Authority indicated the ad was also "political," another subject matter banned under the advertising policy). "Political" and "commercial" were not defined in the advertising policy, but the Authority staff agreed that an ad was not commercial unless it promoted the monetary interests of the advertiser in some way. In addition, it appeared that the Authority had not consistently adhered to the ban on noncommercial ads (it accepted ads from Just Harvest, the Fair Housing Partnership, and the Women's Law Project). The coalition sued pursuant to 42 U.S.C. § 1983, alleging a violation of the First Amendment's Free Speech Clause, in that the Authority's advertising space was a public forum, and rejecting the ad amounted to impermissible content-based discrimination; further, it claimed that the ad was rejected as a result of unconstitutional viewpoint discrimination.

The district court granted the Authority's summary judgment motion on the content-based discrimination claim, holding that the advertising space was not a public forum, but denied the motion as to the viewpoint-discrimination claim as a genuine dispute existed about whether the Authority had rejected the coalition's ad because of hostility towards the ad's message. That claim was scheduled for a bench trial, following which the court ruled that Authority had rejected the ad as a result of viewpoint discrimination. The rejection because the ad was "noncommercial" was a pretext for viewpoint discrimination, as the Authority had accepted similar public advocacy ads in the past. The Authority appealed.

The U.S. Court of Appeals for the Third Circuit affirmed. Regardless of whether the advertising space was a public or nonpublic forum—which was an issue in dispute—the coalition was entitled to relief because it had established viewpoint discrimination. If a government allowed speech on a certain subject, it had to accept all viewpoints on the subject. In this case, the rejection of the ad as "political" was not meaningful as that did not occur until after the lawsuit was filed (and it was "less than obvious that the ad could even be considered 'political'"); the noncommercial character rejection was undermined by the fact that similar ads, even though they promoted free services, had been permitted. These "comparator ads were all designed to educate readers about their legal rights." "[W]e do not suggest that the Port Authority must accept all noncommercial, rights-education advertisements going forward. We hold only that the facts of this case indicate viewpoint discrimination, and that the coalition is therefore entitled to relief. If the Port Authority were to develop more precisely phrased written guidance on the ads for which it will sell advertising space and apply the guidance in a neutral and consistent manner, it may, in the future, be able to reject ads like the one at issue." *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, No. 09-3352, 2011 U.S. App. LEXIS 16128 (3d Cir. Aug. 05, 2011).

Invocational Prayers – School Board

Since its inception in 1969, the Indian River School Board had a policy of praying before each regularly-scheduled meeting. In 2004, following a heated community debate and complaints about the propriety of these invocational prayers, the board adopted a written policy providing that, on a rotating basis, one board member per meeting would be given the opportunity to offer a prayer or request a moment of silence. Any such prayers could be sectarian or non-sectarian, denominational or non-denominational, but the opportunity could not be used or exploited to proselytize, advance or convert anyone, or to derogate or otherwise disparage any particular faith or belief. Participation in this prayer was limited to the adult members of the board: no student or person present was required to participate in any way. The practice surrounding the recitation of the prayer was essentially the same as it was prior to the enactment of the formal policy. Also, it was "customary for a board member to offer a disclaimer"—this indicated to those present that prayer was a voluntary activity limited to the adult members of the board, and that no school employee, student in attendance or member of the community was required to participate. The record showed that the prayers recited at the meetings "nearly always—and exclusively—refer[red] to Christian concepts."

The meetings were routinely attended by students: to receive awards, to participate in performances or as ROTC members, to speak as the student government reps or during the public comment section. Parents of children in the school district sued, claiming that the invocational prayers and policy were unconstitutional under the Establishment Clause of the First Amendment. The board claimed that a school board was analogous to a legislative body, and that its practice of opening meetings with a prayer was akin to the practice upheld in *Marsh v. Chambers*, 463 U.S. 783 (1983) (Nebraska's practice of opening legislative sessions with a prayer held not to be a violation of the Establishment Clause). The district court agreed, and dismissed the claim. It found *Marsh* applied; further, as "*Marsh* did not intend to authorize only non-sectarian" prayer, the content of the board's prayers was not dispositive.

On appeal, the U.S. Court of Appeals for the Third Circuit reversed. "The issue in this case is whether a school board may claim the exception established for legislative bodies in *Marsh*, or whether the traditional Establishment Clause principles governing prayer in public schools apply." The legislative prayer exception did not apply, and the case was more properly addressed using the Supreme Court's principles endorsed in *Lee v. Weisman*, 505 U.S. 577, 592 (1992). "*Marsh*'s entire approach rest[ed] on the long-standing and 'unique' history of legislative prayer." Several elements of the board's actions took it outside the purview of *Marsh*, especially that the board carried out its practice of praying in an atmosphere with "many of the same indicia of coercion and involuntariness that the Supreme Court ha[d] recognized elsewhere in its school prayer jurisprudence." Further, the purpose and nature of the board removed it from the logic in *Marsh*. Applying the three-part test

established by *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court found the policy did not survive the "effect prong" of *Lemon* (the practice could neither advance nor inhibit religion). The policy was closely linked to the desire to maintain prayer at Indian River school events, and a reasonable observer would view the content of the board's prayers as promoting religion. The court also found that the policy failed using the endorsement test. *Doe v. Indian River School District*, No. 10-1819, 2011 U.S. App. LEXIS 16121 (3d Cir. Aug. 05, 2011).

Personnel & Employment

Police, Overtime & the FLSA

The plaintiffs, sergeants in the New York City Police Department (NYPD), brought a lawsuit alleging a denial of overtime pay under the Fair Labor Standards Act of 1938 (FLSA) for the period from April 19, 2001 to the present. The plaintiff sergeants performed general law enforcement activities, as well as specialized law enforcement activities undertaken only by sergeants as opposed to lower-ranked police officers (sergeants were the second-lowest ranked officers in the NYPD). Under the FLSA, overtime was required for any workweek longer than 40 hours, but the Act exempted workers "employed in a bona fide executive ... capacity." 29 U.S.C. § 213(a)(1). Prior to August 2001, regulations imposed a so-called "short test" for determining whether an employee was considered an exempt executive. 29 C.F.R. § 541.1(f) (2003). Under the federal Department of Labor's (DOL) Part 541 revisions in 2004, however, the executive exemption was revised and the DOL promulgated additional provisions, including the so-called "first responder regulation," 29 C.F.R. § 541.3(b)(1), defining the scope of the FLSA exemptions. That regulation stated the executive exemption did not apply to police officers and similar first responders because "their primary duty is not management of the enterprise in which the employee is employed."

The district court concluded that the DOL had no intention, in promulgating this regulation, of departing from established case law, and proceeded to apply the general primary duties test to the sergeants to determine whether their primary duty was management. It applied the short test under the old regulations for the period from 2001 to August 2004, and concluded the sergeants' primary duty was management, being "front-line NYPD supervisors." For the claim in this period, the court granted partial summary judgment to the City. For the post-August 2004 claims, it found that genuine issues of material fact as to the officers' management authority precluded the grant of partial summary judgment. The jury returned a verdict for the City.

Pending the appeal, the U.S. Court of Appeals for the Second Circuit requested that the Secretary of Labor submit her views as to whether the plaintiffs satisfied the executive exemption. The Secretary's *amicus* brief asserted that the district court failed to take into proper consideration the first responder regulation when applying the primary duties test to the plaintiffs and, therefore, erred in concluding that plaintiffs' primary duty was management. Further, the regulation was to be interpreted to mean that when first responders directed the work of subordinate officers while performing the types of law enforcement duties enumerated in the regulation's section 541.3(b)(1), such supervision did not constitute "management" that, in applying the primary duties test, would satisfy the second prong of executive exemption. Thus, police officers' field law enforcement work was not exempt management work.

In addressing the appeal, the Second Circuit noted that it was primarily being asked to determine whether the DOL's interpretation of its regulations was "plainly erroneous or inconsistent" with the FLSA regulations. The court concluded that the DOL's interpretation was not, and thus, was entitled to controlling deference. Applying that interpretation to the facts of this case, it held that the primary duty of sergeants was not "management"; therefore, the plaintiffs did not qualify for the "bona fide executive" exemption from the FLSA's overtime pay requirements. *Mullins v. City of New York*, 161 Lab. Cas. (CCH) P35,930; 18 Wage & Hour Cas. 2d (BNA) 35 (2d Cir. 2011).

Facebook & FLSA "Complaint"

Lilli Morse was employed by JP Morgan Chase & Co. She claimed that the employer failed to pay overtime wages owed to her, as required under the Fair Labor Standards Act of 1938 (FLSA). Morse further claimed that after she complained about this on her Facebook page, the employer retaliated by terminating her employment. Quite apart from the posting, she apparently never complained directly to her employer at all. She sued, and the employer brought a motion to dismiss arguing, first, that Morse failed to plead sufficient facts to state a claim for unpaid overtime; second, that a Facebook posting lacked the hallmarks of a real or serious "complaint" to an employer.

The court granted the motion in part. Rule 8(a)(2) of the Federal Rules of Civil Procedure required that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief," so as to "give the defendant fair notice of what the ...claim is and the grounds upon which it rests." The necessary elements that had to be shown here were simply a failure to pay overtime compensation to a covered employee, and accordingly, Morse had pled sufficient facts to state a cause of action for unpaid overtime. On whether Morse could ground a retaliation claim based on the complaint posted on her Facebook page, the court found against her. The FLSA's retaliation provision made it unlawful to discharge an employee because the employee "filed any complaint." 29 U.S.C. § 215(a)(3). The purpose of the "filing" requirement was to give the employer notice that a real complaint was being made, as opposed to a situation where the employee was simply venting or "letting off steam." Morse did "not allege that she made anything close to a serious complaint to her employer." The posting of a grievance on an employee's Facebook page did not constitute the "filing" of a complaint within the meaning of the FLSA. *Morse v. JP Morgan Chase & Co.*, No. 8:11-CV-779-T-27EAJ, 2010 U.S. Dist. LEXIS 143520 (M.D. Fla. 2010). **ML**