrimination-in-public-accommodations.html> [<http://perma.cc/KKT5-7TY2>]. There are federal statutes prohibiting discrimination in a place of public accommodation; however, the issue of whether these statutes would apply to a volunteer have not been addressed. See 42 U.S.C. § 2000a (2014).

82. MASS. GEN. LAWS ch. 272, § 92A (2016). See also *infra* Section III.A. Generally, statutes defining “place of public accommodation” will also provide a non-exhaustive list of examples of places of public accommodation. See, e.g., 42 U.S.C. § 2000a (2014); MASS. GEN. LAWS ch. 272, § 92A (2016).

83. *State Public Accommodation Laws*, NAT’L CONF. OF ST. LEGISLATURES (July 13, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> [<https://perma.cc/5S95-YVPK>].

84. See generally *Quinnipiac Council, Boy Scouts, Inc. v. Comm’n on Human Rights & Opportunities*, 528 A.2d 352 (Conn. 1987); *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999) *rev’d for First Amendment concerns*, 530 U.S. 640 (2000); *Shepherdstown Volunteer Fire Dep’t v. State ex rel West Va. Human Rights Comm’n*, 309 S.E.2d 342 (W. Va. 1983).

85. See generally *Quinnipiac Council*, 528 A.2d 352.

86. See generally *Dale*, 734 A.2d 1196; *Shepherdstown*, 309 S.E.2d 342.

87. See generally *Johnson v. Plasma All.*, No. C2-99-1261, 2000 Minn. App. LEXIS 502 (Minn. Ct. App. May 23, 2000).

88. See generally *Quinnipiac Council*, 528 A.2d 352.

various roles from 1972–76.⁸⁹ Nevertheless, when Pollard applied to be a scoutmaster, she was refused because “the policy of the Boy Scouts of America [says] that scoutmasters [must] be men at least 21 years of age.”⁹⁰ Pollard appealed the lower court decision, arguing the court erred in determining that the Quinnipiac Council, Boy Scouts, Inc. was not a place of public accommodation.⁹¹

On appeal, the court analyzed both whether Quinnipiac Council, Boy Scouts, Inc. was a place of public accommodation and whether failure to allow a woman to serve as a Boy Scouts scoutmaster violated the Connecticut public accommodation anti-discrimination statute.⁹² The Connecticut public accommodation anti-discrimination statute provides that it is discriminatory “[t]o deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation.”⁹³ The court looked into the legislative history of the public accommodation anti-discrimination statute and found it doubtful that the Legislature meant to require a physical site for an organization to fit into the definition of a “place of public accommodation.”⁹⁴ As a result, the court determined that in Connecticut, coverage under the public accommodation anti-discrimination statute does not require a physical place as an essential element of the statute.⁹⁵ Nevertheless, the court held the public accommodation anti-discrimination statute did not encompass a volunteer offering her own services.⁹⁶

B. *Service Volunteers in West Virginia*

West Virginia analyzed whether a service volunteer could bring a claim under the public accommodation anti-discrimination statute in *Shepherdstown Volunteer Fire Department v. State ex rel West Virginia Human Rights Commission*.⁹⁷ In *Shepherdstown*, the court consolidated two separate cases where a fire department denied females the opportunity to volunteer because of their sex.⁹⁸ The Shepherdstown Volunteer Fire

89. *Id.* at 355.

90. *Id.*

91. *Id.*

92. CONN. GEN. STAT. § 46a-64 (2015); *Quinnipiac Council*, 528 A.2d at 354.

93. CONN. GEN. STAT. § 46a-64(a) (2015).

94. *Quinnipiac Council*, 528 A.2d at 357.

95. *Id.* at 358.

96. *Id.* at 360; *see also* CONN. GEN. STAT. § 46a-64 (2015) (prohibiting denial of “full and equal accommodations in any place of public accommodation”).

97. *See generally* *Shepherdstown Volunteer Fire Dep’t v. State ex rel West Va. Human Rights Comm’n*, 309 S.E.2d 342 (W. Va. 1983). *See also* W. VA. CODE § 5-11-3 (2016); W. VA. CODE § 5-11-9 (2016).

98. *Shepherdstown*, 309 S.E.2d at 344.

Department denied membership to three female applicants without giving an explanation or allowing for reconsideration.⁹⁹ Similarly, the Berkeley Springs Volunteer Fire Department's constitution required members (volunteer firefighters) be male, prompting the return of female applicants' applications without consideration.¹⁰⁰ The Berkeley Springs Volunteer Fire Department amended the constitution to remove the restriction, but continued to deny applications of females for membership.¹⁰¹

The court examined whether a service volunteer could bring a claim under the West Virginia anti-discrimination statute by determining whether a volunteer fire department is a place of public accommodation, and therefore whether the exclusion of women from volunteering constituted a violation of the statute.¹⁰² The West Virginia anti-discrimination statute encompasses both employment discrimination and discrimination in a place of public accommodation.¹⁰³ The statute makes it an unlawful discriminatory act to "[r]efuse, withhold from or deny . . . any of the accommodations, advantages, facilities, privileges, or services of [a] place of public accommodation[]" because of someone's membership in a protected class.¹⁰⁴

Additionally, West Virginia statutes extensively regulate volunteer fire departments.¹⁰⁵ The court found a volunteer fire department is a place of public accommodation because the fire department received some public funding, thereby making it a quasi-governmental body, and because the fire department provided a service to the public.¹⁰⁶ As a result,

99. *Id.*

100. *Id.* at 346.

101. *Id.*

102. W. VA. CODE § 5-11-3 (2016); W. VA. CODE § 5-11-9 (2016); *Shepherdstown*, 309 S.E.2d at 347–48.

103. W. VA. CODE § 5-11-9 (2016).

104. W. VA. CODE § 5-11-9(6)(A) (2016). *See also Accommodation*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A convenience supplied by someone; esp., lodging and food."); *Advantage*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Any benefit or gain . . ."); *Facility*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004) ("[S]omething that makes an action, operation, or course of conduct easier . . ."); *Privilege*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004) ("[A] right or benefit that is given to some people and not to others."); *Service*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[T]he performance of some useful act or series of acts for the benefit of another, usu[ally] for a fee . . . an intangible commodity in the form of human effort . . .").

105. *Shepherdstown*, 309 S.E.2d at 349. West Virginia statutes give power to municipalities to allow for the formation of volunteer fire departments and to establish the minimum and maximum number of people necessary to form a volunteer fire department, while simultaneously making the volunteer fire department "subject to the authority of the governing body." *Id.* (citing W. VA. CODE §§ 8-15-1, -4 (2014)).

106. *Id.* at 351.

volunteer fire departments are subject to West Virginia's public accommodation anti-discrimination statute with regard to volunteer firefighters.¹⁰⁷

C. *Service Volunteers in New Jersey*

New Jersey analyzed whether a service volunteer could bring a claim under the anti-discrimination statute in *Dale v. Boy Scouts of America*.¹⁰⁸ Dale was an Assistant Scoutmaster with the Boy Scouts who realized he was gay when he went to college.¹⁰⁹ Dale was interviewed following his attendance at a seminar about the psychological needs of gay and lesbian teenagers, and shortly thereafter he received a letter, revoking his membership and asking him to sever all ties with the Boy Scouts.¹¹⁰ According to the letter, Dale's membership was revoked because the Boy Scouts of America expressly prohibits lesbian and gay adults from being members.¹¹¹

To determine whether a service volunteer could bring a claim under the anti-discrimination statute, the New Jersey Supreme Court examined whether the Boy Scouts of America, an organization, could be considered a place of public accommodation.¹¹² The New Jersey anti-discrimination statute encompasses both employment discrimination and discrimination in a place of public accommodation, stating "[a]ll persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation" regardless of their membership in a protected class.¹¹³ The court observed that the statute must be interpreted liberally as the Legislature had directed.¹¹⁴

The court also recognized that for twenty-five years, a "place" has not been restricted to a fixed location in New Jersey.¹¹⁵ The court referenced an earlier case in which it found "[t]he statutory noun place . . . is a term of convenience, not of limitation[,] . . . employed to reflect the fact that public accommodations are commonly provided at fixed places."¹¹⁶ Additionally, the court addressed how the Legislature has done

107. *Id.* at 352.

108. *See generally* Dale v. Boy Scouts of Am., 734 A.2d 1196 (N.J. 1999) *rev'd for First Amendment concerns*, 530 U.S. 640 (2000).

109. *Id.* at 1204.

110. *Id.* at 1205.

111. *Id.* "[The] Boy Scouts claims that the language 'morally straight' and 'clean' in the Oath and Law, respectively, constitutes a rejection of homosexuality." *Id.* at 1202.

112. *Id.* at 1207-08.

113. N.J. STAT. ANN § 10:5-4 (West 2016).

114. *Dale*, 734 A.2d at 1208.

115. *Id.* at 1209.

116. *Id.* (quoting Nat'l Org. of Women v. Little League Baseball, Inc., 318 A.2d 33, 37

nothing to limit the definition of “place.”¹¹⁷ As a result, the court concluded the Boy Scouts organization is subject to the New Jersey law against discrimination because it is a “place of public accommodation.”¹¹⁸ The court further concluded the revocation of Dale’s membership equated to a denial of privileges and advantages, which therefore violated the anti-discrimination law.¹¹⁹

D. *Donor Volunteers in Minnesota*

Minnesota determined whether a donor volunteer could bring a claim alleging discrimination in a place of public accommodation in *Johnson v. Plasma Alliance*.¹²⁰ Johnson brought a claim under a Minneapolis ordinance banning discrimination in a place of public accommodation in the city on the basis of affectional preference.¹²¹ The claim arose when Johnson attempted to donate plasma and Plasma Alliance asked whether “he had had sex with another man since 1977.”¹²² Johnson said he had, and as a result was not allowed to donate.¹²³ Four years later, Johnson discovered that he was a permanently-rejected donor as a result of the incident.¹²⁴

The analysis of whether Plasma Alliance violated the ordinance proceeded as if Plasma Alliance were a place of public accommodation.¹²⁵

(N.J. Super. Ct. App. Div. 1974)).

117. *Id.* at 1210.

118. *Id.* at 1230.

119. *Id.* The United States Supreme Court reversed this decision because requiring the Boy Scouts to allow a homosexual scout leader violated the organization’s First Amendment rights. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000). The United States Supreme Court did not find the New Jersey Supreme Court was incorrect in determining the Boy Scouts is a place of public accommodation under New Jersey law. *Id.*

120. *See generally* *Johnson v. Plasma All.*, No. C2-99-1261, 2000 Minn. App. LEXIS 502 (Ct. App. May 23, 2000).

121. *Id.* at *2. “Affectional preference is defined as ‘having or manifesting an emotional or physical attachment to another consenting person or persons, or having or manifesting a preference for such attachment, or having or projecting a self-image not associated with one’s biological maleness or one’s biological femaleness.’” *Id.* at *4 (quoting MINNEAPOLIS, MINN., CODE OF ORDINANCES, Title 7, § 139.20 (1990)). The Minneapolis ordinance has since been updated to replace instances of “affectional preference” with “sexual orientation.” MINNEAPOLIS MINN., CODE OF ORDINANCES, Title 7, § 139 (2006), http://www.minneapolismn.gov/www/groups/public/@council/documents/webcontent/convert_278654.pdf [https://perma.cc/KL3K-F529].

122. *Johnson*, 2000 Minn. App. LEXIS 502 at *1–2.

123. *Id.* at *2.

124. *Id.*

125. *See generally id.*; *cf. Levorsen v. Octapharma Plasma, Inc.*, No. 2:14-cv-325, 2014 U.S. Dist. LEXIS 166360, at *11–12, *18 (D. Utah Dec. 1, 2014) (holding a plasma donation center is not a place of public accommodation under the Americans with Disabilities Act as the plasma donation center pays the donor for the plasma and then sells the plasma for a profit).

The court held that Plasma Alliance did not violate the ordinance, but did not address whether Plasma Alliance was a place of public accommodation.¹²⁶ Ultimately, the court found Johnson was not actually discriminated against by Plasma Alliance, drawing upon a now repudiated distinction between Johnson not being allowed to donate because of his status (affectional preference) and his conduct (because he had sex with another man).¹²⁷

E. *The Approaches of Other States Regarding Discrimination Claims of Volunteers under Public Accommodation Anti-Discrimination Statutes are Inadequate in Massachusetts*

Massachusetts has consistently pioneered the promulgation of laws prohibiting discrimination.¹²⁸ Massachusetts was the first state in the country to legalize same-sex marriage,¹²⁹ and was the second state in the nation to implement a comprehensive anti-discrimination law protecting individuals from discrimination on the basis of sexual orientation in housing, public accommodations, employment, credit, and services.¹³⁰ Additionally, Massachusetts has implemented legislation to protect transgender people from discrimination.¹³¹ The Equal Rights Amendment

126. *Johnson*, 2000 Minn. App. LEXIS 502, at *12.

127. *Id.* at *11. In *Lawrence v. Texas*, the United States Supreme Court overturned a statute criminalizing sodomy, because making the conduct criminal punishes the status. *Lawrence v. Tex.*, 539 U.S. 558, 575 (2003). The Court held that “[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” *Id.* at 575. Justice O’Connor expounds on this idea, stating “[w]hile it is true the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. . . . Texas’ sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class.” *Id.* at 583 (O’Connor, J. concurring).

128. *History of the MCAD*, MASS.GOV, <http://www.mass.gov/mcad/about/mcad-history.html> [<https://perma.cc/84DD-CFYT>]. In 1944, the governor of Massachusetts implemented a committee to combat discrimination, which later became the Massachusetts Commission Against Discrimination. *Id.* Massachusetts laws prohibiting discrimination in employment and in places of public accommodation offer protections from discrimination on account of sex, sexual orientation, disability, national origin, race, color, and religious creed. *See* MASS. GEN. LAWS ch. 151B, § 4 (2016); MASS. GEN. LAWS ch. 272, § 98 (2016).

129. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003). “Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under the law protected by the Massachusetts Constitution.” *Id.*

130. *Anti-Discrimination Law in Massachusetts*, GLAD (Feb. 11, 2014), <https://www.glad.org/rights/massachusetts/c/anti-discrimination-law-in-massachusetts> [<https://perma.cc/29XD-Y5S6>].

131. *Id.*; *see* MASS. GEN. LAWS ch. 22C, § 32 (2016) (stating that a “threatened, attempted or completed overt act motivated at least in part by . . . gender identity” constituted a hate crime). The First Circuit Court of Appeals has also held that it is possible to assert a theory of sex discrimination based on being treated disparately for not conforming to gender norms.

to the Massachusetts Constitution provides that cases of sex discrimination will be examined under strict scrutiny.¹³² Accordingly, providing enhanced protections against discrimination to volunteers in Massachusetts is consistent with the State's historical views and stances regarding discrimination.¹³³

The methods other states use with regard to volunteers' discrimination claims are inadequate solutions in Massachusetts.¹³⁴ The state that has refused to allow a volunteer to bring a discrimination claim under public accommodation anti-discrimination law—Connecticut—would provide an ineffective solution for Massachusetts to follow as this approach provides no additional protections to volunteers.¹³⁵ The states that have allowed volunteers to allege claims of discrimination in a place of public accommodation—Minnesota, New Jersey, and West Virginia—could serve as a starting point for Massachusetts.¹³⁶ Nevertheless, Massachusetts would need to expand beyond the scope of protection given to volunteers in these other states as each state only addresses either service volunteers or donor volunteers; Massachusetts should implement a protection for all types of volunteers.¹³⁷ However, the limited scope of these other states could simply be the product of the limited number of cases in which volunteers allege discrimination in a place of public accommodation.¹³⁸

Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215 (1st Cir. 2000).

132. Lorianne Sainsbury-Wong, Benjamin Wilson & Alyssa Vangeli, *The Useful but Overlooked Massachusetts Equal Rights Amendment*, MASSBAR (Aug. 2011), <http://www.massbar.org/publications/lawyers-journal/2011/august/the-useful-but-overlooked-massachusetts-equal-rights-amendment> [<https://perma.cc/4MG2-F6LB>].

133. See *History of the MCAD*, *supra* note 128.

134. See generally *Quinnipiac Council, Boy Scouts, Inc. v. Comm'n on Human Rights & Opportunities*, 528 A.2d 352 (Conn. 1987); *Johnson v. Plasma All.*, No. C2-99-1261, 2000 Minn. App. LEXIS 502 (Ct. App. May 23, 2000); *Dale v. Boy Scouts of Am.*, 734 A.2d 1196 (N.J. 1999) *rev'd for First Amendment concerns*, 530 U.S. 640 (2000); *Shepherdstown Volunteer Fire Dep't v. State ex rel West Va. Human Rights Comm'n*, 309 S.E.2d 342 (W. Va. 1983).

135. See generally *Quinnipiac Council*, 528 A.2d 352.

136. See generally *Johnson*, 2000 Minn. App. LEXIS 502 (allowing a donor volunteer to bring a claim alleging discrimination in a place of public accommodation); *Dale*, 734 A.2d 1196 (allowing a service volunteer to bring a claim alleging discrimination in a place of public accommodation); *Shepherdstown*, 309 S.E.2d 342 (allowing service volunteers to bring a claim alleging discrimination in a place of public accommodation).

137. See generally *Johnson*, 2000 Minn. App. LEXIS 502 (allowing a donor volunteer to bring a claim alleging discrimination in a place of public accommodation); *Dale*, 734 A.2d 1196 (allowing a service volunteer to bring a claim alleging discrimination in a place of public accommodation); *Shepherdstown*, 309 S.E.2d 342 (allowing service volunteers to bring a claim alleging discrimination in a place of public accommodation).

138. See generally *Quinnipiac Council*, 528 A.2d 352 (holding that Connecticut's public accommodation anti-discrimination statute does not cover someone offering her own services); *Johnson*, 2000 Minn. App. LEXIS 502 (analyzing whether a plasma donation center

F. *State Views on Discrimination with Regard to Interns*

It is worthwhile to note that six states and the District of Columbia have recently amended statutes to reflect protections for a specific type of service volunteers: interns.¹³⁹ Connecticut is the most recent state to provide protections for unpaid interns against discrimination and sexual harassment,¹⁴⁰ joining California,¹⁴¹ Maryland,¹⁴² New York,¹⁴³ Oregon,¹⁴⁴ Illinois,¹⁴⁵ and the District of Columbia.¹⁴⁶ Whereas the protections for unpaid interns are beneficial, the scope of these protections is unfortunately very limited because they only apply to a small class of service volunteers.¹⁴⁷ Additionally, the Connecticut statute offers protections to interns specifically in the context of employment-like relationships where someone is working with the intention of gaining training and experience.¹⁴⁸ Furthermore, these protections do not address whether an intern or any other type of volunteer can bring a claim under public accommodation anti-discrimination law.¹⁴⁹ If Massachusetts implemented statutory protection for unpaid interns akin to Connecticut, only a specific class of service volunteers would receive protections.¹⁵⁰ Massachusetts legislators must also be cognizant of the hurdle presented by *Comey v. Hill*, which requires explicit notice of legislative intent to

discriminated against a donor under a public accommodation anti-discrimination ordinance); *Dale*, 734 A.2d 1196 (holding that an openly homosexual male not allowed to be a scout leader can bring a claim under public accommodation anti-discrimination law; *Shepherdstown*, 309 S.E.2d 342 (holding that a volunteer fire department refusing to allow a female volunteer violated the public accommodation anti-discrimination statute).

139. Samantha Lachman, *A Shocking Number of States Don't Protect Unpaid Interns from Discrimination and Sexual Harassment*, HUFF. POST (May 27, 2015, 4:17 PM), http://www.huffingtonpost.com/2015/05/27/unpaid-interns-harassment_n_7453826.html [https://perma.cc/HDJ6-HBTK].

140. 2015 Conn. Acts 56 (2015).

141. CAL. GOV'T CODE § 12940 (Deering 2016) (protecting unpaid interns from discrimination and sexual harassment).

142. MD. CODE ANN., STATE GOV'T § 20-610 (LexisNexis 2016) (protecting unpaid interns from discrimination).

143. N.Y. EXEC. LAW § 296-c (LexisNexis 2016) (protecting unpaid interns from discrimination and sexual harassment).

144. OR. REV. STAT. § 659A.350 (2015) (protecting unpaid interns from discrimination and sexual harassment).

145. 775 ILL. COMP. STAT. 5/2-101 (2014) (protecting unpaid interns from sexual harassment).

146. D.C. CODE §§ 2-1401.02, 2-1401.11 (2016) (protecting unpaid interns from discrimination and sexual harassment).

147. *See, e.g.*, 2015 Conn. Acts 56 (2015). “‘Intern’ means an individual who performs work for an employer for the purpose of training . . .” *Id.*

148. *See, e.g., id.*

149. *See, e.g., id.*

150. *See id.*

cover relationships beyond traditional employer-employee relationships.¹⁵¹

III. MASSACHUSETTS SHOULD ALLOW ALL VOLUNTEERS WHO FACE DISCRIMINATION TO BRING CLAIMS UNDER THE PUBLIC ACCOMMODATION ANTI-DISCRIMINATION STATUTE

Currently, if a volunteer is discriminated against based on membership or perceived membership in a protected class, the volunteer has limited remedies in Massachusetts courts.¹⁵² Volunteers are currently limited to claims brought under common law or under the Massachusetts civil rights statute.¹⁵³ All volunteers should have greater statutory protections against discrimination because the current anti-discrimination statutes, as they apply to volunteers, do not provide sufficient protection.¹⁵⁴ The Massachusetts civil rights statute only prevents constitutional rights from being interfered with by use of or attempted use of threats, intimidation, or coercion.¹⁵⁵ Under the Massachusetts civil rights statute, if a volunteer is turned away or mistreated because of membership or perceived membership in a protected class, the volunteer would have no statutory claim because turning someone away does not involve threats, intimidation, or coercion *per se*.¹⁵⁶

The Massachusetts Supreme Judicial Court has previously analyzed what constitutes an employer-employee relationship, implying that a volunteer cannot bring a claim under employment anti-discrimination law; the Legislature has not responded to this analysis.¹⁵⁷ However, Massachusetts has not addressed whether a volunteer can bring a claim under public accommodation anti-discrimination laws.¹⁵⁸ In determining whether a volunteer can bring a claim of discrimination under the Massachusetts public accommodation anti-discrimination statute, there are two questions that must be answered.¹⁵⁹ First, is the recipient of the

151. *See* *Comey v. Hill*, 438 N.E.2d 811, 814 (Mass. 1982).

152. *See* MASS. GEN. LAWS ch. 12, §§ 11H-I (2016); *Lowery v. Klemm*, 845 N.E.2d 1124, 1130-31 (Mass. 2006).

153. *See* MASS. GEN. LAWS ch. 12, §§ 11H-I (2016); *Lowery v. Klemm*, 845 N.E.2d 1124, 1130-31 (Mass. 2006).

154. *See* MASS. GEN. LAWS ch. 12, §§ 11H-I (2016).

155. *Id.*

156. *See id.*

157. *See* *Comey v. Hill*, 438 N.E.2d 811, 814 (Mass. 1982) (regarding the scope of the Massachusetts employment anti-discrimination laws: "In the absence of any indication to the contrary, we will not assume that the Legislature intended to cover relationships outside the traditional common law employer-employee relationship.>").

158. *See* MASS. GEN. LAWS ch. 272, §§ 92A, 98 (2016).

159. *See* MASS. GEN. LAWS ch. 272, §§ 92A, 98 (2016).

volunteer efforts a place of public accommodation?¹⁶⁰ Second, does the denial of the ability to volunteer amount to a denial of accommodations, advantages, facilities, or privileges?¹⁶¹ If the answer to both of these questions is yes, then Massachusetts should allow a volunteer to bring discrimination claims under the public accommodation anti-discrimination statutes.¹⁶²

A. *Places of Public Accommodation*

When a court determines the meaning of words in a statute, unless the word is a technical term, it “shall be construed according to the common and approved usage of the language”¹⁶³ The Massachusetts Supreme Judicial Court interpreted the meaning of “place” in the context of “place of public accommodation” in *U.S. Jaycees v. Massachusetts Commission Against Discrimination*.¹⁶⁴

The court in *U.S. Jaycees* considered whether an organization, U.S. Jaycees, would be considered a place of public accommodation for purposes of Massachusetts public accommodation anti-discrimination laws.¹⁶⁵ The question arose when women were denied admission into the organization, and they alleged the denial of admission amounted to sex discrimination under the public accommodation anti-discrimination law.¹⁶⁶ U.S. Jaycees limited membership to men aged eighteen to thirty-five, which was supported by the organization’s by-laws.¹⁶⁷

The court analyzed various definitions of “place” and determined that on its face, the Massachusetts public accommodation anti-discrimination law does not apply to membership organizations since they do not fall within the accepted definitions of “place.”¹⁶⁸ The first criterion

160. See MASS. GEN. LAWS ch. 272, § 92A (2016). “A place of public accommodation . . . shall be deemed to include any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public” *Id.* The Commonwealth provides a non-exhaustive list of examples of places of public accommodation. *Id.*

161. See MASS. GEN. LAWS ch. 272, § 98 (2016). “All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation” *Id.*

162. See MASS. GEN. LAWS ch. 272, §§ 92A, 98 (2016).

163. MASS. GEN. LAWS ch. 4, § 6 (2016).

164. See generally *U.S. Jaycees v. Mass. Comm’n Against Discrimination*, 463 N.E.2d 1151 (Mass. 1984).

165. *Id.* at 1152.

166. *Id.*

167. *Id.* at 1154. The by-laws stated that the purpose of U.S. Jaycees is to “promote and foster the growth and development of young men’s civic organizations in the United States” *Id.* at 1153.

168. *Id.* at 1156.

that must be met in determining whether something is a place of public accommodation is that it must be an actual physical place.¹⁶⁹ The court noted that U.S. Jaycees does not maintain a “physical ‘place’ of operations in Massachusetts.”¹⁷⁰ Because U.S. Jaycees did not have a primary place of operations in Massachusetts and an organization itself cannot *be* a place of public accommodation, the court concluded that U.S. Jaycees was not a place of public accommodation with regard to the public accommodation anti-discrimination laws.¹⁷¹ However, the court recognized that it was still possible for the organization to discriminate in a place of public accommodation.¹⁷² For instance, if an organization, while in a place of public accommodation, does not allow a person to participate because of his or her membership in a protected class, the organization’s actions may be considered discriminatory under the public accommodation anti-discrimination statute.¹⁷³

Applying the court’s analysis in *U.S. Jaycees*, whether a volunteer can allege discrimination in a place of public accommodation will depend on whether a business or organization has a primary place of operations in Massachusetts that receives the volunteer efforts.¹⁷⁴ If a person volunteers—as either a service or donor volunteer—for a business or organization that has a primary physical place of operations in Massachusetts, then the recipient of the volunteer efforts would be considered a “place” and may fall within the scope of public accommodation anti-discrimination law.¹⁷⁵ Importantly, however, even if the person or organization does not have a primary place of operations in Massachusetts, the recipient of the volunteer efforts may still be considered a “place” for purposes of the public accommodation anti-discrimination law if the location of the alleged discriminatory act falls within the definition of “place” with regard to the statute.¹⁷⁶

169. *Id.* at 1157.

170. *Id.* at 1156. The court held that Massachusetts Jaycees, which maintains a place of operation in Massachusetts, could be considered a place of public accommodation. *Id.* at 1160. *Cf. Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1209 (N.J. 1999) (stating that for twenty-five years, a “place” has not been restricted to a fixed location in New Jersey), *rev’d for First Amendment concerns*, 530 U.S. 640 (2000).

171. *U.S. Jaycees*, 463 N.E.2d at 1160.

172. *Id.* at 1157.

173. *See id.* at 1159–60. Accordingly, “neither the U.S. Jaycees nor the Massachusetts Jaycees may discriminate against women in the admission to, or treatment on, the property of Massachusetts Jaycees.” *Id.* at 1160.

174. *See generally id.*

175. *See, e.g., id.* at 1160 (holding an organization that does not have a primary place of operation in Massachusetts is not a place of public accommodation for purposes of the public accommodation antidiscrimination statute).

176. *See id.* at 1159–60.

After determining whether a business or organization is a place, it is necessary to determine whether that place would be considered a place of public accommodation.¹⁷⁷ A “public accommodation” is defined as “[a] business that provides lodging, food, entertainment, or other services to the public”¹⁷⁸ The Massachusetts public accommodation anti-discrimination statute greatly increases the scope of the term “place of public accommodation” with “the inclusion of the words ‘any place . . . which is open to and accepts or solicits the patronage of the general public.’”¹⁷⁹ Whereas the Massachusetts public accommodation anti-discrimination statute enumerates examples of places of public accommodation, the broad legislative purpose for the statute indicates the list is not exhaustive and should not restrict application of the term “place of public accommodation.”¹⁸⁰

In the broadest application, a business or organization could be a place of public accommodation and could be liable to *anyone* under the public accommodation anti-discrimination statute so long as the business or organization solicits the patronage of someone in the general public.¹⁸¹ However, in a narrower scope, claims under the public accommodation anti-discrimination statute could be limited to only those *specific individuals* from whom the place of public accommodation solicits patronage.¹⁸² “Patronage” is defined as “[t]he giving of support, sponsorship, or protection.”¹⁸³ Financial support of a business from clients or customers would fit into this definition of patronage; additionally, support in the form of volunteer efforts could also fit into this definition.¹⁸⁴

Whereas the broadest application of the Massachusetts public accommodation anti-discrimination statute would apply to volunteers as well as anyone else, there is also a way in which the more narrow application would apply to volunteers.¹⁸⁵ A common method of obtaining the help of volunteers is through recruitment.¹⁸⁶ Recruitment of

177. See MASS. GEN. LAWS ch. 272, § 92A (2016).

178. *Public Accommodation*, BLACK’S LAW DICTIONARY (10th ed. 2014) (found as a sub-definition of *accommodation*).

179. *Local Fin. Co. of Rockland v. Mass. Comm’n Against Discrimin.*, 242 N.E.2d 536, 538 (Mass. 1968) (quoting MASS. GEN. LAWS ch. 272, § 92A).

180. MASS. GEN. LAWS ch. 272, § 92A (2016); *Local Fin. Co. of Rockland*, 242 N.E.2d at 538.

181. See MASS. GEN. LAWS ch. 272, § 92A (2016); see also Ryan H. Nelson, *An Indirect Challenge to the FDA’s “Gay Blood Ban”*, 23 TUL. J.L. & SEXUALITY 1, 12 (2014).

182. See MASS. GEN. LAWS ch. 272, § 92A (2016).

183. *Patronage*, BLACK’S LAW DICTIONARY (10th ed. 2014).

184. See *id.*

185. See MASS. GEN. LAWS ch. 272, § 92A (2016).

186. See Jenette Nagy, *Recruiting Volunteers*, COMMUNITY TOOL BOX,

volunteers is a type of solicitation, and consequently, solicitation of the volunteer's support, or patronage.¹⁸⁷ Therefore, if a business or organization attempts to recruit volunteers or publicly advertises the availability of volunteer opportunities, even the narrow view of what is encompassed by the term "place of public accommodation" would allow a volunteer to bring a claim under the Massachusetts public accommodation anti-discrimination statute should the business or organization violate the statute.¹⁸⁸

B. *Denial of the Ability to Volunteer Based on Membership or Perceived Membership in a Protected Class Equates to a Violation of the Massachusetts Public Accommodation Anti-Discrimination Statute*

In determining whether a place of public accommodation has violated the Massachusetts public accommodation anti-discrimination statute by turning away a volunteer, it is necessary to examine whether the volunteer was denied the "accommodations, advantages, facilities, [or] privileges of [the] place of public accommodation" because of his membership in a protected class.¹⁸⁹ Whereas volunteers typically do not receive remuneration, they often offer their services in order to receive something non-monetary in return.¹⁹⁰ The benefits a volunteer receives depend on the individual volunteer and the type of volunteer work.¹⁹¹ Although some benefits are consistent regardless of the type of volunteer,¹⁹² more often benefits vary depending on whether the volunteer is a service volunteer¹⁹³ or a donor volunteer.¹⁹⁴ The next step, therefore, is to examine the various benefits a volunteer receives and to determine whether these benefits could be considered accommodations, advantages,

<http://ctb.ku.edu/en/table-of-contents/structure/volunteers/recruiting/main>
perma.cc/8AJE-CPYL].

[<https://>

187. See *Solicitation*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The act or an instance of requesting or seeking to obtain something; a request or petition . . .").

188. See MASS. GEN. LAWS ch. 272, § 92A (2016).

189. MASS. GEN. LAWS ch. 272, § 98 (2016).

190. Nagy, *supra* note 186.

191. See WALTER P. PIDGEON, JR., THE UNIVERSAL BENEFITS OF VOLUNTEERING 37–38 (1998).

192. See, e.g., CHARLES A. BENNETT, VOLUNTEERING: THE SELFISH BENEFITS 29 (2001). "Selfless people are good people . . . They're in it for the image, a quick 'feel good.'" *Id.* at 29.

193. See, e.g., Horoszowski, 5 *Surprising Benefits*, *supra* note 13.

194. See, e.g., Feigenbaum, *supra* note 13; Rachel Swalin, 4 *Unexpected Benefits of Donating Blood*, HEALTH (June 13, 2014), <http://news.health.com/2014/06/13/4-unexpected-benefits-of-donating-blood/> [<https://perma.cc/WSM9-R8FS>].

facilities, or privileges.¹⁹⁵

For purposes of this Note, a service volunteer is someone who offers his services without expectation of remuneration.¹⁹⁶ Service volunteers can take various forms; the most common examples of service volunteers, however, are what many consider to be traditional volunteers—people who give their time to activities, such as reading to children in an orphanage—and interns—people who give their services with the goal of increasing professional experience.¹⁹⁷ A donor volunteer is someone who makes donations.¹⁹⁸ Donor volunteers give tangible goods such as blood or money.¹⁹⁹ Volunteers gain various types of benefits—physical, mental, social, professional, and economic—as a result of their volunteer efforts.²⁰⁰ Benefits may apply to volunteers as a general class or to one specific type of volunteer.²⁰¹ For example, studies have shown that those who volunteer receive more health benefits than the recipients of the volunteer efforts.²⁰²

1. Benefits for Service Volunteers

Research shows a significant relationship between improved physical health and volunteering.²⁰³ Those who volunteer tend to have lower mortality rates than those who do not volunteer.²⁰⁴ Additionally, studies have shown that service volunteers have increased functional ability.²⁰⁵ Some volunteers may even report experiencing a “helper’s high . . . an actual physical sensation that occurs when people help others

195. See MASS. GEN. LAWS ch. 272, §§ 92A, 98 (2016).

196. See *Service*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Labor performed in the interest . . . of others.”); *Volunteer*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Someone who gratuitously and freely confers a benefit on another[.]”).

197. See *5 Different Types of Volunteering Activities*, VOLUNTEER WKLY. (Nov. 30, 2012), <http://www.volunteerweekly.org/types-of-volunteering-activities/> [<https://perma.cc/Z6R5-QH9F>] [hereinafter *5 Different Types*].

198. See *Donor*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Someone who gives something without receiving consideration for the transfer.”); *Volunteer*, BLACK’S LAW DICTIONARY (10th ed. 2014).

199. See, e.g., *Ways to Donate*, AM. RED CROSS, <http://www.redcross.org/donations/ways-to-donate> [<https://perma.cc/XL6P-ZFFV>]; *Ways to Give*, FEEDING AM., <http://www.feedingamerica.org/ways-to-give/> [<https://perma.cc/2QYJ-FVQA>].

200. See ROBERT GRIMM JR. ET AL., OFFICE OF RESEARCH & POLICY DEV., CORP. FOR NAT’L & CMTY. SERV., THE HEALTH BENEFITS OF VOLUNTEERING: A REVIEW OF RECENT RESEARCH 1 (2007); *5 Different Types*, *supra* note 197; Feigenbaum, *supra* note 13.

201. See generally, e.g., GRIMM JR. ET AL., *supra* note 200; Horoszowski, *5 Surprising Benefits*, *supra* note 13; Feigenbaum, *supra* note 13.

202. GRIMM JR. ET AL., *supra* note 200, at 3.

203. *Id.* at 1.

204. *Id.*

205. *Id.*

that makes them experience greater energy and strength”²⁰⁶

Additionally, volunteers experience increased mental health and social benefits.²⁰⁷ Volunteers who freely give their time feel they have more free time.²⁰⁸ “[T]he feeling of having more time” tends to lead to lower stress levels.²⁰⁹ Volunteering has also been shown to lead to reduced depression later in the volunteer’s life.²¹⁰ Volunteers feel socially connected, experience increased levels of self-esteem and happiness, and enjoy improved psychological well-being.²¹¹ Volunteers also feel more loved.²¹² “Volunteering builds empathy, strengthens social bonds and makes you smile—all factors that increase the feeling of love.”²¹³ Additionally, service volunteers build more bonds with fellow volunteers and with organizers, thereby leading to an increased sense of belonging.²¹⁴

Furthermore, people who volunteer develop new skills.²¹⁵ When service volunteers partake in skill-based volunteer work such as internships, they gain additional professional benefits.²¹⁶ Volunteering can also lead to career gains.²¹⁷ Internships provide opportunities to network and to connect with mentors in a specific field of business.²¹⁸ Additionally, internships allow the volunteer to gain new skills and “real world” experience.²¹⁹ An internship provides an opportunity for the volunteer to explore career options and ensure the career path is correct

206. Rita Altman, *The Benefits of Volunteering*, HUFF. POST (Aug. 5, 2013, 6:06 PM), http://www.huffingtonpost.com/rita-altman-rn/the-benefits-of-volunteer_b_3377383.html [https://perma.cc/CB3E-2G6X].

207. GRIMM JR. ET AL., *supra* note 200, at 1.

208. See Horoszowski, *5 Surprising Benefits*, *supra* note 13.

209. Mark Horoszowski, *Volunteering Makes You Happier—Here’s Why*, MOVING WORLDS (Feb. 12, 2014), <http://blog.movingworlds.org/volunteering-makes-you-happier/> [https://perma.cc/P526-S7J5] [hereinafter Horoszowski, *Volunteering Makes You Happier*].

210. GRIMM JR. ET AL., *supra* note 200, at 1.

211. Phillip Moeller, *Why Helping Others Makes Us Happy*, U.S. NEWS (Apr. 4, 2012, 9:20 AM), <http://money.usnews.com/money/personal-finance/articles/2012/04/04/why-helping-others-makes-us-happy>.

212. Horoszowski, *5 Surprising Benefits*, *supra* note 13.

213. *Id.*

214. Horoszowski, *Volunteering Makes You Happier*, *supra* note 209.

215. Horoszowski, *5 Surprising Benefits*, *supra* note 13.

216. See Heather Huhman, *Why You Should Get a Summer Internship*, U.S. NEWS (Apr. 29, 2011, 9:00 AM), <http://money.usnews.com/money/blogs/outside-voices-careers/2011/04/29/why-you-should-get-a-summer-internship> [https://perma.cc/Q825-EXM3].

217. Dawn C. Carr, *5 Reasons Why You Should Volunteer*, PSYCHOL. TODAY (Mar. 12, 2014), <https://www.psychologytoday.com/blog/the-third-age/201403/5-reasons-why-you-should-volunteer> [https://perma.cc/TDG8-FWPP].

218. Beth Braccio Hering, *Why Are Internships So Important?*, CNN (Apr. 14, 2010, 11:09 AM), <http://www.cnn.com/2010/LIVING/worklife/04/14/cb.why.internships.important/> [https://perma.cc/GNQ2-AW4R].

219. *Id.*

for the volunteer.²²⁰ If it is, an internship could put the volunteer in a position where he has an advantage for future employment opportunities.²²¹ If the internship does not lead to employment, the service volunteer has nevertheless strengthened his resume and made connections for future employment references elsewhere.²²²

2. Benefits for Donor Volunteers

There are certain types of benefits specific to donor volunteers.²²³ Federal law allows a deduction on federal taxes for charitable contributions.²²⁴ This tax benefit could serve as a motivation for many who make donations.²²⁵ However, donor volunteers seeking a tax deduction are not limited to contributing monetary donations.²²⁶ A donor volunteer can receive tax deductions by donating used clothing to thrift shops and reporting the value of the donated goods to the Internal Revenue Service.²²⁷ A donor volunteer is also entitled to a tax deduction for the fair market value of donated food and household goods.²²⁸ Additionally, when a donor volunteer donates an automobile to an IRS-qualified organization, the donor volunteer can claim a tax deduction up to the fair market value of the car.²²⁹

There are also additional benefits when a donor volunteer gives biological material, such as blood.²³⁰ Blood donors experience health benefits including increased blood flow.²³¹ While there is no confirmed correlation between the increased blood flow and long lasting health benefits, studies have shown that people who donate blood are hospitalized less often.²³² Additionally, blood donors receive the equivalent of a “mini check-up” when they donate blood, as blood donors

220. Huhman, *supra* note 216.

221. *Id.*

222. *Id.*

223. *See, e.g.*, Feigenbaum, *supra* note 13.

224. 26 U.S.C. § 170(a)(1) (2014).

225. *See* Feigenbaum, *supra* note 13.

226. *See, e.g.*, Ron Lieber, *Tax-Deductible Clothing Donations Are Great, Except Your Used Socks*, N.Y. TIMES (May 15, 2015), http://www.nytimes.com/2015/05/16/your-money/tax-deductible-clothing-donations-are-great-except-your-used-socks.html?_r=1 [<https://perma.cc/PAM4-2DCB>]; *Can I Get Tax Deductions for Charitable Contributions*, EFILE.COM, <http://www.efile.com/tax-deduction/income-deduction/charitable-contributions/> [<https://perma.cc/KC3C-KS9U>] [hereinafter *Can I Get Tax Deductions*].

227. Lieber, *supra* note 226.

228. *Can I Get Tax Deductions*, *supra* note 226.

229. TAX EXEMPT AND GOV'T ENTITIES DIV., IRS, A DONOR'S GUIDE TO CAR DONATION 3, <https://www.irs.gov/pub/irs-tege/pub4303.pdf> [<https://perma.cc/PY4M-NDMP>].

230. *See, e.g.*, Swalin, *supra* note 194.

231. *Id.*

232. *Id.*

are required to have their temperature, blood pressure, pulse, and hemoglobin levels checked prior to donating.²³³ Donated blood is also screened for sexually transmitted infections and other infectious diseases.²³⁴ Additionally, blood donation helps to regulate iron levels in the body.²³⁵ Donating blood removes iron from the body and statistics show that decreasing the amount of iron in a healthy person's body is beneficial to the person's health.²³⁶ By donating blood, the blood donor also reduces his general risk of certain types of heart disease.²³⁷

3. The Denial of Benefits Volunteers Receive Amounts to a Denial of Privileges and Advantages

Regardless of the types of volunteer efforts, volunteering provides various benefits to the volunteer.²³⁸ Many organizations promote these benefits in an effort to recruit volunteers.²³⁹ The pivotal question is

233. *Id.*

234. *Id.* Similarly, sperm donors receive benefits such as STD testing, physical exams, and genetic testing. See *Benefits of Becoming a Donor*, SPERM BANK OF CAL., <https://www.thespermbankofca.org/content/benefits-and-compensation> [https://perma.cc/Q3L5-32AX].

235. Swalin, *supra* note 194.

236. *Id.*

237. *Health Benefits of Donating Blood*, ONE BLOOD, <https://www.oneblood.org/about-donating/blood-donor-basics/can-i-donate/health-benefits.html> [https://perma.cc/9TSN-XCCL]. Similar to blood donation, a person can also donate plasma, which typically entails receipt of some form of monetary compensation. See, e.g., *Plasma Donation FAQs*, OCTAPHARMA PLASMA, <http://octapharmaplasma.com/donor/plasma-donation-faq> [https://perma.cc/72YV-YFFR]. It is arguable whether the donation of plasma is a volunteer effort because of the receipt of monetary compensation. See *id.* See also *Remuneration*, BLACK'S LAW DICTIONARY (10th ed. 2014). Some plasma donation centers emphasize that the compensation is in exchange for the time spent donating plasma, not the plasma itself. See, e.g., *Plasma Donation FAQs*, *supra* note 237. Thus, this compensation could be viewed as remuneration. See *Remuneration*, BLACK'S LAW DICTIONARY (10th ed. 2014). Therefore, instead of being considered a volunteer, the donor may be viewed as an independent contractor entrusted with the task of giving plasma. See *Independent Contractor*, BLACK'S LAW DICTIONARY (10th ed. 2014). Whereas the plasma donor would not fit neatly into the definition of independent contractor, the receipt of remuneration in exchange for the time spent donating plasma raises the question of whether the donor *could* be considered an independent contractor. See *id.* However, if the compensation is in exchange for the time spent donating, it would not counter an argument that the plasma donor is a donor volunteer. See, e.g., *Plasma Donation FAQs*, *supra* note 237. Regardless, the plasma donor will receive benefits that apply to volunteers in general, such as improved psychological and mental well-being. See Horoszowski, *Volunteering Makes You Happier*, *supra* note 209.

238. See GRIMM JR. ET AL., *supra* note 200, at 1; 5 *Different Types* *supra* note 197; Feigenbaum, *supra* note 13.

239. See, e.g., *Benefits of Volunteering*, ASUG, <https://www.asug.com/volunteers/benefits-of-volunteering> [https://perma.cc/PR5R-PVXT]; *Benefits of Volunteering*, BIG BROTHERS BIG SISTERS MASS. BAY, http://www.bbbsmb.org/site/c.9gKMJZMxF7LUG/b.8724893/k.5791/Benefits_of_Volunteering.htm [https://perma.cc/57HL-ZLFC]; *Why Donate Blood?*, AM. RED CROSS,

whether denial of these benefits based on the volunteer's membership in a protected class would amount to a denial of "accommodations, advantages, facilities [or] privileges" for purposes of the Massachusetts public accommodation anti-discrimination statute.²⁴⁰ To answer this question, it is necessary to understand the definitions of each of these words. An "accommodation" is "[a] convenience supplied by someone; esp[ecially], lodging and food."²⁴¹ An "advantage" is "[a]ny benefit or gain."²⁴² A "facility" is "something that makes an action, operation, or course of conduct easier."²⁴³ A "privilege" is "a right . . . granted as a peculiar benefit, advantage, or favor."²⁴⁴ These definitions are important because Massachusetts law labels "the right to the full and equal accommodations, advantage, facilities and privileges of any place of public accommodation" as a civil right.²⁴⁵

Ryan H. Nelson addressed this question in his article *An Indirect Challenge to the FDA's "Gay Blood Ban,"*²⁴⁶ albeit within the narrow scope of a man who has had sex with another man being banned from donating blood.²⁴⁷ Focusing on the benefits a blood donor receives, such as a "mini physical," Nelson stated that because denying a person the

<http://www.redcrossblood.org/donating-blood/why-donate-blood> [https://perma.cc/ZMR5-22TD]; 4 *Personal Benefits of Volunteering in Your Community*, UNITED WAY (Oct. 2, 2012), <http://www.unitedway.org/blog/4-personal-benefits-of-volunteering-in-your-community> [https://perma.cc/XN3Z-A3KJ].

240. MASS. GEN. LAWS ch. 272, § 98 (2016). The statute itself does not define these terms. *See id.*

241. *Accommodation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

242. *Advantage*, BLACK'S LAW DICTIONARY (10th ed. 2014).

243. *Facility*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004).

244. *Privilege*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004).

245. MASS. GEN. LAWS ch. 272, § 98 (2016).

246. Nelson, *supra* note 181.

247. *Id.* at 4. The U.S. Food and Drug Administration recently changed its policy regarding the indefinite ban on men who have had sex with men being able to donate blood. *FDA Updates Blood Donor Deferral Policy to Reflect the Most Current Scientific Evidence and Continue to Ensure the Safety of the U.S. Blood Supply*, U.S. FOOD & DRUG ADMIN. (Dec. 21, 2015), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm478031.htm> [https://perma.cc/SK2X-88L3]. The updated policy only bans men who have sex with men from donating blood for a twelve-month period after they have had sex with another man. *Id.* The June 2016 mass shooting at Pulse nightclub in Orlando, Florida, revitalized the debate over the FDA's ban disallowing men who have had sex with men from donating blood. *See* Donald G. McNeil, Jr., *Orlando Shooting Renews Debate Over Limits on Gay Men Donating Blood*, N.Y. TIMES (June 15, 2016), http://www.nytimes.com/2016/06/16/health/orlando-shooting-renews-debate-over-limits-on-gay-men-donating-blood.html?_r=0 [https://perma.cc/KDJ7-6X7P]. Prompted in part by the fact that Pulse was a gay nightclub, gay men under the impression that restrictions had been relaxed prepared to donate blood and help victims, yet were turned away because the FDA's restrictions remained intact. *Id.* *See* Lizette Alvarez & Richard Pérez Peña, *Orlando Gunman Attacks Gay Nightclub, Leaving 50 Dead*, N.Y. TIMES (June 12, 2016), <http://www.nytimes.com/2016/06/13/us/orlando-nightclub-shooting.html>.

ability to donate blood denies the person the perks associated with the blood donation, it equates to a denial of advantages and privileges.²⁴⁸ It is less likely the denial of these benefits would amount to a denial of accommodations or facilities.²⁴⁹

Nelson's argument could be expanded to all volunteers.²⁵⁰ Volunteers receive a multitude of benefits for their efforts.²⁵¹ If a person is denied the ability to volunteer, the person will be denied the benefits he otherwise would have received.²⁵² Additionally, based on the definition of "advantage" as "[a]ny benefit or gain . . .," it reasonably follows that the denial of these benefits would also amount to a denial of advantages.²⁵³ Similarly, with "privilege" being defined as "a right or benefit that is given to some people and not to others," it is a reasonable inference that the denial of benefits would equate to a denial of privileges.²⁵⁴ Therefore, if a business or organization with a principal place of operations in Massachusetts solicits volunteers and denies someone the opportunity to volunteer based on his membership in a protected class, then the business or organization would likely be violating the Massachusetts public accommodation anti-discrimination statute.²⁵⁵ Massachusetts should thus allow a volunteer to bring a discrimination claim under the public accommodation anti-discrimination law.²⁵⁶

C. *Public Policy Supports Granting Volunteers the Ability to Bring Discrimination Claims under the Massachusetts Public Accommodation Anti-Discrimination Statute*

Maintaining a strong volunteer workforce is integral to the success of many businesses, especially mission-driven workforces.²⁵⁷ Organizations that aim to improve society, "places like museums, social service organizations, and faith-based organizations[,] typically depend on unpaid volunteers to help accomplish their goals.²⁵⁸ Volunteers help keep our cities and towns clean, mentor and teach society's youth, and educate the public; this is just a small sampling of what volunteers do to

248. Nelson, *supra* note 181, at 4–5.

249. *Id.* at 5.

250. *See id.*

251. *See supra* Sections III.B.1, III.B.2.

252. *See supra* Sections III.B.1, III.B.2.

253. *See Advantage*, BLACK'S LAW DICTIONARY (10th ed. 2014).

254. *See Privilege*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004).

255. *See* MASS. GEN. LAWS ch. 272, §§ 92A, 98 (2016).

256. *See* MASS. GEN. LAWS ch. 272, §§ 92A, 98 (2016).

257. Carr, *supra* note 217.

258. *Id.*

help society.²⁵⁹ Volunteers are critical to helping society function.²⁶⁰

Examining what would happen if there were no volunteers brings into relief the importance of volunteers in society.²⁶¹ “[I]magine if one day, all volunteers simply didn’t show up What basic needs would go unmet? What opportunities to grow, learn, and thrive as a society would be lost?”²⁶² Massachusetts has experienced volunteer shortages first-hand.²⁶³ One example of an organization that suffers from a lack of volunteers is the Massachusetts Chapter of the American Red Cross, which solicited for donations of blood and platelets to counteract a seasonal shortage in 2015.²⁶⁴ Another example is the Girl Scouts, which has numerous girls annually who are placed on a waitlist due to lack of adult volunteers.²⁶⁵

A shortage of volunteers has detrimental impacts on society.²⁶⁶ Why then should it be acceptable to discriminate against a volunteer and reject his offerings of volunteer efforts solely because of his membership or perceived membership in a protected class? Prohibiting discrimination of volunteers will benefit society by helping to prevent a further decrease in volunteers that would result from the discrimination.²⁶⁷ For public policy reasons, it is in the best interest of the Commonwealth to allow volunteers to bring discrimination claims under the Massachusetts public accommodation anti-discrimination statute.²⁶⁸

259. *Why is Volunteering Important?*, IDEALIST, <http://www.idealists.org/info/Volunteer/Why> [<https://perma.cc/NZ7D-KCFT>]. Idealist is part of the non-profit organization Action Without Borders, and is intended to connect people with non-profit organizations in order to do more with what we have. *See A Brief History of Idealist*, IDEALIST, <http://www.idealists.org/info/About/History> [<https://perma.cc/C7XX-74BK>]. *See also Volunteer Resource Center*, IDEALIST, <http://www.idealists.org/info/Volunteer> [<https://perma.cc/Y7A2-7K7G>]. Volunteering helps to bring about local action and help society, while allowing people to find volunteer opportunities. *See A Brief History of Idealist*, *supra* note 259. *See also Volunteer Resource Center*, *supra* note 259.

260. *Why is Volunteering Important?*, *supra* note 259.

261. *See id.*

262. *Id.*

263. *See Volunteering in MA*, *supra* note 2.

264. *Red Cross Urges Summer Blood and Platelet Donations to Prevent Seasonal Shortage*, AM. RED CROSS (May 18, 2015), <http://www.redcrossblood.org/news/ma/red-cross-urges-summer-blood-and-platelet-donations-prevent-seasonal-shortage> [<https://perma.cc/9LJK-GXKX>] [hereinafter *Red Cross Urges Donations*].

265. Brian Lee, *Girl Scout Numbers on Decline in Worcester Area over Volunteer Shortage*, TELEGRAM.COM (Oct. 19, 2014, 6:00 AM), <http://www.telegram.com/article/20141019/NEWS/310199795> [<https://perma.cc/Y3MZ-MNVR>] [hereinafter *Girl Scout Numbers*].

266. *See Why is Volunteering Important?*, *supra* note 259.

267. *See, e.g., Red Cross Urges Donations*, *supra* note 264; *Girl Scout Numbers*, *supra* note 265.

268. *See* MASS. GEN. LAWS ch. 272, §§ 92A, 98 (2016). It is possible that an argument could be made asserting that it is against public policy to allow volunteers to bring a legal claim alleging discrimination against an employer. This could potentially lead organizations to stop

CONCLUSION

Volunteering provides multiple benefits to both the volunteer and the recipient of the volunteer efforts.²⁶⁹ These benefits take many forms (physical, mental, social, professional, and economic) and are found with service volunteers and donor volunteers.²⁷⁰ Regardless of the benefits incurred, there is often a shortage of volunteers, and consequently, a continual need for more volunteers.²⁷¹ This shortage of volunteers has been experienced first-hand in Massachusetts, where only about 25 percent of residents volunteer.²⁷² When a business or organization refuses a volunteer because of his membership in a protected class, the shortage of volunteers is exacerbated.²⁷³

Currently, a volunteer in Massachusetts has limited statutory protections against discrimination.²⁷⁴ Volunteers can bring a claim under the Massachusetts civil rights statute only if the discrimination is the result of “threats, intimidation or coercion, or attempt[ed] . . . threats, intimidation, or coercion.”²⁷⁵ If a person is not permitted to volunteer because of his membership in a protected class, he is denied the various benefits afforded to volunteers, which would amount to a denial of privileges and advantages.²⁷⁶ Assuming the business or organization is soliciting volunteer efforts and has a principal place of operations in Massachusetts, it would likely be considered a place of public accommodation.²⁷⁷ Based on these criteria being met, the business or organization would be discriminating in a place of public accommodation.²⁷⁸ Therefore, Massachusetts should allow anyone who is denied the ability to volunteer in a place of public accommodation based on membership or perceived membership in a protected class the opportunity to bring a discrimination claim under the Massachusetts

providing volunteer opportunities in an effort to avoid discrimination allegations. While it would seem the public policy behind stopping discrimination would be more powerful, this argument will not be analyzed in this Note.

269. See GRIMM JR. ET AL., *supra* note 200, at 3.

270. See, e.g., Horoszowski, 5 *Surprising Benefits*, *supra* note 13; Feigenbaum, *supra* note 13.

271. See Paul Clolery, *Troubling Numbers in Volunteering Rates*, NON PROFIT TIMES (Feb. 27, 2014), <http://www.thenonproffitimes.com/news-articles/troubling-numbers-in-volunteering-rates/> [https://perma.cc/CB44-HDLU].

272. *Volunteering in MA*, *supra* note 2.

273. See Clolery, *supra* note 271.

274. See MASS. GEN. LAWS ch. 12, §§ 11H–I (2016).

275. MASS. GEN. LAWS ch. 12, § 11H (2016).

276. See, e.g., Horoszowski, 5 *Surprising Benefits*, *supra* note 13; Feigenbaum, *supra* note 13.

277. Cf. *U.S. Jaycees v. Mass. Comm’n Against Discrimination*, 463 N.E.2d 1151, 1160 (Mass. 1984). See *Local Fin. Co. of Rockland v. Mass. Comm’n Against Discrimination*, 242 N.E.2d 536, 538 (Mass. 1968).

278. See MASS. GEN. LAWS ch. 272, §§ 92A, 98 (2016).

public accommodation anti-discrimination statute.²⁷⁹

When John and Jim were denied the opportunity to volunteer at the food pantry, they were turned away because the manager of the food pantry believed they were in a same-sex relationship. Similarly, the manager refused John and Jim's donations for the same reason. The denial of the opportunity to volunteer and the rejection of the donation constitute a denial of the benefits that are intrinsic to volunteering. Whereas John and Jim currently would have no statutory protections available to them, this proposed change in the scope of the Massachusetts public accommodation anti-discrimination statute would afford John and Jim statutory protections while also benefitting the public.

279. See MASS. GEN. LAWS ch. 272, §§ 92A, 98 (2016).