STATE OF MICHIGAN

COURT OF APPEALS

DON R. VOLKE,

Plaintiff-Appellant,

v

ACO SPORTSMAN SERVICE, INC., MICHAEL SANTO and LINDA SANTO,

Defendants-Appellees.

UNPUBLISHED
November 1, 1996

No. 184755
LC No. 93-324399-CZ

Before: M. J. Kelly, P.J., Hood and H. D. Soet,* JJ.

PER CURIAM.

In this action for overtime compensation, plaintiff appeals by right from an order granting defendants summary disposition. Plaintiff brought this action under the Fair Labor Standards Act (FLSA), 29 USC 201 *et seq.*, alleging that defendants failed to pay him overtime compensation that he was owed. We reverse.

Plaintiff argues that the trial court erred in granting defendants summary disposition. The trial court did not articulate its reasons for granting defendants' motion, but apparently accepted the arguments, advanced by defendants, that defendants were not subject to the FLSA. Defendants first argue that they were not subject to the FLSA because their business was not "an enterprise engaged in commerce or in the production of goods for commerce," as defined in 29 USC § 203(s)(1)(A) and used in 29 USC § 207, the section of the FLSA which governs overtime pay. Defendants fail to recognize that the "enterprise" form of FLSA coverage is an additional, alternative basis for coverage. *Montalvo v Tower Life Building*, 426 F2d 1135, 1139 (CA 5, 1970). Employees are individually covered, regardless of the enterprise, if they are personally engaged in interstate commerce or in the production of goods for commerce. *Id.*; 29 USC 207(a)(1). Plaintiff presented evidence, in the trial court, that the Department of Labor concluded that plaintiff was involved in interstate commerce, and defendants offered no evidence to the contrary. The trial court therefore erred in granting summary disposition on this basis.

---

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendants also contended below that they were exempt from the FLSA because they were engaged in a retail or service business. At one time, the FLSA contained exemptions for retail and service businesses, but they were repealed in 1989. 29 USC § 213(a)(2) and (4), amendments and history. Summary disposition was also improper on this basis.

Defendants also contended that plaintiff was not covered by the FLSA because he was a management employee as provided in 29 USC § 213(a)(1), which exempts employees "employed in a bona fide executive, administrative or professional capacity" from the overtime payment requirements of 29 USC § 207. The phrase "executive, administrative or professional capacity" is defined in 29 CFR 541.1, 541.2 and 541.3. The only category which conceivably might apply to plaintiff is "executive capacity." However, that exemption requires that the employee "customarily and regularly directs the work of two or more other employees" of the business. 29 CFR 541.1(b).

Defendants did not provide any evidence from which the trial court could have concluded that plaintiff customarily supervised two or more employees, and plaintiff provided the Department of Labor investigator's conclusion that defendants would find it difficult to show that their employees were exempt supervisors because both individual defendants were actively involved in the business. Pursuant to MCR 2.116(G)(3)(b), defendants had the initial burden to provide supporting evidence that they were entitled to summary disposition because plaintiff was exempt as a matter of law, but they failed to do so. Accordingly, this was also not a proper basis for granting defendants summary disposition.

Reversed and remanded.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ H. David Soet