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**IN THE UNITED STATES DISTRICT COURT**

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**FOR THE DISTRICT OF ARIZONA**

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9 John Guido, et al.,

No. CV-13-00216-TUC-JAS

10 Plaintiffs,

**ORDER**

11 v.

12 Mount Lemmon Fire District,

13 Defendant.

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Pending before the Court is Defendant's motion for summary judgment and Plaintiffs' cross-motion for partial summary judgment.<sup>1</sup> For the reasons stated below, Defendant's motion for summary judgment is granted and Plaintiffs' cross-motion for partial summary judgment is denied.

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**STANDARD OF REVIEW**

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<sup>1</sup> As the Court would not find oral argument helpful in resolving this matter, oral argument is denied.

<sup>2</sup> When citing and quoting cases throughout this Order, internal quotes and citations have been omitted unless otherwise noted by the Court.

1 issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational  
2 trier of fact could resolve the issue either way." *Id.* Thus, the "mere scintilla of  
3 evidence" in support of the nonmoving party's claim is insufficient to defeat summary  
4 judgment. *Id.* at 252. However, in evaluating a motion for summary judgment, "the  
5 evidence of the nonmoving party is to be believed, and all justifiable inferences are to be  
6 drawn in his favor." *Id.* at 255.

7 **BACKGROUND**

8 Plaintiffs John Guido and Dennis Rankin began working for Defendant Mount  
9 Lemmon Fire District in 2000. The position each held was Firefighter EMT. In 2005,  
10 both Guido and Rankin were promoted to the rank of Captain. On June 15, 2009, Guido  
11 and Rankin were laid off; Rankin was in his fifties and Guido was in his forties at the  
12 time of the layoffs. On July 28, 2009, Guido and Rankin each filed a Charge of  
13 Discrimination with the U.S. Equal Employment Opportunity Commission alleging that  
14 Defendant discriminated against them on the basis of age. Thereafter, on April 1, 2013,  
15 Plaintiffs filed a Complaint in this case alleging that they were terminated in violation of  
16 the Age Discrimination in Employment Act ("ADEA") which prohibits discrimination  
17 against employees 40 and older on the basis of their age.<sup>3</sup>

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21 <sup>3</sup> The Court has omitted a detailed discussion of the parties' factual positions  
22 pertaining to the underlying merits of the case as this case is subject to dismissal on other  
23 grounds (i.e., the ADEA does not apply as Defendant did not have 20 or more employees  
24 during the relevant time period as required by the ADEA). In a nutshell, Plaintiffs argue  
25 they were very experienced, qualified, and received positive performance evaluations;  
26 they were over 40 when they were laid off and were the oldest full-time employees at the  
27 time; they were replaced by substantially younger and less qualified individuals; and  
28 Defendant's reasons for their layoffs are pretext. In contrast, Defendant argues that it had  
been facing a budget crisis for several years; it was forced to lay off employees due to  
lack of funding; that Plaintiffs were eventually laid off as they were asked (like all other  
firefighters) to help increase funding by participating in wild land fire assignments which  
brought in extra money for Defendant (but Plaintiffs failed to participate in such  
assignments unlike other firefighters who did participate to bring in extra funding); and  
there is otherwise no evidence of age discrimination as Defendant hired Rankin when he  
was 46 years old, promoted Guido and Rankin to Captains in 2005 (when Guido was 42  
years old and Rankin was 50 years old), they were laid off only four years after they had  
been promoted, and the same person that hired and promoted them also laid them off.

1 **DISCUSSION**

2 **Political Subdivisions and the 20 Employee Requirement**

3 Defendant argues that this case is subject to dismissal as the ADEA only applies to  
4 employers that have 20 or more employees, and the undisputed facts show that Defendant  
5 never had 20 or more employees during the relevant time period in this case. In contrast,  
6 Plaintiffs argue that Defendant’s argument must fail as the 20 employee requirement does  
7 not apply to political subdivisions such as Defendant. A review of the pertinent authority  
8 reflects that the 20 employee requirement applies to political subdivisions.

9 The ADEA defines an employer subject to the provisions of the ADEA as: “The  
10 term ‘employer’ means a person engaged in an industry affecting commerce who has  
11 twenty or more employees for each working day in each of twenty or more calendar  
12 weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968,  
13 employers having fewer than fifty employees shall not be considered employers. The  
14 term also means (1) any agent of such a person, and (2) a State or political subdivision of  
15 a State and any agency or instrumentality of a State or a political subdivision of a State,  
16 and any interstate agency, but such term does not include the United States, or a  
17 corporation wholly owned by the Government of the United States.” 29 U.S.C. 630(b)  
18 (emphasis in the original).

19 Plaintiff argues that the clear language of the statute reflects that if an entity is a  
20 political subdivision, it automatically qualifies as an “employer” under the statute, and  
21 the 20 employee requirement is not imported into the provision pertaining to political  
22 subdivisions. Although the Ninth Circuit has not addressed this issue, Defendant  
23 correctly argues that the Circuit Courts that have directly addressed this issue have  
24 consistently rejected the position advanced by Plaintiff, and have found that the 20  
25 employee requirement does apply to political subdivisions. The Seventh Circuit was the  
26 first Circuit Court to address this issue. *See Kelly v. Wauconda Park District*, 801 F.2d  
27 269 (7<sup>th</sup> Cir. 1986). The plaintiff in *Kelly* presented the same argument as Plaintiff in this  
28 case: that the clear language of the statute reflects that the 20 employee requirement does

1 not apply to political subdivisions. The defendant in *Kelly* argued that in amending and  
2 expanding the statute from applying to just private employers to also government  
3 employers, Congress applied the 20 employee requirement to government employers as  
4 well. The Seventh Circuit resolved the issue as follows:

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6 The first issue we must decide is whether the definition of employer in  
7 section 630 is ambiguous. If the plain language of the statute is clear, we do  
8 not look beyond those words to interpret the statute . . . When the statute's  
9 language is ambiguous, we look to the legislative history of the statute to  
10 guide our interpretation . . . Kelly argues that, by setting state and political  
11 subdivisions in a separate sentence, Congress unambiguously indicated that  
12 government employers were a separate category of employers not subject to  
13 the twenty-employee minimum. Although Kelly's reading of the statute is  
14 certainly a fair and reasonable one, we disagree that the language is capable  
15 of only that interpretation . . . [Defendant] enunciates another fair and  
16 reasonable interpretation of section 630(b)—that Congress, in amending  
17 section 630(b), merely intended to make it clear that states and their  
18 political subdivisions are to be included in the definition of “employer,” as  
19 opposed to being a separate definition of employer. Under this  
20 interpretation, government employers would be subject to the same limits  
21 as other employers. Because both Kelly and [defendant] present reasonable,  
22 but conflicting, interpretations of the plain meaning of section 630(b), we  
23 cannot say that the statute is unambiguous. We therefore must look to the  
24 legislative history to guide our interpretation . . . [T]he legislative history of  
25 . . . the ADEA . . . indicate[s] that Congress's main purpose in amending the  
26 [ADEA] was to put public and private employers on the same footing. The  
27 Senate Special Committee on Aging supported extending the ADEA  
28 because “it is difficult to see why one set of rules should apply to private  
industry and varying standards to government” . . . Both the Senate Special  
Committee on Aging Report and the House Report supporting the ADEA  
amendment, . . . recommended adding public employers to the ADEA as  
well as lowering the minimum number of employees from twenty-five to  
twenty. Neither report drew any distinction between the coverage of public  
and private employers . . . Following the 1974 ADEA amendment, Senator  
Bentsen stated that “[t]he passage of this measure insures that Government  
employees will be subject to the same protections against arbitrary  
employment [discrimination] based on age as are employees in the private  
sector . . . [T]he final enactment of the ADEA amendment in 1974  
completed coverage of public employees on the same basis as private  
employees . . . In the face of this evidence that Congress intended section  
630(b) to apply the same coverage to both public and private employees,

1 Kelly fails to offer any evidence from the legislative record of the 1974  
2 ADEA amendment which supports his interpretation of section 630(b) . . .  
3 [T]he relevant legislative history discussed above firmly indicates that  
4 Congress intended the ADEA . . . [to subject] public and private employers  
5 to the same employment discrimination coverage . . . Congress intended the  
6 ADEA amendment to cover public and private employers equally . . . [T]he  
7 legislative history of the statute, which we find supports the [defendant's]  
8 reading of the statute, i.e., that the twenty-employee minimum applies to  
9 government employers. Because [defendant] has never employed twenty  
10 employees, the district court's decision to dismiss Kelly's complaint is  
11 affirmed.

12 *Id.* at 270-73. Other Circuits that have addressed the issue have agreed with *Kelly* that the  
13 statute is ambiguous, that the legislative history reflects that Congress intended the 20  
14 employee requirement to apply to government employers, and that the 20 employee  
15 requirement applies to political subdivisions. *See Palmer v. Arkansas Council on*  
16 *Economic Education*, 154 F.3d 892, 896 (8<sup>th</sup> Cir. 1998); *E.E.O.C. v. Monclova Township*,  
17 920 F.2d 360, 363 (6<sup>th</sup> Cir. 1990). The Court finds this Circuit authority persuasive, and  
18 likewise finds that the 20 employee requirement applies to political subdivisions such as  
19 Defendant.<sup>4</sup> As such, unless there is an issue of fact as to whether Defendant fell within  
20 the 20 employee requirement during the pertinent timeframe (i.e., 2008 and 2009),  
21 Plaintiffs' case must be dismissed.

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23 <sup>4</sup> The Court notes that the only case Plaintiffs cite to support their position is from  
24 the Northern District of Alabama. *See Holloway v. Water Works and Sewer Board Of the*  
25 *Town of Vernon*, 2014 WL 2566066, \*5 (N.D.Ala. May 15, 2014). While this case does  
26 support Plaintiff's position, it is contrary to the consistent line of Circuit Court cases that  
27 have addressed the issue, and the Court finds these decisions more persuasive. In  
28 addition, the Court notes that the *Holloway* case does not explain why the analysis in the  
Circuit Court cases is inapplicable; *Holloway* summarily states that the statute is clear  
that the 20 employee requirement is inapplicable to political subdivisions, and therefore  
there was no need to address the legislative history discussed in *Kelly*, *Palmer*, and  
*Monclova Township*. *See id.* at 5 n. 3.

1                   **Qualifying Employees for 2008 and 2009**

2                   At most, Defendant argues that the undisputed facts show that Defendant had no  
3 more than 19 qualifying employees in both 2008 and 2009. Defendant submits records  
4 from the Arizona Department of Economic Security reflecting that in 2008 and 2009,  
5 Defendant only paid a total of 19 individuals for performing full and part-time work for  
6 Defendant.<sup>5</sup> As such, as Defendant did not have the minimum 20 employees for 2008  
7 and 2009, Defendant is not subject to the ADEA such that this case must be dismissed.  
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9 The Court agrees.

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11                   Plaintiffs argue that despite the undisputed facts for 2008 and 2009 from the  
12 Arizona Department of Economic Security that Defendant only paid a total of 19  
13 individuals for performing full and part-time work for Defendant, the 20 employee  
14 requirement is still met on other grounds. Plaintiffs assert that because Defendant simply  
15 had 20 or more employees listed on its payroll in 2008 and 2009 (i.e., the payroll list  
16 happened to include individuals who were reserve/seasonal and volunteer firefighters that  
17 performed no work and received no pay in 2008 and 2009), that fact alone is enough to  
18 meet the 20 employee requirement even if less than 20 individuals actually performed  
19 work and were paid by Defendant in 2008 and 2009. To support this argument, Plaintiff  
20 quotes the following statement from a Supreme Court case addressing the minimum  
21 employee requirement in Title VII:  
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27                   <sup>5</sup> In 2008, Defendant had potentially 13 individuals work the requisite 20 weeks,  
28 and in 2009, Defendant had potentially 10 individuals work the requisite 20 weeks. In  
any event, in both 2008 and 2009, there were a total of 19 individuals that actually  
worked and received wages from Defendant.

1 Metropolitan contends that if one were asked how many employees he had  
2 for a given working day, he would give as the answer the number of  
3 employees who were actually performing work on that day. That is possibly  
4 so. Language is a subtle enough thing that the phrase “have an employee  
5 for a given working day” (as opposed to “have an employee on a given  
6 day”) may be thought to convey the idea that the employee must actually be  
7 working on the day in question. But no one before us urges that  
8 interpretation of the language, which would count even salaried employees  
9 only on days that they are actually working. Such a disposition is so  
10 improbable and so impossible to administer (few employers keep daily  
11 attendance records of all their salaried employees) that Congress should be  
12 thought to have prescribed it only if the language could bear no other  
13 meaning . . . Under the interpretation we adopt, by contrast, all one needs to  
14 know about a given employee for a given year is whether the employee  
15 started or ended employment during that year and, if so, when. He is  
16 counted as an employee for each working day after arrival and before  
17 departure.

18 *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 208-211  
19 (1997)(emphasis added); Plaintiffs’ Response (Doc. 71) at p. 10; Plaintiffs’ Reply in  
20 Support of Cross-Motion for Summary Judgment (Doc. 79) at p. 3.

21 A closer review of the *Walters* case shows that it does not support Plaintiffs’  
22 position. The *Walters* case dealt with a similar provision contained in Title VII of the  
23 Civil Rights Act of 1964 (dealing with race, sex, and national origin discrimination)  
24 which stated that Title VII only applies to an employer who “has fifteen or more  
25 employees for each working day in each of twenty or more calendar weeks in the current  
26 or preceding calendar year.” *Id.* at 204. The question presented was “whether an  
27 employer ‘has’ an employee on any working day on which the employer maintains an  
28 employment relationship with the employee, or only on working days on which the  
employee is actually receiving compensation from the employer.” *Id.* This question  
arose because “Metropolitan’s ‘working days are Monday through Friday, and the

1 'current' and 'preceding' calendar years for purposes of the retaliatory-discharge claim  
2 are 1990 and 1989. The parties have stipulated that Metropolitan failed to satisfy the 15–  
3 employee threshold in 1989. During most of 1990, Metropolitan had between 15 and 17  
4 employees on its payroll on each working day; but in only nine weeks of the year was it  
5 actually compensating 15 or more employees on each working day (including paid leave  
6 as compensation). The difference resulted from the fact that Metropolitan had two part-  
7 time hourly employees who ordinarily skipped one working day each week.” *Id.* at 205  
8 (emphasis added). Due to the two part-time hourly employees who ordinarily skipped  
9 one working day each week (but, were nonetheless consistently performing work for  
10 Metropolitan and were actually being paid throughout 1990), Metropolitan argued that it  
11 was only compensating 15 or more employees on each working day for only nine weeks  
12 of the year, and therefore it should not be considered an employer covered by Title VII.  
13 As noted above, the Supreme Court rejected this position as reflected in the portion of the  
14 opinion quoted by Plaintiffs.

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19 The Supreme Court emphasized, and the parties therein agreed, that the dispositive  
20 issue as to whether an employer had the minimum number of employees for the requisite  
21 20 weeks was not whether an individual was being paid by the employer on a particular  
22 day, but whether the employer and the individual had an “employment relationship” on a  
23 particular day. *Id.* at 207. While the Supreme Court did state that an employment  
24 relationship is often “most readily demonstrated by the individual’s appearance on the  
25 employer’s payroll,” the Supreme Court did not state that an individual is automatically  
26 considered an employee based solely on the fact that the individual appears on the  
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1 employer's payroll. *See id.* at 206-212. Furthermore, the Supreme Court certainly did  
2 not state that an individual appearing on an employer's payroll is considered an employee  
3 even if that individual did not perform work and receive pay from the employer during  
4 the pertinent time frame. *See id.* Thus, while an employment relationship is most often  
5 demonstrated by looking "first and primarily to whether the individual in question  
6 appears on the employer's payroll . . . what is ultimately critical . . . is the existence of an  
7 employment relationship . . . under traditional principles of agency law . . . [T]he ultimate  
8 touchstone . . . is whether an employer has employment relationships with [the minimum  
9 number of employees required by the statute] for each working day in 20 or more weeks  
10 during the year[s] in question." *Id.* 211-212. In light of the foregoing, Plaintiffs'  
11 argument that the 20 employee requirement is met because Defendant had 20 or more  
12 employees listed on its payroll in 2008 and 2009 (i.e., including reserve and volunteer  
13 firefighters that performed no work and received no pay in 2008 and 2009) is rejected.  
14 Unlike the individuals in *Walters* who actually performed part-time work and were paid  
15 during the pertinent time frame, the individuals Plaintiffs seek to include to meet the 20  
16 employee requirement did not perform work and get paid by Defendant in 2008 and  
17 2009. Thus, just because these individuals happen to appear on Defendant's  
18 Unemployment Tax and Wage Reports from the Arizona Department of Economic  
19 Security does not show they had the requisite employment relationship for purposes of  
20 the ADEA (especially in the circumstances at bar). Rather, there is no evidence of an  
21 employment relationship between Defendant and these individuals who did not perform  
22 work and get paid by Defendant in 2008 and 2009.

1           Lastly, Plaintiffs argue that Defendant’s volunteer firefighters should be  
2 considered employees for purposes of the ADEA; if this were the case, the 20 employee  
3 requirement could be satisfied for 2008 and 2009. The only authority Plaintiffs cite to  
4 support its position is A.R.S § 23-901(d) which is a provision of Arizona’s workers’  
5 compensation statute which simply includes volunteer firefighters in its definition of  
6 employees. This provision, however, does not establish that individuals listed as  
7 volunteer firefighters for Defendant are employees for purposes of the federal ADEA;  
8 Plaintiffs have not cited any case law to support their position that the volunteers at issue  
9 qualify as employees under the ADEA. Defendant, however, cites case law to support its  
10 position that the volunteers in this case do not qualify as employees under the ADEA.<sup>6</sup>

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14           Courts have held that volunteers can potentially qualify as employees under  
15 federal discrimination statutes such as Title VII<sup>7</sup> where the volunteer is “entitled to  
16 significant [or substantial] benefits.” *See Pietras v. Board of Fire Com'rs of Farmingville*  
17 *Fire Dist.*, 180 F.3d 468, 473 (2<sup>nd</sup> Cir. 1999) (“[T]he question of whether someone is or is  
18 not an employee under Title VII usually turns on whether he or she has received direct or  
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21           <sup>6</sup> The parties have not cited, nor has the Court found, published Ninth Circuit case  
22 law on point dealing with the volunteer issues at bar. Defendant did cite a brief,  
23 unpublished Ninth Circuit case discussing whether a volunteer police officer could be  
24 considered an employee under Title VII. *See Waisgerber v. City of Los Angeles*, 406  
25 Fed.Appx. 150 (9<sup>th</sup> Cir. 2010) (unpublished disposition). Although such unpublished  
26 authority is not precedent (*see* Ninth Circuit Rule 36-3), the Court notes that *Waisberger*  
27 stated that the plaintiff (an unpaid volunteer) could possibly amend her complaint to  
28 allege the “substantial benefits necessary to make her an employee under Title VII.” *Id.*  
at 152. The *Waisberger* case involved unique circumstances where the trial court granted  
the defendant’s motion to dismiss the complaint where plaintiff’s counsel did not oppose  
the motion or appear at the hearing; unbeknownst to the trial court and defense counsel at  
the time, plaintiff’s counsel did not file an opposition or appear at the hearing because she  
was dying of brain cancer during the relevant period. *See id.* at 151.

<sup>7</sup> Title VII and the ADEA both define “employee” (in a very circular manner) as  
“an individual employed by an employer.” 42 U.S.C. § 2000e(f) (Title VII); 29 U.S.C. §  
630(f) (ADEA).

1 indirect remuneration from the alleged employer . . . [A]n employment relationship  
2 within the scope of Title VII can exist even when the putative employee receives no  
3 salary so long as he or she gets numerous job-related benefits . . . We conclude . . . that a  
4 non-salaried volunteer firefighter's employment status under Title VII is a fact question  
5 when that firefighter is entitled to significant benefits.”); *U.S. v. City of New York*, 359  
6 F.3d 83, 91-92 (2<sup>nd</sup> Cir. 2004)(To show that they were “employees” for purposes of Title  
7 VII, plaintiffs participating in New York’s work experience program “must establish that  
8 [they] received remuneration in some form for [their] work . . . This remuneration need  
9 not be a salary . . . but must consist of substantial benefits not merely incidental to the  
10 activity performed . . .”).

11 In *Pietras v. Board of Fire Com'rs of Farmingville Fire Dist.*, the plaintiff was a  
12 volunteer probationary firefighter (i.e., trainee) with the Farmingville Fire District; she  
13 alleged that the physical agility test that she was required to pass in order to become a  
14 full-fledged volunteer firefighter had a disparate impact on women. See *Pietras*, 180  
15 F.3d at 470-71. Although she was not paid, the court held that there was an issue of fact  
16 as to whether Pietras could be considered an employee for purposes of Title VII as she  
17 “was entitled to numerous firefighter benefits [as a trainee which included]: 1) a  
18 retirement pension, (2) life insurance, (3) death benefits, (4) disability insurance, and (5)  
19 some medical benefits.” *Id.*; see also *Haavistola v. Community Fire Company of Rising*,  
20 6 F.3d 211, 221 (4<sup>th</sup> Cir. 1993) (finding that there was an issue of fact as to whether a  
21 volunteer firefighter was an employee under Title VII where she “received the following  
22 benefits . . . with the Fire Company: state-funded disability pension . . . survivors'  
23 benefits for dependents . . . scholarships for dependents upon disability or death . . .  
24 bestowal of a state flag to family upon death in the line of duty . . . benefits under the  
25 Federal Public Safety Officers' Benefits Act when on duty . . . group life insurance . . .  
26 tuition reimbursement for courses in emergency medical and fire service techniques . . .  
27 coverage under Maryland's Workers Compensation Act . . . tax-exemptions for  
28 unreimbursed travel expenses . . . ability to purchase, without paying extra fees, a special

1 commemorative registration plate for private vehicles . . . and access to a method by  
2 which she may obtain certification as a paramedic.”).

3 In *Jacob-Mua v. Veneman*, 289 F.3d 517, 521 (8<sup>th</sup> Cir. 2002)<sup>8</sup>, the court held that a  
4 volunteer researcher with the Department of Agriculture could not be considered an  
5 employee under Title VII as she “was not paid, did not receive annual and sick leave  
6 benefits or coverage . . . and she was not entitled to merit promotion, holiday pay,  
7 insurance benefits, or competitive status.” The court also rejected her claim that the  
8 research and experience she obtained for her dissertation via her volunteer work counted  
9 as sufficient compensation to be considered an employee; the court found that case law  
10 did not support her position. *See id.* In *Evans v. Wilkinson*, 609 F.Supp.2d 489 (D.Md.  
11 2009), the plaintiff was a volunteer emergency medical technician (“EMT”) with the  
12 Lexington Park Volunteer Rescue Squad (“VRS”); the plaintiff alleged that VRS revoked  
13 her EMT privileges in violation of Title VII and the ADEA. *See id.* at 490. Although she  
14 received no salary, the plaintiff alleged that she qualified as an employee under the  
15 discrimination statutes because certain benefits were available to her which included a  
16 “Length of Service Program”; a first-time homeowner’s assistance program; and a  
17 scholarship program. *Id.* at 494. The court found that these possible benefits were  
18 insufficient to qualify her as an employee under Title VII and the ADEA. As to the  
19 Length of Service Program, it provided that volunteers who have reached the ages of 55  
20 or 60, completed at least 20 years of certified active volunteer service, and had  
21 accumulated a minimum of 50 points per calendar year in volunteer service, would  
22 receive a monthly payment of either \$125 or \$175 for the remainder of their life; it also  
23 provided for monetary payments if the volunteer, who is otherwise eligible for the  
24 monthly payments, became disabled or died during the course of volunteer service. *Id.* at  
25 494-495. In finding that this Length of Service Program was too conditional and minor  
26 to characterize the plaintiff as an employee, the court stressed “that monthly payments

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28 <sup>8</sup> Abrogated on other grounds, *Torgerson v. City of Rochester*, 643 F.3d 1031 (8<sup>th</sup>  
Cir. 2011).

1 under this Length of Service Program are not guaranteed by any means; Plaintiff herself  
2 would be required to render a minimum of 20 years of additional certified active  
3 volunteer service in addition to accumulating a minimum of the 50 required points per  
4 calendar points in accordance with the program's description . . . [T]he length of service  
5 program d[oes] not constitute the sort of guaranteed remuneration which establish[s] an  
6 employer-employee relationship . . . [It does] not provide a guarantee of consideration for  
7 the work performed as it was not provided in a contemporaneous fashion, which result[s]  
8 in little or no economic dependence by most volunteer firefighters because one could  
9 forfeit the benefit by failing to reach the threshold age, completing the requisite number  
10 of years in service or earning the requisite number of points per year.” *Id.* Likewise, as  
11 to the first-time homeowner’s assistance program and scholarship program that were  
12 available to volunteers such as the plaintiff, volunteers still had to apply and qualify for  
13 these benefits which were not by any means guaranteed to volunteers. The court found  
14 that the benefits at issue were too conditional and minor to qualify the plaintiff as an  
15 employee under Title VII or the ADEA. *See id.* at 494-496.

16 In the case at bar, Plaintiffs argue that volunteers for Defendant should be  
17 considered employees as they receive substantial benefits; for example, as referenced  
18 above, volunteer firefighters are included within the definition of employees in Arizona’s  
19 workers’ compensation statute, may receive a pension, and receive training and  
20 experience that could lead to full-time employment as a firefighter. The record reflects  
21 that most of the volunteers are either residents of Mount Lemmon, or young individuals  
22 looking for experience that could possibly lead to full-time employment with larger fire  
23 departments. While gaining experience through volunteering in the hope of obtaining  
24 full-time employment in the future is prudent, this is largely incidental to volunteer work  
25 in general, and is not a substantial benefit for purposes of being considered an employee  
26 under the ADEA based on the authority discussed herein. As to workers’ compensation,  
27 there is no evidence or discussion of this issue in the record other than Plaintiffs pointing  
28 out that volunteers are included within the definition of employees under the pertinent

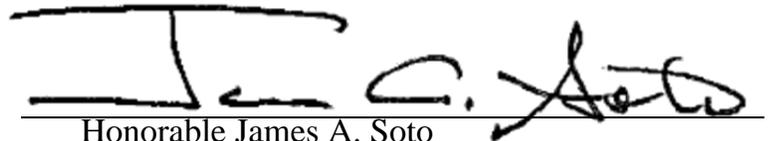
1 statutory provision in A.R.S § 23-901(d). As to volunteers possibly receiving a pension,  
2 the pension at issue is very similar to the “Length of Service Program” discussed above  
3 in the *Evans* case. Arizona’s volunteer pension provides a monthly pension not to exceed  
4 \$400 based upon availability for volunteers who have served for 25-plus years, or who  
5 have reached age 60 and have served for 20-plus years. See A.R.S. § 9-967(A). As  
6 pertinent to Defendant, the record reflects that there are a total of two volunteers who are  
7 receiving \$125 per month relating to their volunteer service. In light of the foregoing,  
8 and as the volunteers at issue did not receive wages, health insurance, sick leave, or any  
9 other significant benefits from Defendant, the Court finds that Defendant is entitled to  
10 summary judgment as there is no material issue of fact supporting a finding that  
11 volunteers received substantial benefits from Defendant such that they could qualify as  
12 employees under the ADEA in this case. As Defendant did not have the required 20  
13 employees during the relevant time frame, this case must be dismissed.

14 **CONCLUSION**

15 Accordingly, IT IS HEREBY ORDERED as follows:

- 16 (1) Defendant’s motion for summary judgment (Doc. 68) is granted, and Plaintiff’s cross-  
17 motion for partial summary judgment (Doc. 71) is denied.  
18 (2) This case is dismissed with prejudice. The Clerk of the Court shall enter judgment  
19 and close the file in this case.

20  
21 Dated this 11th day of December, 2014.

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26 Honorable James A. Soto  
27 United States District Judge  
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