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**