

because the Defendants had failed to honor their agreement to provide him certain benefits when he was employed.

Affidavits and supporting papers were filed on behalf of both parties after which the Trial Court first granted a motion for summary judgment as to count one and thereafter as to count two.

Mr. Best appeals, contending there are several disputed issues of material fact which preclude entry of a summary judgment. Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993).

The Federal Statute in question, after providing for overtime pay for hours worked in excess of 40 per week, provides the following:

§ 213. Exemptions

(a) The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to--

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative

activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities).

It appears that notwithstanding the fact that Mr. Best's title was manager, he would nonetheless be entitled to overtime pay if less than 40 percent of his endeavors were managerial. In this connection and in connection with his insistence under count 2, his affidavit states the following:

I was hired by Mke Talley, partner of T & P Partnership, as a cook. I was promised by Mke Talley that he would match the insurance benefits I had on my previous job he hired me away from, which benefits I told him all about. These included hospitalization and health, dental and life insurance benefits.

My primary duty, which I performed at least Ninety Percent (90%) of the time throughout my employment, was to cook and otherwise prepare food. A minor part of my time, never more than Ten Percent (10%), was spent on other duties, such as placing advertisements, assisting in hiring, discharge, and counseling employees, assisting in, establishing policies and procedures, and supervision. I did not develop or assist in developing compensation plans.

There are affidavits in the record with supporting documents from two of the partners of T & P Partnership, the operating entity for Southern Skillet Restaurant, which refute the factual statements in Mr. Best's affidavit. Thus, it is clear there is a genuine issue of material fact, making summary judgment inappropriate. Byrd v. Hall, supra.

For the foregoing reasons the judgment of the Trial Court is vacated and the cause remanded for further proceedings not inconsistent with this opinion. Costs of appeal are adjudged against the Defendants.

Houston M Goddard, P. J.

CONCUR:

Don T. Murray, J.

William H. Inman, Sr. J.