DECLARATION OF CHRISTOPHER GRIFFIN

I, Christopher Griffin, hereby declare and state:

1. I am the Office Manager of the Gould Social Workers' Union (SWU). This declaration is being submitted in support of Defendant SWU's Motion for Summary Judgment.

2. SWU is a local union that represents social workers who live and work in and around the City of Gould. SWU has twelve paid employees, including an Office Manager (my position), an Operations Manager (Andrea Hadjiyianni's position), an Assistant Operations Manager, a Treasurer, a Political Action Chair, a Membership Chair, two Administrative Assistants, a Human Resources representative, and three members of the Board of Directors. All of SWU's employees work fulltime for SWU, except the three Board members, who work only part-time as Board members.

3. I started working for SWU approximately fifteen years ago. I initially volunteered my time to SWU twice per week. After three years, I was offered a permanent, paid position as an Administrative Assistant. Over the years, I was promoted multiple times until I was ultimately offered my current position as SWU's Office Manager. I have continuously held this position for the last four years. As SWU's Office Manager, I am responsible for supervising all of SWU's daily operations.

4. SWU is associated with the Federation of Social Workers (FSW), which is a national federation of local and regional unions that represent social workers. I am not supervised by, nor do I report to, anyone at FSW on a daily or even weekly basis. My contact with FSW is generally limited to attending monthly meetings with FSW's Regional Manager and other FSW officers. At these meetings, we discuss in general terms SWU's status and operations. FSW's officers also occasionally make general recommendations about ways to improve SWU's growth and development.

5. One of my many duties as SWU's Office Manager is to oversee SWU's unpaid, part-time volunteer program. This program was designed to benefit both the local community and its volunteers by having the volunteers work primarily on issues addressing the homelessness problem in the City of Gould. SWU's volunteers are not given any written contracts; they are verbally offered positions, and SWU always reserves the right to ask a volunteer to leave if the volunteer is not the "right fit" for the office.

6. In April 2014, I interviewed Anna Dewan, a twenty-four-year-old individual with a bachelor's degree in social work, for a position as one of our unpaid volunteers. Historically, all of our volunteers have been students or other individuals who had not yet attained college degrees, so we were

thrilled when Dewan applied because she already had a relevant college degree. At the time, I informed her that we ask all our volunteers to work twenty-five hours per week, but her schedule would be flexible. I further informed her that she would be allowed to work any day of the week that she wanted and to work from home, as long as she completed her assigned tasks in a timely manner. I also told her that she would not be offered any direct benefits, such as a salary or wages, but she would be covered by SWU's standard workers' compensation insurance plan, which is issued through FSW. She would also receive free parking and lunch on the days she volunteered at the office. Based on my recommendation, the hiring committee offered a volunteer position to Ms. Dewan, and Ms. Dewan accepted. She began volunteering in May 2014. At the time, Ms. Dewan was SWU's only volunteer.

7. Unfortunately, Ms. Dewan injured herself on the job during her first week of volunteering. She slipped and fell in a small puddle of water in the kitchen and landed on the left side of her body. I immediately drove her to the emergency room. After x-rays were taken, we learned that she had broken her left arm. The doctor said that her recovery process would take eight weeks and that she would be required to attend physical therapy. I consulted with the other SWU officers, and because her medical bills were less than $10,000, we decided to

pay for Ms. Dewan's medical treatment, physical therapy, and medications to avoid the hassle of making a workers' compensation insurance claim.

8. Ms. Andrea Hadjiyianni, SWU's Operations Manager, oversees all of SWU's work on our homelessness initiative. She therefore acted as Ms. Dewan's immediate supervisor while Ms. Dewan was volunteering for SWU. Ms. Hadjiyianni assigned all of Ms. Dewan's daily tasks. Ms. Dewan was also required to report to Ms. Hadjiyianni before she left the office each day about her progress on her assignments. Additionally, Ms. Dewan was required to ask for Ms. Hadjiyianni's permission before working on any new projects involving SWU.

9. During the time they worked together, Ms. Hadjiyianni assigned Ms. Dewan various projects, including providing research support on political initiatives affecting the homeless population, maintaining a database of affiliates that worked on the homelessness issue, and attending meetings of special-interest organizations that also dealt with the homelessness issue. In addition to these projects, Ms. Dewan was asked to organize SWU's social activities and to do administrative tasks, such as answering telephones, greeting clients, and performing data entry. Because Ms. Dewan developed a fairly extensive knowledge of Gould's homelessness problem, I and the other SWU officers would often ask Ms. Dewan's opinion regarding new

projects affecting our homelessness initiative. I and other SWU officers, including Ms. Hadjiyianni, always treated Ms. Dewan's advice and opinions with respect because of her expertise in this area and the high quality of her work product. On at least two occasions, she independently decided to expand the scope of her assigned research projects by finding data from related fields and then creating demonstrative charts to explain her findings. When she showed her results to SWU, she was praised for taking control of her own work.

10. In late April 2015, almost a year after SWU hired Ms. Dewan, she went to SWU's Human Resources Department and alleged that Ms. Hadjiyianni had sexually harassed her on numerous occasions. I was surprised to learn of that allegation because I had frequent contact with the two of them during the preceding year, while Ms. Dewan was volunteering at SWU. All of the interactions that I witnessed between them were professional and appropriate. I never witnessed Ms. Hadjiyianni make any comments to Ms. Dewan suggesting that she was interested in her on a romantic or sexual level. Further, when I questioned Ms. Dewan about her allegations, she was unable to provide any corroborating evidence substantiating her claims. I also spoke to Ms. Hadjiyiani about the allegation, and she denied ever sexually harassing Ms. Dewan.

11. After I investigated Ms. Dewan's complaint, I discussed her allegations with SWU's officers. Because she was unable to provide any corroborating evidence, we decided not to take any action against Ms. Hadjiyianni. Shortly after being advised of that decision, it is my understanding that Ms. Dewan also filed a complaint with FSW's Human Resources Department. Shortly thereafter, I was contacted by FSW's Human Resources Department. I told them about the results of my investigation. A few days later, I was informed that FSW had decided not to take any action against Ms. Hadjiyianni for the same reasons that SWU had decided not to act, including Ms. Dewan's failure to provide any evidence to corroborate her allegations. After both SWU and FSW decided not to take any action concerning Ms. Dewan's allegations, on June 1, 2015, Ms. Dewan quit her position at SWU.

12. I am informed and believe that, on July 1, 2015, Ms. Dewan then filed a complaint in federal court against SWU, alleging that she was the victim of sexual harassment, in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1).

13. I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this 3rd day of January, 2016 in Gould City, Gould.

Christopher Griffin
CHRISTOPHER GRIFFIN

DECLARATION OF JOSEPH PEACOCK

I, Joseph Peacock, hereby declare and state:

1. I am the Vice President of Operations for the Federation of Social Workers (FSW). This declaration is submitted in support of Defendant Gould Social Workers' Union's (SWU) Motion for Summary Judgment.

2. The FSW is a national federation of local and regional unions, including SWU. FSW is dedicated to protecting the rights of professional social workers and enhancing the professional development of its member unions through lobbying, professional development opportunities, providing advantageous retirement and workers' compensation plans, helping the local unions negotiate their collective bargaining agreements, and other services. FSW currently has eleven offices around the United States, with a total of approximately 200 paid employees. Those offices provide services for FSW's twenty-five member unions, including SWU. The individuals who are members of the local and regional unions are also considered to be members of FSW. Overall, the local and regional unions that comprise FSW have approximately 150,000 individual members, making FSW one of the largest national federations of social workers' unions in the country.

3. Prior to holding my current position at FSW, I worked for fifteen years as SWU's Operations Manager, from 1991 through 2006. During my time at SWU, I was instrumental in developing labor relations and enhancing SWU's presence and reputation in the Gould community. Because of my successful leadership, during my last year at SWU, I was asked to serve on SWU's Board of Directors, which is a part-time paid position. I accepted the position, and I am currently still serving part-time as one of SWU's Board of Directors.

4. After working at SWU for fifteen years, in January 2006, I was offered the position as FSW's Vice President of Operations, which I accepted. When I left SWU, I recommended that my former assistant, Andrea Hadjiyianni, be promoted to the Operations Manager position at SWU because of her dedication to advocating for the rights of professional social workers, as well as her hard work and professional attitude.

5. On January 5, 2015, I was invited to serve as on FSW's National Board of Directors. I accepted and have been serving part-time of FSW's Board for the past year. FSW's Board has eight part-time members. Given that FSW is a relatively small national federation of unions, it is common for someone who is on the board of a local union, like SWU, to also serve on FSW's Board. Besides me, two other FSW Board members currently serve

concurrently on FSW's Board and on the boards of other local unions (not SWU).

6. As a local union, SWU is chartered by FSW, but remains a self-governing organization, as shown by SWU's Constitution, which states that it is a "separate and distinct organization" from FSW. In order to be considered an official member of FSW, SWU must agree to abide by FSW's overarching rules and regulations, but SWU and the other local unions are otherwise autonomous and self-sufficient.

a. For example, SWU does not rely on FSW for day-to-day financial planning; SWU has its own treasury, separate from FSW's treasury. SWU meets its budget through the collection of its membership dues and other business activities. FSW and SWU have a unified dues structure, which means that SWU deducts monthly dues from its members' paychecks and is responsible for allocating ten percent of those dues to FSW. SWU also maintains all of its own financial records and issues checks in its own name. However, FSW's rules do place certain financial and ethical restraints on the local unions, like SWU; specifically, FSW reserves the right to audit SWU's financial reports at any time to check for financial improprieties that might hurt the union members, although FSW typically audits SWU's financial reports only once a year. Also, if SWU needs to make a capital expenditure exceeding $10,000, it must be approved by FSW. For

example, SWU had to get approval from FSW last year before purchasing a new van to transport employees and volunteers. Similarly, FSW's approval is required if SWU increases the salary of its officers or offers employee bonuses that exceed the $10,000 expenditure cap. Other than those two restrictions, FSW and SWU do not share financial operations.

b. SWU also maintains control over its own hiring, supervising, and firing of SWU's employees and volunteers. SWU sets the hours, wages, and working conditions for all of its own employees without input from FSW. SWU also has the authority to elect its own officers and directors. The only indirect benefits that FSW provides to the local unions' members, including SWU's members, are access to FSW's standard 401(k) pension plan and its workers' compensation insurance.

c. FSW's member unions, including SWU, are, however, bound by certain general rules and policies that are dictated by FSW, including employment policies and anti-harassment policies. For example, SWU is bound by FSW's non-discrimination and anti-harassment policies and procedures, which are outlined in both FSW and SWU's respective employee handbooks and distributed to all employees of both organizations. Those policies state, among other things: "Every reasonable effort will be made to ensure a work environment that promotes equal opportunity and prohibits unlawful discriminatory practices,

including harassment. Any employee who has a concern regarding this policy should meet with the Director of Human Resources, and any complaint in violation of such policies will be investigated and resolved appropriately." This policy is consistent with the anti-harassment policies employed by other unions in the industry.

12. In April 2015, a human resources representative from FSW informed me that one of SWU's volunteers had accused Ms. Hadjiyianni of sexual harassment. I told the representative that I had worked closely with Ms. Hadjiyianni for years, that these allegations were outrageous, and that Ms. Hadjiyianni had always acted ethically and professionally when I was working with her.

13. I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this 3rd day of January, 2016 in Gould City, Gould.

Joseph Peacock

JOSEPH PEACOCK

DECLARATION OF ANNA DEWAN

I, Anna Dewan, hereby declare and state:

1. I live in the City of Gould, California. This declaration is being submitted in support of my Opposition to Defendant's Motion for Summary Judgment.

2. I am a twenty-four-year-old female with a bachelor's degree in social work from California State University, Gould. After taking a course in Hunger & Homelessness in America during my senior year in college, I became very passionate about providing social and economic justice for the local homeless population in and around Gould.

2. In April 2014, I responded to Defendant Gould Social Workers' Union's (SWU) advertisement seeking a position as an unpaid, part-time volunteer. Even though this volunteer position was normally filled by individuals without a college degree, I was excited about the opportunity because I wanted to gain hands-on work experience addressing the homelessness problem in Gould. Shortly after I submitted my application, I was brought in for an interview with Mr. Christopher Griffin, SWU's Office Manager.

3. During the interview, Mr. Griffin asked me questions about why I was interested in volunteering with the union and my educational background in studying homelessness issues. He told me that if I were offered the position, I would be able to work

from home and select the days of the week that I worked, as long as I worked at least twenty-five hours per week. He also told me that I would not receive any wages, salary, or direct benefits. Still, SWU would provide me with its standard workers' compensation insurance plan, provide free parking, and pay for my lunch each day that I volunteered. Mr. Griffin told me about the different tasks that volunteers were expected to perform, and I became very excited because the assignments would allow me to positively affect the homelessness issue in Gould. A few weeks later, I received an offer over the phone for the volunteer opportunity. I immediately accepted it.

4. I met my supervisor, SWU's Operations Manager, Ms. Andrea Hadjiyianni, during my first day of volunteering in May 2014. Ms. Hadjiyianni was responsible for assigning each of my daily tasks. For instance, during my first two weeks, I was asked to research political initiatives affecting the homeless population. Based on my research, I attended a staff meeting at which SWU's directors asked about my research and my opinion regarding whether SWU should support the initiative. The SWU officers ultimately agreed with me and decided not to move forward with that particular political initiative. I was ecstatic that my efforts at volunteering allowed my voice to be heard. On at least two occasions, I was praised for expanding the scope of my research assignments and for taking control of

my own work. Since Ms. Hadjiyianni was also my supervisor, I was required to report to her at the end of each day, letting her know the progress that I had made on my assignments. Although I was allowed to choose which days of the week I worked and to work at home as long as I completed my work on time, I had to ask her permission before taking on new projects for SWU.

5. Unfortunately, during my first week with SWU, I slipped and fell while walking through SWU's kitchen. There was a small puddle of water on the tile floor that I did not see. I slipped backwards and landed on my left elbow. Mr. Griffin drove me to the local emergency room. After taking some x-rays, the doctor told me I had broken my left arm. My arm was set in a hard cast, and I was required to attend physical therapy once a week for eight weeks. Because of my physical therapy appointments, I chose to work at home one day a week, but I still managed to get all my assigned projects done. SWU agreed to pay for all of my medical treatment, physical therapy sessions, and prescriptions.

6. During my third week of volunteering, Ms. Hadjiyianni met me as I came into the office on that Monday and said with a smile, "Hey baby, how you doing? I have to say, I wouldn't mind trying out your sugarlips for size." That same week, I was asked to serve coffee to the attendees at SWU and FSW's monthly management meeting. As I was serving the coffee, Ms.

Hadjiyianni called me “sugarlips” again and all the attendees, including FSW’s Vice President of Operations Joseph Peacock, laughed. That seemed to encourage Ms. Hadjiyianni; for the rest of my time at SWU, she always addressed me as “baby” or “sugarlips.” Although she did this repeatedly in front of SWU’s other employees, no one ever told her to stop.

7. As the months progressed, Ms. Hadjiyianni’s behavior became worse; she began calling me late in the evening to ask me what I was going to wear the next time I came into the office. I told her that her actions made me extremely uncomfortable, but she was relentless. Then, one night after work in April 2015, Ms. Hadjiyianni followed me to my car and pressed her body against mine as I attempted to leave. She then asked me if we could go home together, but I declined.

8. The next day, I reported her to SWU’s Human Resources (HR) Department. The administrative assistant who took my report admitted to me that she had heard that Ms. Hadjiyianni had a history of sexual harassment complaints, which made me think that SWU would take some action against Ms. Hadjiyianni. One day later, the head of SWU’s HR department and Mr. Griffin interviewed me. They asked me if I could provide any documents or other witnesses to corroborate my allegations. I admitted that I did not have any corroboration, but told them that I thought there had been prior complaints against her, which would

corroborate mine. Their only response was to say that they were unaware of any prior complaints. One week later, I was surprised and disappointed when Mr. Griffin told me that he had discussed my complaint with SWU's other officers and that they would not be taking any action against Ms. Hadjiyianni because of her longevity with SWU, her positive reputation within the community, and my failure to provide any corroborating evidence.

9. After SWU's HR Department failed to take any action against Ms. Hadjiyianni, I filed a formal complaint with SWU's affiliated national union, the Federation of Social Workers (FSW). After approximately one week, I received a telephone call from the FSW Human Resources Department informing me that, after a thorough investigation, the department had determined that my claim had no merit.

10. On June 1, 2015, I quit my volunteer position. I then retained an attorney and asked my attorney to file a formal complaint against SWU, alleging sexual harassment in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1).

11. I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this 13th day of January, 2016 in Gould City, Gould.

Anna Dewan
ANNA DEWAN

DECLARATION OF LAUREN FISHELMAN

I, Lauren Fishelman, hereby declare and state:

1. I am a former employee of the Gould Social Workers' Union (SWU). This declaration is being submitted in support of Plaintiff Anna Dewan's Opposition to Defendant SWU's Motion for Summary Judgment.

2. I have a master's degree in business management. After I received my master's degree, approximately fifteen years ago, I took my first job as the Office Manager of SWU. Among my duties as SWU's Office Manager, I was responsible for hiring new employees and interviewing volunteers for SWU's volunteer program, which was just beginning at that time.

3. During my first year working for SWU, a female volunteer informed me that the Assistant Operations Manager, Ms. Andrea Hadjiyianni, was sexually harassing her. The female volunteer complained that Ms. Hadjiyianni had inappropriately touched her and called her on the telephone after-hours to ask inappropriate questions. When I reported this complaint to SWU's Human Resources Department, they told me that this volunteer was just looking for a "pay day." They assured me that Ms. Hadjiyianni was very professional and that she would never do such a thing, but they also promised that they would look into the incident. A few months later, when I asked the

Human Resources Department about the results of their findings, I was informed that their findings were inconclusive. I also received a verbal warning that if I were to make a big deal out of this sexual harassment report, my job would be in jeopardy, so I did nothing further at that time.

4. The next year, I received another complaint from another female volunteer that Ms. Hadjiyianni had sexually harassed her. Her complaints were exactly the same as the previous volunteer's complaints. I went back to the Human Resources Department to inform them that another sexual harassment incident had occurred. I told the head of that department that I believed this was a serious issue and that he needed to take affirmative action to resolve this issue. He thanked me for my opinion and asked me to leave the office.

5. I also submitted a formal complaint with the Human Resources Department of the Federation of Social Workers (FSW), which is a national federation of local unions, including SWU. However, FSW's human resources representative informed me that they would not be taking any action on the complaint because they could not find any evidence to corroborate the volunteer's story, despite having done a thorough investigation.

6. A few days later, I was called into my supervisor's office and informed that I was being relieved of my position because, despite my extensive education and work experience, I

did not have the “same values” as SWU. I was terminated immediately, almost exactly two years after I had been hired.

7. During my time working at SWU, I was able to witness the relationship between SWU and its national counterpart, the FSW, firsthand. During the time I worked at SWU, I felt like I was also a de facto employee of FSW. As described more fully below, SWU and FSW generally operated more like a cohesive unit than two distinct entities.

a. Employees at SWU and FSW have access to the same intranet system, which makes all employees easily accessible regardless of where they are physically located. All employees at SWU and FSW are given the same “@FSW.com” email address when they start working.

b. SWU employees are also eligible to participate in FSW’s pension plan and workers’ compensation insurance plan. When I began working at SWU, I started a 401(k) plan administered by FSW, but I never had a reason to use the workers’ compensation insurance.

c. FSW also maintains control of SWU’s financial decisions in a variety of ways. For example, SWU cannot make large purchases, such as buying a new car or remodeling its office space, without first getting approval from FSW. SWU also sets the working hours and wages for its hourly employees, but FSW caps the salaries of SWU’s directors and officers. FSW’s

pre-approval is required for any salary increase beyond a certain amount. FSW also does an annual audit of all of SWU's financial records to check for improprieties.

d. FSW also maintains control of SWU's employment decisions and labor relations in a variety of ways. First, although SWU technically has authority over the hiring and firing of its employees, it is common for FSW officers to strongly recommend someone for a position, and that person is typically selected for that position. Second, it is common for employees to transfer back and forth between FSW and its local affiliates. For instance, after I started at SWU, FSW's Regional Office Manager went on paternity leave, and I filled the position until he returned. When they asked me to take the position, FSW explained that it would be easier for someone who already knew the ropes at FSW to temporarily hold two positions rather than hire a replacement. Third, although SWU signs its own collective bargaining agreements with employers who hire SWU's members, FSW commonly helps negotiate those agreements.

8. I hereby declare under penalty of perjury that the foregoing is true and accurate. Executed this 15th day of January, 2016 in Gould City, Gould.

Lauren Fishelman
LAUREN FISHELMAN

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF GOULD

ANNA DEWAN,	)	
	)	CV No. 16-026-MS
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
	)	MOTION FOR SUMMARY JUDGMENT
v.	)	
	)	
GOULD SOCIAL WORKERS' UNION,	)	
	)	
Defendant.	)	
	)	

This matter comes before the Court on Defendant Gould Social Workers' Union's (SWU) Motion for Summary Judgment. In July 2015, Plaintiff Anna Dewan filed a complaint against SWU, alleging that one of SWU's officers had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), by sexually harassing her while she worked for SWU as a volunteer. In its motion for summary judgment, SWU argues that the undisputed facts show that Dewan's sexual harassment claim fails as a matter of law because: (1) SWU is a small employer exempt from Title VII requirements because it has fewer than fifteen employees; and (2) even if SWU is large enough to qualify as a small employer, Dewan was not an "employee" entitled to sue under Title VII because she was an unpaid volunteer.

Based on the following Findings of Fact and Conclusions of Law, the Court agrees that Dewan's sexual harassment claim fails

as a matter of law. Accordingly, SWU's Motion for Summary Judgment is GRANTED.

I. FINDINGS OF FACT

Based on the declarations submitted by SWU in support of its Motion for Summary Judgment and the declarations submitted by Dewan in opposition to SWU's Motion, the Court finds that the following facts are relevant and undisputed.

1. At the time she was working for SWU, Dewan was a twenty-four-year-old with a bachelor's degree in social work.

2. SWU is a local union that has nine fulltime paid employees, including an Operations Manager, an Assistant Operations Manager, an Office Manager, a Treasurer, a Political Action Chair, a Membership Chair, two Administrative Assistants, and one Human Resources representative. It also has a three-member Board of Directors. The Board members are paid, part-time employees.

3. SWU is a member of the Federation of Social Workers (FSW), which is a national federation of local unions whose members are primarily social workers. FSW currently has eleven offices in the United States, with a total of 200 paid employees. FSW's offices provide services for its twenty-five member unions, including SWU.

4. To be a member of FSW, a local union must agree to abide by FSW's overarching rules and regulations, but SWU and the other local unions are otherwise autonomous.

a. For example, SWU does not rely on FSW for financial support or day-to-day financial planning; SWU has its own treasury, collects its own membership dues, maintains its own financial records, and issues checks in its own name. However, FSW's rules place certain financial and ethical restraints on SWU; specifically, FSW has the right to audit SWU's financial reports at any time to check for financial improprieties. If SWU needs to make a capital expenditure exceeding $10,000, FSW's approval is required. Other than those two restrictions, FSW and SWU do not share financial operations.

b. SWU also maintains control over its own hiring, supervising, and firing of SWU's employees and volunteers. SWU sets the hours, wages, and working conditions for its employees, without input from FSW. SWU also has the authority to elect its own officers and directors. The only indirect benefits that FSW provides to SWU's members are access to FSW's standard 401(k) pension plan and its workers' compensation insurance.

c. One of the rules FSW requires its member unions, including SWU, to adopt is its anti-harassment policy, which is outlined in both FSW and SWU's respective employee handbooks. It states, among other things: "Every reasonable effort will be

made to ensure a work environment that promotes equal opportunity and prohibits unlawful discriminatory practices, including harassment. Any employee who has a concern regarding this policy should meet with the director of human resources, and any complaint in violation of such policies will be investigated and resolved appropriately."

5. SWU has a longstanding volunteer program that is designed to benefit both the local community and the individual volunteers by having its volunteers work primarily on issues addressing the homelessness problem in the City of Gould.

6. In April 2014, SWU's office manager, Christopher Griffin, interviewed Dewan for a part-time position in SWU's volunteer program. During the interview, Griffin informed Dewan that she would be required to work twenty-five hours per week but would be allowed to work whatever days of the week she chose and to work from home at her convenience. She would not be offered any direct benefits, such as a salary or wages, but SWU would provide her with its standard workers' compensation insurance plan (which was issued through FSW), free parking, and free lunch each day she volunteered at the office. He also stated that volunteers could be asked to leave their position at SWU at any time if they were found not to be the "right fit." He offered Dewan a position as a volunteer. Although SWU's volunteers were normally students and other individuals without

college degrees, but Dewan accepted the offer because she was excited to get hands-on experience working on Gould's homelessness issues.

7. In early May 2014, Dewan began volunteering for SWU. During her first week, Dewan broke her arm when she slipped and fell in SWU's kitchen. She had to undergo an eight-week recovery process, which required her to attend physical therapy. SWU agreed to pay for all of Dewan's medical treatment.

8. Ms. Andrea Hadjiyianni, SWU's Operations Manager, was Dewan's direct supervisor, and she assigned work to Dewan. Most of Dewan's work involved researching political initiatives affecting the homeless population, maintaining a database of affiliates that worked on the homeless problem, and attending meetings of special-interest organizations. On at least two occasions, Dewan expanded the scope of her assignments and was praised for going above and beyond what was expected of her. Because her work made her quite familiar with the homeless problem, SWU's officers often asked for Dewan's opinion concerning SWU's projects concerning homelessness and whether it would be a good idea to work with specific organizations. On a few occasions, SWU's officers gave heavy weight to Dewan's opinions. Dewan was also occasionally tasked with answering SWU's telephones, greeting clients, performing data entry, and

planning social events. Dewan worked about twenty-five hours a week, but she was allowed to work at home when she wished.

9. In April 2015, Dewan filed a complaint with SWU's Human Resources Department, alleging that Ms. Hadjiyianni had sexually harassed her on multiple occasions. Dewan was unable to provide SWU with any evidence corroborating her claims at that time. However, a former SWU Office Manager, Lauren Fishelman, has since stated that she had informed SWU's Human Resources Department on two prior occasions that two other volunteers had also accused Ms. Hadjiyianni of sexual harassment. Because Dewan was unable to present any corroborating evidence at the time she made her complaint, SWU refused to take any action against Ms. Hadjiyianni. When she learned that SWU was not going to take any action against Ms. Hadjiyianni, Dewan also complained about the alleged sexual harassment to FSW's Human Resources Department, but it also refused to take any action.

10. On June 1, 2015, Dewan quit her position at SWU.

II. CONCLUSIONS OF LAW

Two issues are before this Court. First, whether SWU and FSW should be considered a "single employer" for purposes of calculating the number of employees for coverage under Title VII, 42 U.S.C. § 2000e(b). Second, assuming that SWU is an employer subject to Title VII's coverage, whether Dewan was an

"employee" of SWU as that term is used in Title VII such that she can sue for sexual harassment in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1).

A. SWU is Not Subject to Title VII's Requirements Because It Does Not Meet the Fifteen-Employee Requirement

Title VII of the Civil Rights Act of 1964 applies only to employers who have "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b).

Employees from different business entities, including corporations and unions, may be aggregated when calculating how many employees they have under Title VII if the establishments have "sufficient interrelation of operations" to effectively constitute a single employer. *See Baker v. Stuart Broad. Co.*, 560 F.2d 389, 392 (8th Cir. 1977).

1. The Different Tests for Determining Whether Two Businesses or Unions Constitute a "Single Employer" Under Title VII

The issue of when two employers have sufficiently integrated operations to be consolidated into a "single employer" for federal regulatory purposes was first addressed in the context of the National Labor Relations Act, 29 U.S.C. § 164. *See Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc.,* 380 U.S. 255, 256 (1965). In that context, the National Labor Relations Board (NLRB)

developed a four-factor test to determine whether separate business entities constituted an "integrated enterprise" that examined: (1) the interrelation of the businesses' operations; (2) whether they have common management; (3) whether they have centralized control of labor relations; and (4) whether there is common ownership between the entities. *Id.*

In 1977, the Eighth Circuit adopted the NLRB's four-factor test in the context of Title VII. *See Baker,* 560 F.2d at 392. Thus, the Eighth Circuit considers four factors when determining if two business entities are sufficiently integrated to be considered a "single employer" in the Title VII context: (1) the interrelation of the businesses' operations; (2) whether they have common management; (3) whether they have centralized control of labor relations; and (4) whether they have common ownership or financial control. *Id*. at 392.

However, two years later, the Seventh Circuit rejected the four-factor test in the Title VII context, reasoning that it was too vague because the factors are unweighted and often "point in opposite directions." *Papa v. Katy Indus.*, 166 F.3d 937, 940 (7th Cir. 1999). The Seventh Circuit criticized the four-factor test as being too easily met, meaning it was inconsistent with Title VII's goal of avoiding imposing the expense of compliance on small employers who could not afford that cost. *Id*. at 941.

In *Papa*, the Seventh Circuit proposed a new test, arguing that only three circumstances can justify treating separate business entities as a "single employer" under Title VII. *Id*. The first situation occurs when a parent corporation would be liable for the wrongdoing of a subsidiary under the theory of "piercing the corporate veil." *Id*. at 940-41. Second, if a business entity divides itself up with the purpose of avoiding Title VII liability, then all of the subparts' employees should be aggregated to meet the statutory minimum requirement. *Id*. at 941. Third, when a parent business or other larger organization has directed the subsidiary to commit the disputed or wrongful acts or policies, the two entities should be treated as a single employer. *Id*. In *Papa*, the court applied this new test to a parent corporation that owned several subsidiaries. Although the parent corporation controlled many of its subsidiaries' activities (including decisions to institute lay-offs and to provide benefits), had overlapping boards of directors with the subsidiaries, and had transferred employees back and forth between the subsidiaries, it was not integrated enough with its subsidiaries to constitute a single employer. *Id*. at 939.

2. Application of the "Papa" Test

The Twelfth Circuit has not issued any opinions choosing between the two tests described above. As an issue of first

impression in this circuit, this Court adopts the three-prong test announced by the Seventh Circuit in *Papa.* It is the better test because it is less ambiguous than the four-factor test, while still being flexible. Applying the *Papa* test to this case, the Court hereby finds that SWU and FSW do not constitute a single integrated employer because they do not fall within any of the three categories outlined in *Papa*.

First, as the parties in this case agreed during oral argument, there is no possibility of "piercing the corporate veil" in this case because the involved entities are a local union and a national union, without any common ownership. Accordingly, the first prong of the *Papa* test is not met.

Second, both parties also agree that there is no evidence indicating that either SWU or FSW were created or founded with the intent to avoid liability under Title VII, so that also cannot be a basis for imposing single-employer liability.

Therefore, the only possible basis for imposing liability is the third category of the *Papa* test. The relevant question for this Court is, therefore, to decide whether a reasonable person could find that the facts show that FSW directed SWU's allegedly discriminatory acts. The Court hereby finds that the record is devoid of any facts showing that FSW in any way directed SWU's Operations Manager to sexually harass Dewan. To the contrary, FSW and SWU had clear policies prohibiting such

behavior. Furthermore, the operations between SWU and FSW are far less integrated than the parent and subsidiary corporations in *Papa*, in which the parent corporation controlled many activities of the subsidiary, including payroll, benefits, and computer operations.

In light of the foregoing, the Court hereby finds SWU is not covered under Title VII because it has only twelve employees, which is fewer than the statutory minimum number of employees required to impose Title VII liability.

B. Dewan Was An Unpaid Volunteer, Not an "Employee" Entitled to Sue for Sexual Harassment Under Title VII

Although the Court probably does not need to reach the issue, it also finds, in the alternative, that Dewan was not an "employee" entitled to sue for sexual harassment under Title VII.

Title VII prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Therefore, Title VII prohibits sexual harassment of an employee that takes the form of a tangible employment action, such as the creation of a hostile or abusive working environment. *Lauderdale v. Tex Dep't of Criminal Justice*, 512 F.3d 157, 162 (5th Cir. 2007).

As discussed above, to be subject to liability under Title VII, an employer must have at least fifteen employees. 42 U.S.C. § 2000e(b). An "employee" under Title VII is defined as "an individual employed by an employer." 42 U.S.C. § 2000e(f). This statutory definition is obviously circular and unhelpful. Although the Twelfth Circuit has not addressed this issue, other circuits have proposed different tests to clarify when a person qualifies as an "employee" under Title VII.

In this case, SWU has argued that the Court should apply a test commonly known as the "threshold-remuneration" test, while Dewan has argued that the Court should apply a common-law agency test to determine whether she qualifies as an employee entitled to sue SWU under Title VII.

1. The Different Tests Used to Determine if a Person Qualifies as an "Employee" under Title VII

Courts disagree as to which test should be applied when evaluating the potential employment relationship between two parties. The Sixth and Ninth Circuits have held that a traditional common-law agency test should be used. *See, e.g.*, *Bryson v. Middlefield Volunteer Fire Dep't, Inc.*, 656 F.3d 348, 354 (6th Cir. 2011); *Fichman v. Media Ctr.*, 512 F.3d 1157, 1161 (9th Cir. 2008). These courts rely heavily on the Supreme Court ruling in *Nationwide Mutual Insurance Co. v. Darden,* 503 U.S. 318, 322 (1992), which outlined twelve factors that should be

considered when evaluating an individual's employment status. Those twelve factors include: (1) the skill required for the work; (2) the source of the instrumentalities and tools used for the work; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party's discretion over when and how long to work; (7) the method of payment; (8) the hired party's role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party. *Id.* at 323-24. In *Darden*, the Supreme Court specifically stated, "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (internal quotations marks omitted).

By contrast, other circuits have adopted a threshold-remuneration test. Under the threshold-remuneration test, if a person does not receive any financial benefit directly from the employer, no employment relationship can exist because compensation is a critical condition of the employer-employee relationship. *See e.g., Juino v. Livingston Par. Fire Dist. No. 5,* 717 F.3d 431, 437 (5th Cir. 2013). For example, in *Juino*, the Fifth Circuit held that a volunteer firefighter was not an

"employee" within the meaning of Title VII because even though she received benefits, such as a life insurance policy, training, and two dollars per emergency call, these benefits failed to make a threshold showing of remuneration. *Id.* at 440-41. The court concluded that "any benefits she received were purely incidental to her volunteer service." *Id.* at 440.

Under the threshold-remuneration test, even if the person does not receive any direct financial payments (e.g., wages or a salary), remuneration may be shown if the person received "significant" indirect benefits, such as scholarships for dependents upon disability or death, tuition reimbursement for emergency medical courses, or group life insurance. *Haavistola v. Cmty. Fire Co. of Rising Sun*, 6 F.3d 211, 222 (4th Cir. 1993). Under this test, volunteers who are unable to present evidence of "indirect but significant remuneration" fail the threshold-remuneration test and therefore cannot establish an employment relationship. *Id.* at 221-22.

In *O'Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997), the Second Circuit explained the justification for applying the threshold-remuneration test by turning to the Supreme Court case of *Community for Creative Non–Violence v. Reid*, 490 U.S. 730, 751-52 (1989), in which the Supreme Court stated that the common-law agency doctrine should be used to determine when a "hired" person constitutes an employee. *O'Connor*, 126 F.3d at

115. Thus, the Second Circuit reasoned that being "hired" is a "prerequisite" to considering whether an individual is an employee, and "only where a 'hire' has occurred should the common-law agency analysis be undertaken." *Id.* Hiring is shown by proving that the person received remuneration. *Id.* In *O'Connor*, an intern at a mental-health facility was not an "employee" under Title VII because she was never given any economic remuneration or a promise of future compensation. *Id.* at 116.

2. Application of the Threshold-Remuneration Test

The threshold-remuneration test has been adopted by a majority of circuits, and as an issue of first impression in this circuit, this Court hereby adopts it as well.

In this case, Dewan has failed to show that she received any direct or significant remuneration for her work at SWU. Similar to the volunteers in *Juino* and *O'Connor* who did not qualify as employees because they failed to make a threshold showing of remuneration, here, Dewan also failed to show that she received sufficient remuneration to meet the definition of "employee" under Title VII. Though Dewan argues that she qualified as an employee because she received medical coverage from the SWU as a result of her slip-and-fall injury, this did not constitute significant remuneration because these were

compensatory payments to cover her medical expenses, not payment for her work as a volunteer.

Based on the undisputed facts, this Court hereby concludes, as a matter of law, that Dewan was not an "employee" within the meaning of Title VII. She was therefore not legally entitled to bring the above-captioned case.

Because the undisputed facts show as a matter of law that Dewan was not entitled to sue SWU, the Court does not need to reach the merits of her sexual harassment claims and has not done so.

III. CONCLUSION

Based on the foregoing, SWU's motion for summary judgment is GRANTED. The Court hereby enters summary judgment for SWU on all claims set forth in the original complaint.

Dated: March 1, 2016

Stacey Villagomez

STACEY VILLAGOMEZ
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

Case No. 16-026-MS

Decided August 1, 2016

ANNA DEWAN,

Plaintiff-Appellant,

v.

GOULD SOCIAL WORKERS' UNION,

Defendant-Appellee.

APPEAL from the judgment of the United States District Court for the District of Gould. Before, Erlikh, Awasthi, and McDonough. Opinion by McDonough, M. Reversed.

I. INTRODUCTION

Plaintiff-Appellant Anna Dewan appeals the district court's order granting summary judgment in favor of Defendant-Respondent Gould Social Workers' Union (SWU). This case began when Dewan filed a complaint alleging that one of SWU's officers had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), by sexually harassing her while she was working as a volunteer for SWU.

In its motion for summary judgment, SWU first argued that it is not a large enough employer to be subject to Title VII's requirements because it does not have fifteen or more employees.

Second, it argued that even if it qualified as an employer under Title VII, Dewan was not a paid employee entitled to protection under Title VII.

In her opposition, Dewan disagreed with both of SWU's contentions, arguing that the undisputed facts showed, as a matter of law, that SWU met the fifteen-employee threshold because SWU and its associated national union, the Federation of Social Workers (FSW), constituted a single integrated employer for Title VII purposes. Second, Dewan argued that the undisputed facts showed that she qualified as an employee under common-law agency principles.

We agree with both Dewan's arguments. We therefore reverse the district court's grant of summary judgment and remand the matter for further proceedings consistent with this opinion.

II. FACTUAL AND PROCEDURAL SUMMARY

SWU is a local union that was created to protect the rights of professional social workers and is located in the City of Gould. At the time the actions alleged in the complaint occurred, SWU had twelve employees, including its Office Manager, Operations Manager, Assistant Operations Manager, Treasurer, Political Action Chair, Membership Chair, two Administrative Assistants, one Human Resources representative, and three members of its Board of Directors. All the employees worked fulltime for SWU, except the members of the Board, who

worked only part-time for SWU.

SWU is a member of a larger, national federation of local unions called the Federation of Social Workers (FSW). The FSW is comprised of a variety of smaller local unions and has approximately 150,000 individual members nationwide. FSW employs approximately 200 individuals.

When the events alleged in the complaint occurred, Anna Dewan was a twenty-four-year-old woman, who had a bachelor's degree in social work and had dedicated her working career to improving Gould's homelessness problem. In April 2014, even though this position was normally offered to individuals without a college degree, because of her deep interest in the homelessness problem, Dewan sought a position at SWU as an unpaid, part-time volunteer. Christopher Griffin, SWU's Office Manager, interviewed Dewan. During the interview, Griffin questioned Dewan about her interest in SWU and homelessness issues. He also informed her that the position required twenty-five hours per-week of work but did not offer any wages, salary, or other direct benefits. However, Griffin also stated that SWU would provide her with SWU's standard workers' compensation insurance plan and pay for her parking and lunch on the days that she volunteered. Griffin also informed Dewan that if she accepted the position, she could be dismissed if she was not the "right fit" for SWU. Dewan accepted SWU's offer.

In May 2014, Dewan began volunteering at SWU. She was SWU's only volunteer. On her first day, she was introduced to her supervisor, Andrea Hadjiyianni, the Operations Manager at SWU. Hadjiyianni was responsible for assigning Dewan's daily tasks. Dewan reported to her each day before leaving the office and was required to get her permission before taking on new assignments.

During Dewan's first week volunteering at SWU, she slipped and fell in the office's kitchen, causing her to break her arm. SWU paid all of Dewan's medical expenses and physical therapy costs associated with the injury.

Dewan worked at SWU for approximately one year, from May 2014 through June 2015. Typically, Dewan worked about twenty-five hours a week, but she could choose to work from home and usually did so one day a week. Over the course of Dewan's time at SWU, Hadjiyianni directly supervised her and assigned her a variety of projects, including researching political initiatives impacting the homeless population, maintaining databases of affiliates, and attending special-interest organization meetings. On two occasions, Dewan went above and beyond what was expected of her and was commended for taking control of her own work. At SWU's staff meetings, its officers often asked Dewan for her opinion about working with certain organizations and the merits of new projects. She was also required to answer

telephone calls, greet clients, perform data entry, and plan social events.

Not long after Dewan began working at SWU, Hadjiyianni allegedly approached her and said, “Hey baby, how you doing? I have to say, I wouldn’t mind trying out your sugarlips for size.” Shortly thereafter, Dewan was asked to serve coffee to the attendees at SWU and FSW’s monthly management meeting. Dewan claims that as she served the coffee, Hadjiyianni called her “sugarlips” while the other attendees, including FSW’s Vice President of Operations, laughed. After that, Dewan claims that Hadjiyianni addressed Dewan exclusively as “baby” or “sugarlips” for the duration of Dewan’s time at SWU.

Dewan also asserts that Hadjiyianni repeatedly called her at night to ask what she planned to wear to work the next day. Dewan allegedly told Hadjiyianni that such behavior was making her uncomfortable, but Hadjiyianni continued. On one occasion, Hadjiyianni allegedly followed Dewan to the parking lot, pressed her body up against Dewan as she was leaving, and asked Dewan if they could go home together, but Dewan declined.

In late April 2015, Dewan reported the harassing conduct to SWU’s Human Resources Department. Dewan was informed that the department had received similar complaints about Hadjiyianni in the past. However, no disciplinary action was taken against Hadjiyianni due to her history with SWU and her reputation in

the community. After SWU failed to take any action, Dewan filed a complaint with FSW's Human Resources Department. FSW also refused to take any action against Hadjiyianni.

At the time that Dewan filed her sexual harassment complaints with SWU and FSW, FSW's current Vice President of Operations, Joseph Peacock, was a member of both SWU's Board of Directors and FSW's Board of Directors. Before he went to work for FSW, Peacock was SWU's Operations Manager for fifteen years, and Hadjiyianni was his Assistant Operations Manager. When Peacock took the position as FSW's Vice President, he recommended that Hadjiyianni be promoted to replace him as SWU's Operations Manager, and SWU agreed. After FSW's Human Resources Department received Dewan's complaint, they contacted Peacock, who personally vouched for Hadjiyianni's reputation and ethics. Shortly after that, FSW's Human Resources Department told Dewan that they would not be bringing any action against Hadjiyianni.

Further, Peacock is not the only employee who has been transferred between SWU and its national affiliate. Lauren Fishelman, a former office manager at SWU, held a position at both the local and national union for a period of time, while another FSW employee was on paternity leave.

Although SWU's Constitution states that it is a "separate and distinct organization" from FSW, a variety of the local and national unions' activities are integrated. All employees at

SWU and FSW have access to the same private intranet system and are given the same "@FSW.com" email address. All paid employees are invited to participate in FSW's pension plan. Employees of both SWU and FSW are also under the same ethical policy prohibiting sexual harassment. Finally, FSW also helps SWU negotiate its collective bargaining agreements with employers.

FSW also exerts financial control over SWU in a number of ways. SWU is required to get FSW preapproval for any capital expenditure over $10,000, and FSW enforces a salary cap on the compensation of SWU's directors and officers. To enforce these rules and prevent improprieties, FSW audits SWU's finances once a year. FSW also influences the hiring and firing of SWU's employees by submitting "recommendations," like the one made by Peacock in favor of promoting Hadjiyianni into the position as SWU's Operations Manager.

On July 1, 2015, Dewan quit her volunteer position at SWU. Shortly thereafter, she filed a complaint in the United States District Court for the District of Gould against SWU, alleging that SWU's employee had sexually harassed her in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1). SWU moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, arguing that SWU did not meet the fifteen-employee minimum threshold required for Title VII coverage because it employed only twelve individuals and did not share enough operations with

FSW to be considered a single employer. Further, SWU argued that even if it qualifies as an employer, Dewan was an unpaid volunteer, not an "employee" within the meaning of Title VII. The district court granted the motion. For the reasons explained below, this Court hereby reverses that grant.

III. DISCUSSION

A. Standard of Review

A district court's denial of a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure is reviewed de novo. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992). The appellate court views the evidence in the light most favorable to the non-movant. *Id.*

B. The District Court Erred in Finding That SWU and FSW Are Not a Single Employer for Purposes of Title VII

Title VII authorizes plaintiffs to sue employers, including labor organizations, for sexual harassment as long as its statutory definitions are met. 42 U.S.C. § 2000e–2(c). Neither party disputes that SWU is a labor organization within the meaning of Title VII. In its motion for summary judgment, SWU asserted, however, that it had an insufficient number of employees to qualify as an "employer" for Title VII purposes because it employs only twelve individuals. Employers with less than fifteen employees are not subject to Title VII's antidiscrimination rules. 42 U.S.C. § 2000e(b). Dewan argued

that SWU met the fifteen-employee minimum requirement because SWU and its national affiliate, FSW, have sufficiently interrelated operations such that the two should be considered a "single employer." This Court agrees with Dewan.

1. The District Court Applied the Incorrect Test to Determine Whether SWU and FSW Should Be Considered a Single Employer

If an employer has fewer than the fifteen-employee minimum necessary to be covered under Title VII, but it is a part of an "integrated enterprise" with another organization, the total number of employees at each organization must be combined to determine Title VII coverage. *See Trevino v. Celanese Corp.*, 701 F.2d 397, 404 (5th Cir. 1983); *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 392 (8th Cir. 1977). To determine if SWU's and FSW's employees should be aggregated for purposes of Title VII, the Court must first decide the proper test for determining whether two business entities constitute a "single employer."

Most circuits have applied a four-factor analysis in deciding whether to consider business organizations as integrated for Title VII purposes. *See, e.g.*, *Romano v. U-Haul Int'l*, 233 F.3d, 655, 666 (1st Cir. 2000); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993); *Trevino*, 701 F.2d at 404; *Baker*, 560 F.2d at 392. These factors focus on the business operations of the involved entities and the degree to which they are interrelated by examining: (1) whether there is

centralized control of labor relations; (2) how much the operations are interrelated; (3) whether they have common management; and (4) whether they have common ownership or financial control. *Baker*, 560 F.2d at 392.

However, the Seventh Circuit rejected the four-factor approach and adopted a new test for determining whether separate business entities constitute an integrated employer. *See Papa v. Katy Indus.*, 166 F.3d 937 (7th Cir. 1999). In *Papa*, the Seventh Circuit reasoned that the four-factor test was too ambiguous and held that employers should be aggregated in only three situations: (1) if a parent corporation could be liable under a "piercing the corporate veil" theory; (2) if a smaller/subsidiary business enterprise was formed with the purpose of evading Title VII liability; or (3) if a parent company directed a subsidiary or smaller business that is somehow controlled to commit the allegedly discriminatory act, practice, or policy. *Id*. at 940-42.

In the present case, the district court adopted the *Papa* test proffered by the Seventh Circuit, and it found that SWU and FSW did not qualify as a single, integrated employer because FSW did not control SWU's business decisions. As a matter of law, the determination as to which test should be used is an issue of first impression in this circuit. For the reasons discussed below, this Court hereby finds that the best test for

determining whether business enterprises should be treated as an integrated "single employer" is the four-factor test that analyzes whether the two entities have interrelated operations, common management, common ownership, and central control over labor relations.

2. The District Court Erred Because the Record Shows That SWU and FSW Meet the Four-Factor Test

First, the four-factor test is the appropriate test for determining whether separate entities are sufficiently interrelated to constitute a single employer because it is a more flexible, more inclusive standard than the narrow standard articulated by the Seventh Circuit in *Papa*. Given the remedial purposes of Title VII, the statute should be afforded a liberal construction, and therefore, a similarly liberal construction should be afforded to the definition of "employer" under 42 U.S.C. § 2000e(b).

When applying the four-factor test, all four factors must be considered, and no one factor alone is dispositive. *See Trevino*, 701 F.2d 397 (finding genuine issue of fact as to whether two entities were a single employer when one exercised control over the other's employees); *Baker*, 560 F.2d at 389 (holding two business entities who shared the same owners, officers, and members of the board of directors constituted a single employer).

Here, application of the four-factor test shows that, at the time of the events alleged in the complaint, SWU and FSW were sufficiently interrelated to be deemed a "single employer" for purposes of Title VII. Given that SWU and FSW maintained a local-national union relationship, rather than a parent corporation-subsidiary corporation relationship, the common ownership factor weighs against imposing single employer liability. However, the rest of the factors demonstrate that SWU and FSW were sufficiently interrelated.

First, at the time of the alleged events, SWU and FSW maintained a significant degree of interrelated operations. FSW provided administrative support to SWU through its private-employee intranet system, as well as by administering SWU employees' pension plans. FSW also provided the parameters within which SWU was allowed to operate via SWU's mandatory compliance with FSW's Constitution and employment policies.

Second, SWU and FSW shared common management. Like in *Baker*, in which the business entities shared officers and directors, SWU and FSW shared at least one member on their respective boards of directors, FSW's Vice President of Operations, Joseph Peacock. Moreover, FSW provided management services for SWU by requiring SWU's office manager to meet with FSW's Regional Manager on a monthly basis.

Third, although FSW does not own SWU, it controlled SWU financially. Although SWU had its own treasury, FSW controlled SWU's ability to make large capital expenditures by requiring pre-approval and maintaining its ability to audit SWU's financial records at any time.

Finally, FSW also exerted a great deal of control over SWU's labor relations. Like in *Trevino*, in which the court found that one business entity controlled the employees of the other, SWU employees were essentially *de facto* employees of FSW. While SWU maintained some control over the hiring and firing of its employees, FSW preserved control over the process by submitting internal "recommendations," including Peacock's recommendation that neither FSW nor SWU take any action against Hadjiyianni, despite the fact that she had been repeatedly accused of sexually harassing SWU's volunteers.

For the foregoing reasons, this Court finds that the employees of SWU and FSW should be aggregated for purposes of calculating the total number of employees for Title VII coverage. Given that at the time of the events alleged in the complaint, SWU employed twelve individuals and FSW employed 200, the fifteen-employee threshold for imposing liability is easily satisfied. Accordingly, the district court erred in finding that SWU was not subject to Title VII's requirements.

C. The District Court Erred in Applying the Threshold-Remuneration Test to Determine Employee Status Under Title VII and Therefore Erred in Granting SWU's Motion for Summary Judgment

Title VII prohibits hiring discrimination based on color, religion, sex, race, or national origin, including harassment of an employee that takes the form of a tangible employment action, such as the creation of a hostile or abusive work environment. *Lauderdale v. Tex Dep't of Criminal Justice*, 512 F.3d 157, 162 (5th Cir. 2007). To bring an anti-discrimination (or sexual harassment) lawsuit under Title VII, the plaintiff must be an employee of the defendant. An "employee" under Title VII is defined as "an individual employed by an employer." 42 U.S.C. §2000e(f). This vague statutory definition has led to confusion among the courts as to how to best determine whether a person is an employee.

1. Disagreement Among the Circuits as to the Appropriate Test to Determine if a Plaintiff Qualifies as an "Employee"

Courts have applied a variety of tests to determine whether an individual qualifies as an "employee" entitled to sue under federal laws, including Title VII. *See generally*, *Juino v. Livingston Par. Fire Dist. No. 5*, 717 F.3d 431, 434 (5th Cir. 2013) (explaining the different tests that the Supreme Court and circuits have used to determine whether a person is an employee). Because this is an issue of first impression in this

circuit, this Court's analysis must begin with the relevant Supreme Court case of *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-24 (1992).

In *Darden*, the Supreme Court looked to the general common law of agency to determine whether a "hired" party was an "employee" or an independent contractor within the context of the Employee Retirement Income Security Act of 1974 (ERISA). *Id.* Among the various factors relevant to its inquiry, the Court looked to: the skill required for the position; the source of the instrumentalities and tools which the individual used to complete his or her work; the location of the work; the duration of the relationship between the parties; whether the hiring party had the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long the hired party worked; the method of payment; the hired party's role in hiring and paying assistants; whether the work was part of the regular business of the hiring party; whether the hiring party was in business; the provision of employee benefits; and the tax treatment of the hired party. *Id.*; *see also Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 449-50 (2003) (considering the definition of "employee" under the Americans with Disabilities Act, 42 U.S.C. § 12101).

Among the circuits, the main point of disagreement is

whether potential plaintiffs must make a threshold showing of "remuneration" before reaching the common-law agency factors. Relying on *Darden*, the Sixth and Ninth Circuits have held that remuneration should be viewed as only one among many, nondispositive factors that make up the common-law agency test. *See*, *e.g.*, *Bryson v. Middlefield Volunteer Fire Dept., Inc.*, 656 F.3d 348, 355 (6th Cir. 2011); *Fichman v. Media Ctr.*, 512 F.3d 1157, 1158 (9th Cir. 2008). For example, in *Bryson*, the Sixth Circuit upheld *Darden*'s requirement that "'all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.'" 656 F.3d at 355 (quoting *Darden*, 503 U.S. at 324). It therefore considered remuneration as but one factor to use when evaluating whether a volunteer firefighter qualified as an employee. *Bryson*, 656 F.3d at 355. Ultimately, the volunteer in *Bryson* was deemed an "employee" because she provided firefighting services in exchange for worker's compensation coverage, gift cards, personal use of the fire department's facilities, and training, among other things. *Id.* at 354.

The Ninth Circuit also held that a court should evaluate "the hiring party's right to control the manner and means by which the product is accomplished" by evaluating common law factors such as duration of the relationship between the parties, possession of an at-will contract, and minimum

standards imposed by the employer. *Murray v. Principal Fin. Grp., Inc.*, 613 F.3d 943, 945 (9th Cir. 2010) (quoting *Darden*, 503 U.S. at 323). It ultimately held that an insurance agent did not qualify as an employee because the defendant insurance company did not control the manner or means by which the plaintiff insurance agent sold his financial products. *Murray*, 613 F.3d at 943.

In contrast, the Second, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits have adopted the threshold-remuneration test. These courts rely heavily upon the plain meaning of Title VII's language. *See, e.g.*, *Juino*, 717 F.3d at 437; *Graves v. Women's Prof'l Rodeo Ass'n, Inc., 907 F.2d 71, 73 (8th Cir. 1990)*; *Llampallas v. Mini-Circuits Lab, Inc.*, 163 F.3d 1236, 1243 (11th Cir. 1998); *O'Connor v. Davis,* 126 F.3d 112, 115-16 (2d Cir. 1997); *Haavistola v. Comm. Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 219-20 (4th Cir. 1993); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (stating that the first step of statutory interpretation is to look toward a statute's plain meaning). The threshold-remuneration test requires a two-step inquiry. First, the volunteer must show remuneration as a threshold matter. Second, if the volunteer succeeds in showing remuneration, the court should then analyze the putative employment relationship under the common-law agency test. *Juino*, 717 F.3d at 435.

2. Adoption of the Common-Law Agency Test and Application to this Case

While the threshold-remuneration test may superficially seem like the most sensible approach to determining the employment status of an individual, it fails to take into account the breadth of control that employers have over volunteers and interns, who are often held to the same standards as employees. For this reason, the Supreme Court has consistently used twelve common-law agency factors when evaluating employment relationships based on the "conventional master-servant relationship as understood by the common law agency doctrine." *Darden,* 503 U.S. at 322; c*.f. Cmty. for Creative Non–Violence v. Reid*, 490 U.S. 730, 751-52 (1989) ("work made for hire" provisions of the Copyright Act of 1976); *N.L.R.B. v. United Ins. Co. of Am*., 390 U.S. 254, 256 (1968) (National Labor Relations Act).

This Court agrees with the reasoning of the Sixth and Ninth circuits in *Darden*, *Bryson*, and *Murray.* This Court therefore holds that, in the ordinary case involving a volunteer seeking to sue under Title VII, courts must evaluate all twelve common-law agency factors when determining the employment status of that individual. *C.f.* Restatement (Second) of Agency § 220(2) (1958) (listing nonexhaustive criteria for identifying master-servant relationships).

While the threshold-remuneration test involves an evaluation of the financial factor, it cannot be the sole determinative factor because this would be inconsistent with the Supreme Court's ruling in *Darden*. Instead of treating remuneration as one decisive factor, the district court should have weighed remuneration, along with the other *Darden* factors.

In this case, sufficient undisputed facts exist for a reasonable fact-finder to conclude that Dewan was an employee of SWU. First, Dewan accepted a volunteer position at SWU, in part, because she wanted to gain hands-on work experience addressing the homelessness problem in her hometown. Further, although she did sometimes expand the scope of her own work, all of her projects were assigned by SWU's office administrator. Her hours were set at a required twenty-five hours per week, her work was part of SWU's regular business, and she received significant indirect benefits in the form of SWU's payment of her medical expenses and its provision of workers' compensation insurance. Thus, the majority of the *Darden* factors weigh in favor of finding that Dewan was in fact SWU's employee.

This finding is also consistent with the purposes that led to the enactment of Title VII. One of the main goals of Title VII is to prevent sexual harassment from plaguing the workplace. 137 CONG. REC. S15273-01, 1991 WL 221385. The workplace's reliance on interns and volunteers demands a

sophisticated approach in protecting the rights of these volunteers who so generously donate their time to help their communities.

We therefore conclude that sufficient undisputed facts exist in this case to support a finding that Dewan acted as an employee for SWU, and the district court therefore improperly granted SWU's motion for summary judgment.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is hereby REVERSED and the matter is REMANDED for proceedings consistent with this opinion.

Dated: August 1, 2016

Megan McDonough
MEGAN MCDONOUGH

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2016

No. 26-18

GOULD SOCIAL WORKERS' UNION,

Petitioner,

v.

ANNA DEWAN,

Respondent.

The petition for writ of certiorari filed by Petitioner Gould Social Workers' Union in the above-captioned matter is hereby granted, limited to consideration of the following questions presented:

1. Did the District Court err in holding that a local union and national union that had only limited shared policies and operations did not constitute a "single employer" subject to liability for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)?

2. Did the District Court err in using a "threshold-remuneration" test to determine that a volunteer receiving medical-treatment coverage from her employer was not an "employee" entitled to sue for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)?