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VOLUNTEERS NOT PROTECTED BY NEW JERSEY'S WHISTLEBLOWER LAW, SAYS COURT

Insights
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A New Jersey appeals court recently ruled that a volunteer firefighter was not an "employee" of the volunteer fire company from which he was expelled, rejecting his whistleblower claim and strictly interpreting the state's statute. The September 13, 2017 ruling should offer guidance to New Jersey employers regarding whether true "volunteers" are protected under the state's Conscientious Employee Protection Act, commonly known as "CEPA" (*Sauter v. Colts Neck Volunteer Fire Company No. 2*).

ROCKY RELATIONSHIP LEADS TO LEGAL CLAIMS

The Colts Neck Fire Department consists of two volunteer companies, aptly named Company No. 1 and Company No. 2. The Companies are overseen by an Executive Fire Council comprised of representatives from each Company and members or designees of the Township Committee. The Township maintains workers' compensation and liability insurance for volunteer firefighters, and also provides them with reduced fees for certain municipal permits and licenses as further incentive to serve.

Jeffrey Sauter, a full-time employee of the Monmouth County Sheriff's Office, joined Fire Company No. 2 when he was still in high school and served for over 20 years. He had a somewhat contentious relationship with his Company. In 2004, he filed a whistleblower claim against the Company after being suspended for 18 months, claiming the suspension was in retaliation for his complaints about the bidding process for renovations to the Company's fire hall –

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after his brother was denied the contract. Sauter and the Company settled the suit for \$10,000.

But Sauter would not let the matter lie. He maintained the settlement failed to make him whole for his legal fees, which he claimed exceeded the settlement by some seven or eight thousand dollars. Several years later, he filed a formal request for his legal fees, and the general membership of the Company voted to reimburse him. After the vote, however, the Company obtained legal advice that the reimbursement would jeopardize the Company's 501(c)(3) tax status, and consequently did not make the reimbursement.

At about the same time, the Company discovered that its recently deceased long-time treasurer had embezzled about \$300,000. The Company made a claim under its fidelity policy, but after Sauter was notified the Company would not be reimbursing him for his legal fees from the 2004 lawsuit, he wrote to the fidelity carrier directly and claimed the Company's proof of loss of the embezzlement was fraudulent.

Soon after that, Sauter complained to the Executive Fire Council that Fire Company No. 2 was permitting members to dispose of their household trash in the Company dumpster. He asked the Executive Council to obtain a legal opinion that this did not threaten the fire department's 501(c)(3) status by conferring a "financial benefit" on insiders.

This, apparently, was the last straw. In response to his latest complaint, several members of Fire Company No. 2 signed a letter to the president and membership committee lodging a formal complaint against Sauter. The complaint alleged Sauter had been disrespectful and abusive to members after his reimbursement claim was rejected; that he had set out to "sabotage" the Company's insurance claim by falsely accusing it of fraud; that his complaint to the Executive Council about the dumpster was frivolous; and that his "angry and belligerent" conduct was "unbecoming" of a Company member and detrimental to the Company and the safety of its members. Among the complainants was Sauter's own brother.

Following an investigation, the membership committee sustained the charges against him and terminated his membership in the Company. Sauter appealed to the full membership, which sustained his termination.

One of the benefits of serving as a volunteer firefighter is that members are eligible for the Emergency Services Volunteer Length of Service Award Program (LOSAP), consisting of deferred compensation benefits of between \$400 and \$1,150 per year of active service. At the time of his expulsion, Sauter had a LOSAP account containing \$5,871.71, which he will be eligible to receive when he turns 55.

VOLUNTEER FINDS NO PROTECTION UNDER WHISTLEBLOWER LAW

Sauter responded to his expulsion by filing a claim under CEPA, which prohibits employers from taking “retaliatory action,” defined as “discharge, suspension or demotion ... or other adverse employment action ... in the terms and conditions of employment.” However, CEPA only applies to an action taken against an “employee” who discloses, threatens to disclose, or refuses to participate in an activity of the employer that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law.

The trial court dismissed Sauter’s CEPA claim, ruling he was not an “employee” entitled to the statute’s protections. Sauter then took his claim to the New Jersey Appellate Division – the state’s intermediate appellate court – and asked for a reversal of the lower court’s decision. However, in an opinion released on September 13, the appeals court affirmed the lower court’s ruling and upheld the termination.

CEPA defines “employee” as one who “performs services for and under the control and direction of an employer for wages or other remuneration.” There was no question that Sauter worked under the control and direction of the fire department. Therefore, the court identified the relevant question as whether Sauter performed his firefighting services “for wages or other remuneration.” If so, he could sustain his claim; if not, he would lose before he could even present evidence regarding his alleged whistleblowing.

Sauter was obviously not paid wages, so the court examined whether he received “other remuneration” for his volunteer work. The court rejected the idea that the LOSAP benefits qualified as “remuneration” under CEPA because they “nowhere near approximate the actual monetary value of the services the firefighters provide.” While firefighters earn points toward their annual LOSAP award by participating in

drills, calls, and training, the LOSAP program does not consider or treat those activities as remunerated tasks. The “very modest LOSAP benefits” Sauter could expect to collect upon turning 55 “would not be sufficient compensation to change the voluntary nature of the firefighting services themselves,” the court ruled.

Finally, the court found no legislative intent for CEPA to protect volunteers, like Sauter, who are not compensated for their work. “An employer-employee relationship,” the court explained, is “the *sine qua non* to establishing liability under the statute” and cannot be found “in the absence of compensation for services.”

WHAT DOES THIS MEAN FOR NEW JERSEY EMPLOYERS?

By defining “employee” under CEPA as one who receives compensation for services that at least approximates the value of those services, the Appellate Division has supplied a relatively clear distinction between “employees,” who are subject to the statute’s protections, and “volunteers,” who are not. There will no doubt be the occasional case where the valuation of volunteers’ services and the benefits provided to them are a subject of dispute. But for the most part, perquisites provided to volunteers are so modest in comparison to the services they provide that there will almost never be a problem distinguishing between them and employees.

If you use the services of volunteers in your organization, you should review the remuneration they receive to determine whether a reasonable court would find them to approximate the value of services they provide. If so, you should be aware that courts could find these volunteers to be entitled to the protections of CEPA, and you should act accordingly in terms of your human resources practices.

This ruling also raises a question of public policy in New Jersey. Could the lack of whistleblower protection to volunteers, at least in some cases, discourage individuals from participating in vital activities such as firefighting? In New Jersey, local communities depend on volunteer fire companies to a surprising extent. If this decision has a chilling effect on volunteers, the solution will not be found in the court system. Instead, because the courts are constrained by the language and scope of CEPA, it would be

for the state legislature to determine if the statute needs to be amended to address this issue.

If you have any questions, please contact the author, [David Treibman](#), your Fisher Phillips attorney, or any member of our [New Jersey office](#).

This Legal Alert provides an overview of a state court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.