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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Stephanos Keele,

10 Plaintiff,

11 v.

12 Rite of Passage Incorporated,

13 Defendant.
14

No. CV-14-02135-PHX-DLR

ORDER

15
16 Before the Court is Defendant Rite of Passage, Inc.'s ("ROP") Motion for
17 Summary Judgment. (Doc. 33.) The motion is fully briefed, and the Court heard oral
18 argument on April 22, 2016. For the following reasons, ROP's motion is denied.

19 **BACKGROUND**

20 ROP owns and operates Canyon State Academy ("CSA"), an alternative high
21 school located in Arizona. (Doc. 34, ¶ 1.) The campus includes residential cottages for
22 the students, which ROP staffs with Group Living Coach Counselors and Group Leaders.
23 (*Id.*) Plaintiff Stephanos Keele worked for CSA as Group Leader from December 2011
24 to December 2012. (*Id.*, ¶ 2.) In September 2014, Keele filed this action against ROP for
25 failure to pay overtime wages in violation of the Fair Labor Standards Act ("FLSA"), 29
26 U.S.C. § 201 *et seq.* (Doc. 1.) ROP moves for summary judgment, arguing Keele was
27 exempt from the FLSA's overtime requirements because he was a bona fide executive
28 employee. (Doc. 33.)

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LEGAL STANDARD

Summary judgment is appropriate if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Substantive law determines which facts are material and “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “A fact issue is genuine ‘if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson*, 477 U.S. at 248). Thus, the nonmoving party must show that the genuine factual issues “can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987) (quoting *Anderson*, 477 U.S. at 250).

DISCUSSION

20 Under the FLSA, employers ordinarily must pay their employees one and one-half
21 times their regular rate for work exceeding forty hours per workweek. 29 U.S.C. §
22 207(a)(1). This overtime requirement does not apply, however, to persons “employed in
23 a bona fide executive, administrative, or professional capacity”—so-called “white collar”
24 employees. 29 U.S.C. § 213(a)(1).

I. 29 C.F.R. § 541.3(b)(1)

26 Preliminarily, Keele argues that the Court need not address the white collar
27 exemptions because his role as a Group Leader falls within the purview of 29 C.F.R. §
28 541.3(b)(1). Section 541.3(b)(1) provides that the white-collar exemptions do not apply

1 to:

2 police officers, detectives, deputy sheriffs, state troopers, highway patrol
3 officers, investigators, inspectors, correctional officers, parole or probation
4 officers, park rangers, fire fighters, paramedics, emergency medical
5 technicians, ambulance personnel, rescue workers, hazardous materials
6 workers and similar employees, regardless of rank or pay level, who
7 perform work such as preventing, controlling or extinguishing fires of any
8 type; rescuing fire, crime or accident victims; preventing or detecting
9 crimes; conducting investigations or inspections for violations of law;
10 performing surveillance; pursuing, restraining and apprehending suspects;
11 detaining or supervising suspected and convicted criminals, including those
12 on probation or parole; interviewing witnesses; interrogating and
13 fingerprinting suspects; preparing investigative reports; or other similar
14 work.

15 Keele argues that ROP's business is "so akin to what prisons do" that § 541.3(b)(1)
16 applies. (Doc. 37 at 3.) He asserts that he "essentially functioned as a correctional
17 officer" because CSA operates like a juvenile home and he was responsible for the
18 residents' safety. (*Id.* at 3-4.) Assuming Keele's description of his job duties is accurate,
19 a Group Leader is not sufficiently analogous to a police officer, first responder, or
20 correctional officer. Keele cites no authority, and this Court is aware of none, applying §
21 541.3(b)(1) merely because a person is responsible for the safety of others. The Court
22 finds this provision inapplicable to this case.

23 **II. Executive Exemption**

24 The Department of Labor ("DOL") has promulgated a four-part test for
25 determining whether a person is "employed in a bona fide executive capacity." A bona
26 fide executive employee is one who is:

27 (1) Compensated on a salary basis at a rate of not less than \$455 per week .
28 . . . ;

(2) Whose primary duty is management of the enterprise in which the
employee is employed or of a customarily recognized department or
subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other
employees; and

(4) Who has the authority to hire or fire other employees or whose
suggestions and recommendations as to the hiring, firing, advancement,
promotion or any other change of status of other employees are given
particular weight.

1 29 C.F.R. § 541.100(a). FLSA exemptions are narrowly construed against employers and
2 “[a]n ‘employer who claims an exemption from the FLSA has the burden of showing that
3 the exemption applies.’” *Webster v. Pub. Sch. Emp. of Wash., Inc.*, 247 F.3d 910, 914
4 (9th Cir. 2001) (quoting *Donovan v. Nekton, Inc.*, 703 F.2d 1148, 1151 (9th Cir. 1983)).

5 **A. Salary Basis**

6 It is undisputed that Keele meets the minimum salary requirement; he earned a
7 fixed annual salary of \$36,000 (\$692.30 per week), which was not subject to reduction
8 based on the quality or quantity of his work. (Doc. 34, ¶¶ 4-6.)

9 **B. Primary Duty**

10 DOL regulations provide a non-exhaustive list of tasks that are considered
11 managerial:

12 Interviewing, selecting, and training of employees; setting and adjusting
13 their rates of pay and hours of work; directing the work of employees;
14 maintaining production or sales records for use in supervision or control;
15 appraising employees’ productivity and efficiency for the purpose of
16 recommending promotions or other changes in status; handling employee
17 complaints and grievances; disciplining employees; planning the work;
18 determining the techniques to be used; apportioning the work among the
19 employees; determining the type of materials, supplies, machinery,
20 equipment or tools to be used or merchandise to be bought, stocked and
21 sold; controlling the flow and distribution of materials or merchandise and
22 supplies; providing for the safety and security of the employees or the
23 property; planning and controlling the budget; and monitoring or
24 implementing legal compliance measures.

25 29 C.F.R. § 541.102. It is undisputed that Keele performed some managerial tasks. For
26 example, Keele interviewed several Coach Counselor candidates, was responsible for
27 making a “paper trail” of employee misconduct, coordinated overnight schedules for
28 Coach Counselors, and ensured the safety of his assigned cottage. (Doc. 34, ¶¶ 8-9, 16,
29 20.)

30 However, Keele disputes whether the performance of these tasks was his primary
31 duty. DOL regulations define “primary duty” as “the principal, main, major or most
32 important duty that the employee performs.” 29 C.F.R. § 541.700(a). Whether a
33 function is an employee’s primary duty is based on all facts in a particular case. *Id.*
34 Factors to consider include:

1 [T]he relative importance of the exempt duties as compared with other
2 types of duties; the amount of time spent performing exempt work; the
3 employee's relative freedom from direct supervision; and the relationship
4 between the employee's salary and the wages paid to other employees for
5 the kind of nonexempt work performed by the employee.

6 *Id.*

7 Keele testified that ninety to ninety-five percent of his time was spent on non-
8 managerial duties, such taking care of the students. (Doc. 38, ¶ 44.) Although Keele
9 spent most of his time on non-exempt activities, ROP argues that he was still an exempt
10 executive employee because his supervisory duties were relatively more important than
11 his non-exempt duties, he was relatively free from direct supervision, and he earned
12 significantly more money than Coach Counselors who performed the same non-exempt
13 work that he performed. (Doc. 33 at 8-13.) However, Keele testified that his role as a
14 Group Leader was substantially similar to that of his prior role as a Coach Counselor.
15 (Doc. 38 at ¶ 1.) For example, he testified that his primary duty as a Group Leader was
16 ensuring the safety of the kids under his care, but that safety was his primary duty as a
17 Coach Counselor as well. (*Id.*, ¶¶ 7, 17.) Keele indicated that his discretion as a Group
18 Leader was limited and that he had little to no freedom from direct supervision. (*Id.*, ¶¶
19 1, 7, 14, 29, 52.) He also stated that the Group Leader and Coach Counselor positions
20 were so similar that Unit Managers and CS-3s commonly joked that Group Leaders
21 merely were "Coach Counselors who didn't get a break." (*Id.*, ¶ 71.)

22 Narrowly construing the executive exemption against ROP, viewing the facts in a
23 light most favorable to Keele, and drawing all reasonable inferences in his favor, a
24 reasonable jury could conclude that Keele's primary duty as a Group Leader was not
25 "management of the enterprise."

26 **C. Supervision of Other Employees**

27 An employer asserting that an employee is an exempt executive must also
28 establish that the employee "customarily and regularly directs the work of two or more
other employees." 29 C.F.R. § 541.100(a)(3). The phrase "customarily and regularly"
refers to a frequency that is "greater than occasional but which, of course, may be less

1 than constant” and “includes work normally and recurrently performed every workweek.”
2 29 C.F.R. § 541.701.

3 ROP contends that Keele routinely directed the work of several Coach Counselors.
4 (Doc. 34, ¶ 28.) However, Keele testified that most of the time he was either alone in his
5 assigned cottage or there with only one other Coach Counselor. (Doc. 38, ¶ 29.) He
6 asserts that Unit Managers and CS-3s performed most of the supervision, training, and
7 staffing. (*Id.*, ¶¶ 59-63.) He stated that he never issued assignments to Coach
8 Counselors. (*Id.*, ¶ 72.) Further, although he supervised the kids in his cottage, he
9 contends that he did not routinely supervise more than two other employees. (*Id.*, ¶¶ 7,
10 12, 29.) Given this factual dispute, a reasonable jury could find that Keele did not
11 customarily and regularly direct the work of two or more other employees.

12 **D. Hiring and Firing Authority**

13 Finally, an employer asserting that an employee is an exempt executive must show
14 that the employee “has the authority to hire or fire other employees or whose suggestions
15 and recommendations as to the hiring, firing, advancement, promotion . . . are given
16 particular weight.” 29 C.F.R. § 541.100(a)(4). Although Keele interviewed several
17 Coach Counselor candidates and was responsible for making a “paper trail” of employee
18 misconduct, he also testified that his hiring recommendations were never followed, and
19 that he lacked authority to fire or meaningfully discipline employees. (*Id.*, ¶¶ 8-10, 13,
20 67-70.) On these facts, a reasonable jury could find that Keele lacked authority to hire or
21 fire employees, and that his recommendations were not given particular weight

22 **CONCLUSION**

23 For the foregoing reasons, the Court concludes that reasonable inferences may be
24 drawn in favor of either party as to whether Keele, as a Group Leader, was a bona fide
25 executive employee within the meaning of the relevant statutes and regulations.
26 Accordingly,

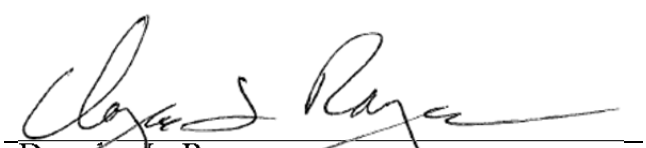
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IT IS ORDERED that ROP's Motion for Summary Judgment, (Doc. 33), is **DENIED**.

Dated this 6th day of May, 2016.



Douglas L. Rayes
United States District Judge