IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAVID M. TAWES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 03-842-KAJ
	)	
FRANKFORD VOLUNTEER FIRE COMPANY,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Alan G. Davis, Esquire; Henry Clay Davis III, P.A., 303 N. Bedford Street, Georgetown, Delaware 19947; Counsel for Plaintiff.

David R. Hackett, Esquire, Griffin & Hackett, P.A., 116 W. Market Street, Georgetown, Delaware 19947; Counsel for Defendant.

January 13, 2005
Wilmington, Delaware

JORDAN, District Judge

I. Introduction

David M. Tawes ("Plaintiff"), a former member of the Frankford Volunteer Fire Company ("Defendant" or the "Fire Company"), alleges that Defendant violated his rights under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq*. ("ADA"). Before me is Defendant's Motion to Dismiss. (Docket Item ["D.I."] 3; the "Motion".) Jurisdiction over this case is proper pursuant to 28 U.S.C. § 1331. For the reasons that follow, Defendant's Motion will be treated as a motion for summary judgment and will be granted.

II. Background[1]

On June 7, 1997, Defendant applied for and, shortly thereafter, was granted membership in the Fire Company as a volunteer firefighter. As part of Plaintiff's application, he agreed to complete certain training, including Hazardous Materials Response Skills Training ("Haz-Mat Training"), within two years of acceptance. (D.I. 1 ¶ 9; D.I. 5 at A-54.) Plaintiff notes, however, that the by-laws that were in force at the time of his application, contained no such requirement. (D.I. 8 at ¶ 3.) In December of 2000, approximately three and one half years after being accepted as a member of the Fire Company, Plaintiff was reminded by the Fire Company that he had not completed the required Haz-Mat Training. (*Id*. at ¶ 4.) The next month, the Fire Company gave Plaintiff a one year extension to complete that training. (*Id*. at ¶ 5.)

[1]The following rendition of the background information does not constitute findings of fact and is cast in the light most favorable to the non-moving party, the Plaintiff.

In February of 2001, Plaintiff was injured during his full-time employment as a truck driver. (*Id*. at ¶ 7.) As a result of his injury, Plaintiff could not work as a truck driver and was removed from active duty at the Fire Company. (*Id*. at ¶ 8-9.) Plaintiff did, however, act as a fire reporter for the Fire Company during this time and responded to enough calls that year to qualify to have the Fire Company contribute $60 to a pension fund in his name.[2] (*Id*. at ¶ 9-10.) At the end of the one year extension, in January of 2002, four and one half years after Plaintiff joined the Fire Company, the Fire Company revoked Plaintiff's membership for failure to complete the Haz-Mat Training. (*Id*. at ¶ 13.)

Before the revocation of his membership, Plaintiff was also eligible for other benefits, namely, discounts on wireless phones and service from Verizon, personal use of the Fire Company's premises, and line-of-duty benefits. (*Id*. at ¶18.) Such benefits do not appear to have economic value to Plaintiff outside his fire fighting role. The line-of-duty benefits included secondary automobile insurance coverage to protect against damage incurred while responding to a call, 19 *Del. C.* Ch. 23; line-of-duty death benefits, 18 *Del. C.* Ch. 66; line-of-duty disability benefits, 18 *Del. C.* Ch. 67; funeral expenses for line-of-duty death, 18 *Del. C.* Ch. 67; compensation under the State Workers Compensation Program for injuries sustained in the line duty, 19 *Del. C.* §20; a $300 tax credit for the purchase of "essential items necessary to perform duties as an

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[2]Each member of the Fire Company has the opportunity to contribute $60 a year to a state pension fund or, if the member responds to a certain number of calls in a given year, the Fire Company will make the contribution in the member's name. A contributing member is eligible to receive certain pension benefits after 10 years of service. 16 *Del. C.* § 6655.

active volunteer firefighter," 30 *Del. C.* Ch. § 113; firefighter skills training (D.I. 8 at ¶ 18); and uniforms and equipment necessary to perform fire fighting duties (*id*. at ¶ 20).

III. Standard of Review

If, on a motion to dismiss for failure to state a claim, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 ... ." Fed. R. Civ. P. 12(b). "The element that triggers the conversion [of a 12(b)(6) motion into a motion for summary judgment] is a challenge to the sufficiency of the pleader's claim supported by extra-pleading material." 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1366 at 485 (2d ed. 1990 and 2003 Supplement). *See also In re Rockefeller Center Properties, Inc. Securities Regulation*, 184 F.3d 280, 287 (3d Cir. 1999) (quoting Wright & Miller).

In the present case, Plaintiff and Defendant have offered numerous matters outside the pleadings in support of their Motions, including information on the type and scope of the benefits received by Plaintiff and other volunteer firefighters. (S*e*e D.I. 4 at 10-11; D.I. 7 at 7-8; D.I. 9 at 8-9.) The Defendant, in its Motion, has cited these matters as a challenge to the sufficiency of Plaintiff's claims. Furthermore, Plaintiff has agreed that "this motion is one more properly considered under a Summary Judgment standard since the parties are presenting materials in addition to the pleadings in support and opposition to the Motion to Dismiss." (D.I. 7 at 6.) Accordingly, Defendant's Motion will be treated as a motion for summary judgment under Rule 56.

After a motion to dismiss is converted into a motion for summary judgment, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b). The Third Circuit has stated that "[t]he parties can take advantage of this [reasonable] opportunity only if they have 'notice of the conversion.'" *In re Rockefeller*, 184 F.3d at 287-288 (quoting *Rose v. Bartle*, 871 F.2d 331, 349 (3d Cir. 1989)). Although Defendant's Motion was labeled as a Motion to Dismiss, the substance of the Motion makes it clear that Defendant was, in the alternative, moving under a summary judgment standard. (*See* D.I. 4 at 7 (stating that "the Court may elect to treat and review the Fire Company's Motion to Dismiss as a Motion for Summary Judgment).) This fact, coupled with Plaintiff's acknowledgment that this Motion "is one more properly considered under a Summary Judgment standard" (D.I. 7 at 6), demonstrates that Plaintiff has had adequate notice that Defendant's Motion could be treated as a motion for summary judgment.

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment shall be entered if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." "[T]he availability of summary judgment turn[s] on whether a proper jury question ... [has been] presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* In making that determination, the court is required to accept the non-moving parties' evidence and draw all inferences from the evidence in the non-moving parties' favor. *Id.* at 255; *Eastman Kodak Co. v. Image Technical Servs., Inc.*,

504 U.S. 451, 456 (1992). Nevertheless, the party bearing the burden of persuasion in the litigation, must, in opposing a summary judgment motion, "identify those facts of record which would contradict the facts identified by the movant." *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.,* 311 F.3d 226, 233 (3d Cir. 2002) (internal quotes omitted).

IV. Discussion

Plaintiff's Complaint contains three claims: Count 1 is a claim for Employment Discrimination under Title I of the ADA; Claim II is a claim for Public Entity Discrimination under Title II of the ADA, and; Count III is a claim for Public Accommodation Discrimination under Title III of the ADA. (D.I. 1 at ¶¶ 20-31.) Plaintiff has voluntarily consented to the dismissal of Count III. (D.I. 7 at 4.)

A. ADA Title I - Employment Discrimination

Title I of the ADA states that

> [n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112. A covered entity includes an employer, which is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person... ." 42 U.S.C. § 12111.

Both sides agree that, not including volunteers, Defendant never had more than three employees. (D.I. 4 at 10; D.I. 7 at 7.) Therefore, for Defendant to be subject to

the requirements of the ADA, Plaintiff and the other volunteer firefighters must be considered to be "employees" of Defendant. The ADA defines an "employee" as "an individual employed by an employer." 42 U.S.C. § 12111. Although this circular definition is of limited utility, the statute adds that the term "person," which is used to define the term "employer," "shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e)." 42 U.S.C § 12111(7); *see* 9 LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 152.01 (2d ed. 2004) (stating that "[t]he ADA specifically provides that these terms [*e.g.*, 'employer'] be interpreted with reference to Title VII"). Therefore, the more well-developed Title VII precedent can act as a guide to the interpretation of the terms "employee" and "employer".[3]

Whether someone is an "employee" is "a question of federal, rather than of state, law; it is to be ascertained through consideration of the statutory language of the Act, its legislative history, existing federal case law, and the particular circumstances of the case at hand." *Calderon v. Martin County*, 639 F.2d 271, 272-273 (5th Cir. 1981). The Supreme Court has stated that the purpose of Title VII "is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971). "In enacting Title VII, Congress sought to eliminate a pervasive, objectionable history of denying or limiting one's livelihood simply because of one's race, color, sex, religion or national origin." *Smith v. Berks Community Television*,

[3]All references to "employee" are in connection with determining if Defendant is a covered entity under the ADA. The definition of "employee" outside of this context may be different. 4 Lex K. Larson, Employment Discrimination § 4.01[1].

657 F. Supp. 794, 795 (D. Pa. 1987) (internal citation omitted). The same motivation can be seen in the text of the ADA, which states that the statute is applicable in "regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112.

The Supreme Court has held that, in "the application of social legislation[,] employees are those who as a matter of economic reality are dependent upon the business to which they render service." *United States v. W. M. Webb, Inc.*, 397 U.S. 179, 185 (1970) (internal citation omitted). As such, when determining if an individual's livelihood is denied or limited in an employment discrimination case, "one must examine the economic realities underlying the relationship between the individual and the so-called principal." *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983). Compensation is of course of paramount importance to such an inquiry. *O'Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997) (holding that remuneration is an "essential condition" of employment, and a volunteer, who did not receive compensation, was not an "employee" under Title VII). In addition, the "manner in which the parties view the relationship is some evidence as to whether the [individual] in any particular case will be deemed an 'employee.'" *Id*.

Numerous courts have held that volunteers are not employees for purposes of employment discrimination. *See, e.g.*, *Graves v. Women's Professional Rodeo Ass'n*, 907 F.2d 71 (8th Cir. 1990) (holding that benefits accrued as a member in a rodeo association does not raise the members to the status of employees); *Hall v. Delaware*

Council on Crime & Justice, 780 F. Supp. 241, 244 (D. Del. 1992) (holding that "reimbursement for some work-related expenses and free admittance to an annual luncheon [does not] constitute compensation significant enough to raise a volunteer to the status of an employee"); *Berks Community Television*, 657 F. Supp. at 795-96 (holding that an individual that volunteered at a television studio, and received no compensation or fringe benefits, was not an employee under Title VII). Reimbursement for a volunteer's expenses is, standing alone, not sufficient to make the volunteer an "employee." *Hall*, 780 F. Supp. at 244.

Plaintiff cites *Haavistola v. Community Fire Co.*, 6 F.3d 211 (4th Cir. 1993), for the proposition that volunteer firefighters are employees under the ADA. (D.I. 7 at 8-9.) In *Haavistola*, membership in the fire company offered the plaintiff one of the few practical ways to qualify as an Emergency Medical Technician - Paramedic ("EMT-P"). 6 F.3d at 221. In addition to potentially qualifying as an EMT-P through membership in the fire company, the plaintiff received other benefits, including reimbursement for medical training and group health insurance. *Id*. The court held that these benefits were sufficient to raise a triable issue of fact as to whether the plaintiff was an employee under Title VII. *Id*. To the extent that this case can be read as holding that an individual who works in exchange for training and employment certification, particularly when alternate means of certification are not available, the decision is distinguishable from the case at bar. To the extent that it can be read to say that a volunteer who receives incidental benefits as a result of volunteering is a covered employee under Title VII, it is unpersuasive. *See Hall*, 780 F. Supp. at 244 (holding that "reimbursement for some

work-related expenses" and other minor benefits received by volunteers "is insufficient to consider these volunteers employees").

It is true that Plaintiff received certain benefits as a result of volunteering at the Fire Company. The question is whether those benefits transform Plaintiff's volunteer relationship with the Fire Company into an employee/employer relationship. To make that determination, I must look at the "economic reality" of the situation. *See W. M. Webb*, 397 U.S. at 185. As discussed above, the benefits that the Fire Company provides to its volunteers consist of line-of-duty benefits, discounts with Verizon, and a pension system. *See supra* at 2-3.

The line-of-duty benefits are not sufficient to make Plaintiff an employee of the Fire Company. Secondary automobile insurance to protect against damage to one's automobile while responding to a call, and insurance to protect against death or injury while acting in one's duty as a volunteer firefighter, have no benefit outside of one's role as a firefighter. Consequently, losing such benefits does not affect one's livelihood. The Verizon discount too appears to be inconsequential, and plaintiff does not allege that the Fire Company or the State of Delaware underwrote those discounts or that they cannot be substantially replicated through other discount offerings from Verizon or its competitiors.

The benefit that raises the most significant question is the pension benefit. As a member of the Fire Company, Plaintiff was permitted to contribute $60 per year to the fund and, after age 60 and ten years of service, would have been entitled to receive a pension. 16 *Del. C.* § 6655. (D.I. 5, Ex. C at 24-25.) If, however, a member works a

minimum of 40 hours in some capacity for the Fire Company, then the Fire Company contributes the $60. (D.I. 5, Ex. C at 24-25.) Examining the two parts of the program separately, namely the potential $60 annual contribution by the Fire Company and the attendant right to receive a pension, I conclude that the pension benefit does not create an employment relationship. With respect to the yearly contribution of $60, such a sum does not rise to the level of employment compensation. Assuming that Plaintiff participates in the minimum required hours to receive the contribution, then it amounts to $1.50 per hour. As this is a minimum, however, firefighters may spend more time participating in Fire Company related activities, thus driving the per hour rate even lower. As to the receipt of the pension itself, Plaintiff has done nothing to rebut the inference that this benefit too is minor, when viewed in the context of remuneration ordinarily associated with employment. Plaintiff has not alleged any benefits associated with the pension fund, beyond the potential return on the $60 annual contribution. (*Id.*) Therefore, he has failed to cite any facts showing that the pension benefit is the type of benefit that supports a finding of "employment." *See Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 233 (3d Cir. 2002) (holding that "when opposing a motion for summary judgment, the party bearing the burden of persuasion in the litigation is obligated to identify those facts of record which would contradict the facts identified by the movant" (internal citation omitted)).

Finally, and not of least importance, the evidence indicates that the parties themselves viewed their relationship as resting strictly on a volunteer basis. Volunteers are not motivated to join the Fire Company for economic reasons. The financial

benefits are much lower than can be expected at even minimum wage employment and can fairly be described as *de minimis*. In addition, Plaintiff does not argue that membership in the Fire Company allows him or other members to qualify to work in new and desirable fields. Instead, as Plaintiff himself admits, volunteering one's time as a firefighter brings "pride and intangible benefits" associated with membership. (D.I. 7 at 8.) Firefighters volunteering to serve through the Defendant make tremendous contributions to their communities, often at significant personal sacrifice. That they do so as volunteers makes their sacrifice all the more admirable, and the economic reality remains that they are not employees.

Consequently, I find that Plaintiff and his fellow volunteers are not employees with respect to the determination of whether the Fire Company had 15 employees during the relevant time frame. Therefore, the Fire Company is not a covered entity under Title I of the ADA, and Plaintiff is not entitled to relief under that statute.

B. ADA Title II - Public Entity Discrimination

Title II of the ADA provides:

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Here, the dispute centers on whether Plaintiff was denied "participation in ... the services" of the Fire Company.[4] *Id*. Defendant argues that

[4]The parties also disagree over whether the Fire Company is a "public entity," within the meaning of the ADA. I make no ruling as to that issue. For the purpose of this Opinion, however, I have assumed that the Fire Company is such an entity.

"participation" here cannot mean participation as a volunteer because the services at issue, *i.e.*, the "output" of the Fire Company, is fire protection, not volunteer satisfaction. (D.I. 4 at 31-33.) In short, the Defendant says, volunteering is not an "output" of the Fire Company and therefore is not protected under Title II. (D.I. 4 at 31-33.) Plaintiff admits that the Third Circuit has not ruled on the validity of the output theory of analyzing ADA claims under Title II but argues that, even if adopted by this court, the theory does not apply in the present case. (D.I. 7 at 29-32.)

The output theory is sound and has been adopted by courts in other jurisdictions. In *Zimmerman v. Oregon DOJ*, the Ninth Circuit noted that "Congress unambiguously expressed its intent for Title II not to apply to employment." 170 F.3d 1169, 1173 (9th Cir. 1999) (citing *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998)). Defining employment as an input, the court went on to state that Title II applies when a "public entity provides an output that is generally available, and that an individual seeks to participate in or receive the benefit of such an output." *Id*. at 1174. *See also Currie v. Group Ins. Comm'n*, 147 F. Supp. 2d 30, 35 (D. Mass. 2001) (stating that "when one thinks of a public entity's services, programs, and activities, one imagines some operation of the agency that is offered for the benefit of the general public").

Plaintiff argues that because "there is no way that a user of the services of the fire company can 'participate in' those activities" other then by being a member, Title II must apply. (D.I. 7 at 30.) Plaintiff, however, misinterprets the statute. The statute states that no individual shall be denied "participation in or be denied the benefits of the

services, programs, or activities of a public entity ... ." 42 U.S.C. § 12132. The Defendant is correct in arguing that the public entity output here is the service of protecting the community against fires. Title II must be read to guard against discrimination in providing that service. But that is the logical limit. As Plaintiff has not demonstrated a denial of the benefit of fire protection, Title II is not a valid basis for Plaintiff's claim against the Defendant.

V. Conclusion

For the reasons set forth herein, Count III of the Complaint will be dismissed with prejudice, and Defendant's Motion to Dismiss (D.I. 3), which has been converted to a Motion for Summary Judgment, will be GRANTED as to the remaining counts in the Complaint. An appropriate order will follow.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DAVID M. TAWES, Plaintiff,	)	
v.	)	Civil Action No. 03-842-KAJ
FRANKFORD VOLUNTEER FIRE COMPANY, Defendant.	)	

ORDER

For the reasons set forth in the Memorandum Opinion issued in this matter today,

IT IS HEREBY ORDERED that Count III of the Complaint (D.I. 1 at ¶¶ 28-32) is dismissed with prejudice, and Defendant's Motion to Dismiss (D.I. 3), which has been converted to a Motion for Summary Judgment, is GRANTED as to the remaining counts in the Complaint.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

Wilmington, Delaware
January 13, 2005