

Management Alert



Unpaid Volunteers Are Not Covered By New Jersey's Whistleblower Law

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Seyfarth Synopsis: *New Jersey's Appellate Division upheld summary judgment dismissing a claim of whistleblower retaliation under the Conscientious Employee Protection Act ("CEPA"), finding that plaintiff, an unpaid volunteer firefighter, was not a protected "employee" as defined by the statute.*

In [Sauter v. Colts Neck Volunteer Fire Company No. 2](#), a published opinion issued on September 13, 2017, a three-judge panel of the Appellate Division of New Jersey held that a plaintiff's CEPA retaliation claim was properly dismissed in light of the fact that plaintiff was an unpaid volunteer firefighter, and not a covered "employee" as defined by CEPA.

The plaintiff was a full-time employee of the Monmouth County Sheriff's Office, and also served as a volunteer member of Colts Neck Volunteer Fire Company No. 2. For his volunteer services, the plaintiff did not receive any pay, but was eligible to participate in the fire company's Emergency Services Volunteer Length of Service Award Program ("LOSAP"). Under LOSAP, the plaintiff was entitled to receive deferred compensation benefits, and had accumulated \$5,871.71 in his LOSAP account over his twenty-plus year career, which he would be eligible to receive as of age fifty-five.

Plaintiff had been a volunteer with the fire company for over twenty years when his membership was terminated after several of his fellow volunteer firefighters, including his own brother, lodged a formal complaint against him. The complaint stemmed from a series of actions the plaintiff took after finding out that he would not receive compensation for attorneys' fees in a prior lawsuit he brought against the fire company. Indeed, the fire company considered reimbursing him, but learned that doing so could jeopardize their 501(c)(3) status and declined to take the risk. Soon after learning he would not be reimbursed, he wrote to the fire company's insurance carrier challenging a recent claim as fraudulent. He also reported to the fire company that a number of volunteers used a fire company dumpster for their own personal trash, and demanded the fire company obtain a formal legal opinion whether using the dumpster would also risk the fire company's 501(c)(3) status. The plaintiff's fellow volunteers accused him of going "out on his own to sabotage the company's insurance claim...falsely claiming that the company intentionally attempted to defraud the insurance company...[and making] a frivolous charge" regarding the use of the dumpsters. As a result of the complaint, and after an investigation, the plaintiff was terminated and the general membership of the fire company declined to reinstate him.

So, the plaintiff sued the fire company, alleging violations of the New Jersey Law Against Discrimination ("LAD"), CEPA, and defamation. During argument, the plaintiff withdrew his LAD claim and the trial judge dismissed the defamation and CEPA claims, finding that he was not an employee under the law. The plaintiff appealed.

The question before the Appellate Division was whether the trial judge correctly concluded that unpaid volunteers are not employees for purposes of CEPA.

The Appellate Division checked the statutory text, and found that CEPA explicitly defines a protected "employee" as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration."

According to the Court, there was no question that the plaintiff performed services for and under the control of the fire company. But, had he done so “for wages or other remuneration?”

The plaintiff argued that his participation in LOSAP sufficed as “remuneration,” but the Court disagreed. It described the benefits as an “award,” and found that the LOSAP benefits were “not [] sufficient compensation to change the voluntary nature of the services themselves.”

Being thorough, the Court even reviewed the legislative intent and purpose underlying the passage of CEPA. The Court highlighted that CEPA was designed to “protect those ‘employees’ who risk their livelihoods in reporting illegal activities in the workplace.” Despite the broad definition of employee under CEPA, which courts have found to include independent contractors, “the Court has never suggested that an employer-employee relationship, the *sine qua non* to establishing liability under the statute...could be found in the absence of compensation for services.” Further, “None of plaintiff’s alleged ‘whistleblowing’ activities posed the least threat to his livelihood for the simple reason that he was not ‘employed’ as a volunteer firefighter.”

Sauter demonstrates that courts looking to determine the scope of statutory protections are well-guided by the statutory text, and are willing to decline invitations of parties looking to expand protections in the name of broad remedial legislation. The text still matters. Thus, certain individuals simply might not be entitled to protections under state laws designed to regulate employer-employee relationships. In New Jersey, for purposes of CEPA, the line is drawn to include those individuals who receive wages or other remuneration, and unpaid volunteerism does not suffice simply because some type of work is performed.

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