COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP179 **Cir. Ct. No. 2004CV5541**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

JEFFERY STEFFEN,

PLAINTIFF-APPELLANT,

V.

VCY AMERICA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Reversed and cause remanded for further proceedings consistent with this opinion*.

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 CURLEY, P.J. Jeffrey Steffen appeals from the order granting summary judgment to VCY America (VCY) and dismissing Steffen's complaint and amended complaint with prejudice. Steffen contends, among other things, that the trial court erred when it determined that the Fair Labor Standards Act (FLSA) did not apply to him in his lawsuit seeking compensation for work that he

performed while employed for VCY, based on its conclusions that: (1) individually, Steffen was not engaged in commerce or in the production of goods for commerce; and (2) VCY was not an enterprise engaged in interstate commerce.

¶2 We conclude that the trial court erred when it granted summary judgment dismissing Steffen's claims because genuine issues of material fact exist. Accordingly, we reverse.

I. BACKGROUND.

¶3 This litigation arises from a dispute over wages Steffen, a former VCY employee, claims he is entitled to under the FLSA for hours that he worked and for overtime pay on occasions when he worked more than forty hours per week. VCY is a nonprofit corporation, which operates a number of noncommercial radio stations pursuant to Federal Communications Commission (FCC) licenses. VCY also operates a television station. It describes its broadcasting, funding, and mission as follows:

> The VCY America, Inc. radio network is satellite distributed, full-service programming consisting of Bible teaching programs, live call-in programs on issues of concern to the Christian community, news and commentary, programs reaching children with the Gospel, and conservative, uplifting Christian music. VCY America, Inc. is funded by donations pursuant to its religious ministry statement – VCY America, Inc. is a non-denominational, conservative Christian non-profit organization based in Milwaukee, Wisconsin. Its ministries reach out by radio, television and satellite as well as in the local community, to present the Gospel, encourage Christians, and stimulate the Church to be the Church in our society.

¶4 In addition to the radio stations and television station it operates, VCY operates a bookstore and a subsidiary, Trail Ridge Ranch and Conference Center (Trail Ridge), which is "a non-profit … organization dedicated to training and teaching families, young adults, and youth the solid basics of a Christian world view." According to VCY, "annual gross receipts or monies received by Trail Ridge Ranch and Conference Center for all of its operations has never been more than $500,000 and is normally in the range of $45,000 to $50,000." Although no specific dollar amount is provided in the record, VCY represents that its bookstore does not generate greater than $500,000.00 in sales annually.

¶5 Steffen worked for VCY as a buildings and grounds worker and was paid hourly with a weekly paycheck. Steffen also was employed by Trail Ridge, and, according to VCY, his primary duty there was directly related to the management and general business operations of Trail Ridge, for which he was paid a weekly salary of $575.38 regardless of the number of hours he worked. In addition, Steffen participated in rallies, i.e., spiritual events "where there are different mixes of scripture readings, prayers, speakers, films and songs," while he was employed at VCY. The parties dispute whether he did so as a volunteer or as an employee.

¶6 Both VCY and Trail Ridge paid Steffen for the work that he performed. He was terminated in 2004, and shortly thereafter, filed this action alleging that VCY violated the FLSA. VCY filed a motion for summary

judgment, asserting that it was not subject to the FLSA because it was not an "enterprise engaged in commerce," as that term is used in the FLSA.

¶7 In an oral decision, the trial court concluded: (1) Steffen, in his individual capacity, was not covered by the FLSA because he was not engaged in commerce or in the production of goods for commerce; and (2) the FLSA did not cover VCY because VCY did not compete in the public with commercial enterprises since it operated its radio stations under noncommercial licenses, and accordingly, was not allowed to air commercials, was restricted to broadcasting educational programming, and did not generate a profit. Consequently, the trial court concluded that VCY's radio stations were "certainly not being operated for a business purpose."

¶8 The trial court went on to state:

> This court does note that the bookstore operated by VCY does engage in competition in the public with ordinary commercial enterprises. However, as noted previously, the court's focus is whether the nonprofit agency is primarily engaged in competition within the public with ordinary commercial enterprises. It is clear that the bookstore is just one small part of VCY's operation. Also, while it does compete in business and generate a profit, it's clear that the bookstore also serves and [sic] integral part of VCY's educational mission.
>
> Finally, because the Trail Ridge facility paid its employees as its own separate entity, the court will consider it separately in deciding whether Mr. Steffen is covered under the Act for his employment at Trail Ridge. Trail Ridge does not qualify as an enterprise engaged in commerce under the Act because it does not have an annual gross volume of sales made or business done of more than [$]500,000.

The trial court granted VCY's motion for summary judgment and dismissed Steffen's case. This appeal followed. Additional facts are provided in the remainder of this opinion as needed.

II. ANALYSIS.

¶9 We review a grant of summary judgment *de novo*, applying the same standards and methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We first must determine whether a claim for relief is set forth in the pleadings. ***Id.*** "In testing the sufficiency of a complaint, we take all facts pleaded by plaintiffs and all inferences which can reasonably be derived from those facts as true." ***Id.*** at 317.

¶10 If we determine that a claim has been asserted and that factual issues exist, we examine the "moving party's affidavits or other proof to determine whether the moving party has made a *prima facie* case for summary judgment." ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980) (parenthetical omitted), *abrogated on other grounds by* ***Olstad v. Microsoft Corp.***, 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139. A *prima facie* case is one in which the "moving [party] must show a defense which would defeat the [non-moving, opposing party]." ***Id.*** If the moving party established a *prima facie* case, we must then determine whether the opposing party has shown that material facts are in dispute or that reasonable alternative inferences can be drawn from the undisputed material facts making a trial appropriate. ***Id.***

¶11 Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2003-04).[1] "An issue of fact is genuine if a reasonable jury could find for the nonmoving party." ***Marine Bank v. Taz's Trucking, Inc.***, 2005 WI 65, ¶12, 281 Wis. 2d 275, 697 N.W.2d 90. A fact is material if it would influence the outcome of the controversy. ***Id.***

¶12 Summary judgment should only be granted where the moving party demonstrates a right to judgment with such clarity that no room for controversy exists. ***Grams***, 97 Wis. 2d at 338. Any doubts as to the existence of a genuine issue of material fact are to be resolved against the moving party. ***Id.*** at 338-39.

A. FLSA definitional language.

¶13 "Employees seeking compensation based on the FLSA have the burden of proving that the FLSA applies to their employer/employee relationship and that the activities in question constitute 'employment' under the FLSA." ***Briggs v. Chesapeake Volunteers in Youth Servs., Inc.***, 68 F. Supp. 2d 711, 714 (E.D. Va. 1999). Once this burden is satisfied, it becomes the employer's obligation to establish whether an exemption to the FLSA is applicable to the circumstances. ***Id.*** The United States Supreme Court has repeatedly interpreted the FLSA "'liberally to apply to the furthest reaches consistent with congressional

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

direction.'" ***Tony & Susan Alamo Found. v. Secretary of Labor***, 471 U.S. 290, 296 (1985) (citation omitted).

¶14 Steffen claims that he is due wages in accordance with 29 U.S.C. § 207(a)(1), which states:

> **(1)** Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Based on the foregoing language, the FLSA covers employees in two contexts: "(1) individually, if the employee is engaged in commerce or the production of goods for commerce, and (2) through their employer, if the employer is an enterprise engaged in interstate commerce or the production of goods for commerce." ***Briggs***, 68 F. Supp. 2d at 714.

¶15 As pertinent for purposes of this appeal:

> **(s)(1)** "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that--
>
> **(A)(i)** has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and
>
> **(ii)** is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated) ….

29 U.S.C. § 203(s)(1)(A).[2] An enterprise is defined as "related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units …." 29 U.S.C. § 203(r)(1). This concept allows the revenues of business entities to be combined to meet the minimum gross sales amount required by the FLSA. *See generally* ***Patel v. Wargo***, 803 F.2d 632, 636 (11th Cir. 1986) ("The legislative history [of the FLSA] clearly states the congressional purpose to expand the coverage of the [FLSA], i.e., to lump related activities together so that the annual dollar volume test for coverage would be satisfied."). Commerce is defined as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b).

B. Whether VCY is an enterprise subject to the FLSA constitutes a genuine issue of material fact.

¶16 VCY contends that it "is not an enterprise engaged in commerce because it is a non-profit, educational, religious, non-commercial broadcasting company prohibited from engaging in ordinary, competitive commercial activities due to their [sic] non-commercial broadcast licenses issued by the Federal Communications Commission (FCC)." However, the FLSA provides "no express or implied exception for commercial activities conducted by religious or other nonprofit organizations." ***Tony & Susan Alamo Found.***, 471 U.S. at 296. The pertinent federal regulation provides:

[2] Steffen does not argue that VCY is "engaged … in the production of goods for commerce." 29 U.S.C. § 207(a)(1).

> Activities of eleemosynary, religious, or educational organization may be performed for a business purpose. Thus, where such organizations engage in ordinary commercial activities, such as operating a printing and publishing plant, the business activities will be treated under the Act the same as when they are performed by the ordinary business enterprise.

29 C.F.R. 779.214. Interestingly, in its briefing, VCY devotes all of its attention to its broadcasting endeavors and neglects to mention the significance of its bookstore to the "enterprise" analysis.

¶17 Steffen points out that the definition of commerce includes "trade … among the several States or between any State and any place outside thereof," 29 U.S.C. § 203(b), and that VCY operates a bookstore engaged in interstate trade. Although the trial court concluded that the bookstore operated by VCY competes in the public with ordinary commercial enterprises, it nevertheless held that because the bookstore is "just one small part of VCY's operation," it could not be said that VCY "is primarily engaged in competition within the public with ordinary commercial enterprises."

¶18 It is unclear why the trial court's determination that the bookstore was a small part of VCY's operation led it to conclude that VCY was not an enterprise under the FLSA, given that the FLSA defines "enterprise" as "related activities performed … by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units …." 29 U.S.C. § 203(r)(1). There is no requirement that the enterprise be "primarily engaged in competition." We conclude that there are genuine issues of material fact in

dispute as to whether VCY's bookstore's "ordinary commercial activities" result in a finding that VCY is an enterprise subject to the FLSA.[3] 29 C.F.R. 779.214.

¶19 Furthermore, there are genuine issues of material fact in dispute regarding whether Trail Ridge and VCY constitute a single enterprise for purposes of the FLSA.

> "'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose." 29 U.S.C. § 203(r)(1). If these three elements–related activities, unified operation or common control and common business purpose–are present, different organizational units are grouped together for the purpose of determining FLSA coverage.

Chao v. A-One Med. Servs., Inc., 346 F.3d 908, 915 (9th Cir. 2003).

[3] Steffen also argues that VCY engages in commerce through its broadcasting "because people watching and listening to [VCY's] stations could be listening and watching commercial stations instead." As support for this contention, Steffen cites the following general language from a case that does not address the FLSA:

> The most popular broadcast stations are affiliated with one of the four major television networks (ABC, CBS, NBC, and Fox). The major network affiliates compete for viewers and advertisers with various independent broadcasters, including independent commercial stations, *noncommercial stations*, and affiliates of emerging networks (UPN, WB, and PAX).

Satellite Broad. & Commc'n Ass'n v. FCC, 275 F.3d 337, 344 (4th Cir. 2001) (emphasis added).

In response, VCY emphasizes that the noncommercial nature of its broadcasting, by its very nature, refutes a finding that it competed with ordinary business enterprises such as commercial broadcast stations. Because we conclude that a sufficient showing has been made to survive summary judgment with respect to Steffen's argument that VCY engages in commerce through its bookstore, further discussion regarding whether VCY's broadcasting constitutes commerce need not be addressed to resolve this appeal. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to decide nondispositive issues).

¶20 Steffen provides the following facts in his brief:

> First, in the present situation, there is an interchange of employees (Vic Eliason[, VCY vice president], Paul McClain[, Steffen's primary supervisor], and the Plaintiff) between VCY America, Inc., and its subsidiary corporation Trail Ridge Conference Center under an agreement between the two corporations to share employees. Second, Trail Ridge and VCY America and [sic] acting in each other's interests with regard to their operation. They share common employees. The Employees work schedules are coordinated so that they can work for both corporations. The two corporations share common management personal [sic]. Third, especially with regard to the defendant's [sic] employment, the two corporations are not completely disassociated with respect to the employment of the defendant [sic] and may be deemed to share control of the employment of the defendant [sic], directly or indirectly, by reason of the fact that one corporation (VCY America) controls the other corporation through the person of Vic Eliason.[4]

(Parentheticals in brief.) The affidavits submitted by VCY confirm that Victor Eliason "is the Vice President, Executive Director and day to day manager of the Defendant, VCY America, Inc. and its subsidiary, Trail Ridge Ranch and Conference Center." Little information is provided in the record as to the nature of materials sold through VCY's bookstore; however, in a general sense, presumably the materials are designed to further the Christian world view. Likewise, Trail Ridge is described by VCY as a nonprofit organization "dedicated

[4] These facts were provided in the section of Steffen's brief addressing his contention that VCY was his joint employer (a contention not directly responded to by VCY). Notwithstanding, the facts are useful for purposes of determining enterprise coverage. We note, however, that the quoted excerpt from Steffen's brief was wholly devoid of record citations, in violation of WIS. STAT. RULE 809.19(1)(e) (2005-06), and we remind counsel we have no duty to scour the record to review arguments unaccompanied by adequate record citation. *See* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990). Because VCY does not refute Steffen's recitation, we conclude there is a genuine issue of fact in dispute.

to training and teaching families, young adults, and youth the solid basics of a Christian world view."

¶21 The foregoing leads us to conclude that there are genuine issues of material fact in dispute as to whether VCY and Trail Ridge engaged in related activities, while under common control or unified operation, for a common business purpose. *See* 29 U.S.C. § 203(r)(1). If it is determined that Trail Ridge and VCY constitute a single enterprise, the trial court will have to revisit the revenue requirement, taking into account the enterprise's "annual gross volume of sales made or business done." 29 U.S.C. § 203(s)(1); *see* ***Chao***, 346 F.3d at 914-15 (noting that if two companies, "A-One and Alternative[,] constitute for purposes of the FLSA a single 'enterprise,' it is irrelevant whether Alternative alone satisfied the revenue requirement. Instead, the proper inquiry would be whether the single enterprise comprised of A-One and Alternative satisfied the requirement").

¶22 In this regard, the trial court took a piece-meal approach, viewing Trail Ridge's purported gross separate from VCY's bookstore's purported gross. According to VCY, "annual gross receipts or monies received by Trail Ridge Ranch and Conference Center for all of its operations has never been more than $500,000 and is normally in the range of $45,000 to $50,000." The extent of the information that we have regarding the bookstore's annual gross value is one paragraph in the affidavit of VCY's vice president/executive director that "VCY

America, Inc. has had at all times material, a dollar volume of sales from its bookstore operation of less than $500,000 annually."[5]

¶23 As it stands, we agree with Steffen that "nowhere in the record was it ever established that the gross volume of the business done by the *entire enterprise* is less than $500,000.00 annually." (Emphasis in brief.) If, following remand, VCY and Trail Ridge are deemed to be a single enterprise, a determination will need to be made as to the enterprise's "gross volume of sales made or business done," which will necessarily include totals from both the bookstore and Trail Ridge.[6] No definitive information is provided as to just what exactly the total "annual gross volume of sales made or business done," 29 U.S.C. § 203(s)(1), for the bookstore is. It is possible that the bookstore annual gross volume, when added to Trail Ridge's annual gross volume, surpasses the $500,000.00 threshold.

¶24 We conclude that the affidavits and other proof demonstrate that genuine issues of fact exist as to whether VCY was an enterprise subject to FLSA

[5] It is unclear from the record whether VCY's averments as to "annual gross receipts or monies received by Trail Ridge Ranch and Conference Center" and "dollar volume of sales," with respect to VCY's bookstore, comport with the inquiry, pursuant to 29 U.S.C. § 203(s)(1), as to the enterprise's "*annual gross volume of sales made or business done*." Because this issue was not briefed by the parties, nor developed in the record, it is not properly before us and we do not address it further. If necessary, it may be addressed by the trial court on remand. *See* ***Meyers v. Bayer AG***, 2007 WI 99, ¶4 n.4, __ Wis. 2d __, 735 N.W.2d 448.

[6] Steffen takes the position that donations factor into the calculation of the gross amount of business done. VCY asserts that Steffen's contention is not supported by legal authority. Again, because we conclude that a sufficient showing has been made to survive summary judgment on other grounds, we refrain from delving into further discussion regarding whether donations can be considered income. *See* ***Gross***, 227 Wis. at 300 (unnecessary to decide nondispositive issues). We do note that with the exception of a fleeting footnote reference in one case, *see* ***Tony and Susan Alamo Found. v. Secretary of Labor***, 471 U.S. 290, 292 n.2 (1985), none of the cases cited by Steffen to support his position in this regard analyze whether donations should be accounted for in determining the gross amount of business done under the FLSA.

coverage and, more specifically, whether VCY and Trail Ridge constitute a single enterprise. Therefore, VCY's motion for summary judgment was improperly granted. Once it is determined whether coverage exists for Steffen's claims under the FLSA, it will become VCY's burden to establish whether an exemption to the FLSA is applicable to the circumstances. ***Briggs***, 68 F. Supp. 2d at 714.

¶25 We note that material fact issues may exist beyond those addressed above. However, we need not delineate each of them. Any disputed question of material fact is sufficient to defeat a motion for summary judgment. *See* ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 122, 334 N.W.2d 580 (Ct. App. 1983) ("[h]aving ascertained that a dispute exists with respect to a material fact, … we need not determine whether other material facts are in dispute …. Section 802.08(2), Stats., allows rendition of summary judgment only if 'there is *no* genuine issue as to *any* material fact'") (emphasis in ***Preloznik***). Accordingly, we reverse and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded for further proceedings consistent with this opinion.

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