party standing basis," for disciplining her in retaliation for her co-worker's expression of concerns and union-related activities. The defendants moved for summary judgment on the basis that they were entitled to qualified immunity because the facts showed no First Amendment violation against Huth, and because Huth lacked standing to raise claims on behalf of Archer. The district court disagreed, finding that Huth's report of Archer's concerns, and the filing of her action, were protected speech under the First Amendment, and that Huth had third-party standing to raise First Amendment claims on behalf of Archer.

The U.S. Court of Appeals for the Second Circuit reversed the denial of qualified immunity, finding that the conduct that resulted in Huth's demotion did not qualify as speech protected from retaliation by the First Amendment pursuant to *Garcetti v. Ceballos*, 547 U.S. 410 (2006); moreover, Huth could not assert a claim on behalf of Archer because Archer's own constitutional rights were not violated. The test under *Garcetti* on whether speech by a public employee was protected from retaliation under the First Amendment began with the question of whether the employee spoke as a citizen on a matter of public concern, and looked at whether the speech addressed a matter of public concern. Because Huth's report was clearly made pursuant to her official duties as a TA employee and supervisor, it fell outside the scope of First Amendment protection. The record also made it plain that Huth's present lawsuit, personal in nature and restricted to her own specific situation, did not qualify as speech "on a matter of public concern." Lastly, while a plaintiff could assert the constitutional claims of a third party in certain circumstances, this still required that the third party itself have a constitutional claim. Since Huth failed to show that Archer suffered an infringement of her constitutional rights or was retaliated against for her activities, Huth's third-party claim was without merit. *Huth v. Haslun*, 598 F.3d 70 (2d Cir. 2010).

School's Code of Conduct

The plaintiffs were teachers at Twin Peaks Charter Academy, which required all employees to sign a "code of conduct," requiring employees to "refrain from actions or behavior harmful/hurtful to others at this school, including malicious gossip and similar activities." In addition, the Academy administrator, Dr. Marlatt, verbally directed the plaintiffs to not discuss school matters with anyone and expressed her preference that the plaintiffs not meet socially. The plaintiffs continued to meet, and claimed that Dr. Marlatt retaliated by giving them poor performance evaluations. Eventually, they resigned and brought a lawsuit against the Academy, Dr. Marlatt, and the public school district, including three First Amendment claims based on the code of conduct and actions by Dr. Marlatt: (1) prior restraints on speech and association; (2) free speech retaliation; and (3) free association retaliation.

The district court granted the defendants' motion for summary judgment on all claims. The U.S. Court of Appeals for the Tenth Circuit reversed as to the First Amendment claims. The case was sent back down to the district court, where that court once again granted the defendants' summary judgment motion. It held Dr. Marlatt was entitled to qualified immunity, and there was no basis under 42 U.S.C. §1983 for holding the school and the district liable as municipal entities. This appeal followed. The Tenth Circuit first addressed standing. The plaintiffs had standing regarding the retaliation claims and on their prior restraint claim against Dr. Marlatt, but lacked standing for the prior restraint claim against the Academy. The record showed nothing indicating that the code of conduct altered or deterred the plaintiffs' speech or association, and there was no concrete or particularized injury. However, the facts showed that the plaintiffs felt afraid that they would be given poor performance evaluations if they disobeyed Marlatt.

The court granted immunity on the prior restraint claim, finding that, while Marlatt expressed a preference that the plaintiffs not meet, she did not forbid them from meeting. The court, however, declined to grant qualified immunity for the speech and association retaliation claims. Here, the speech and association prohibited by Dr. Marlatt covered more speech than necessary or permissible; it did not just prohibit speech about public concerns, but broadly prohibited all speech on "school matters." While pre-existing precedent held that "each instance of speech" should be treated separately when there were "multiple instances of speech, each dealing with separate subjects," the court stated that an "instance of speech" was distinct from a topic of speech. A reasonable administrator could have concluded, from the pre-existing precedent, that each meeting by school employees to discuss various school-related matters would be considered a single instance of speech, and should be analyzed as a whole to determine whether it was protected by the First Amendment. Further, as the vast majority of speech at each meeting was unprotected speech relating to personal disputes with the school's administration and other matters of solely internal significance, the court concluded that controlling precedent would not have put a reasonable administrator on notice that the speech at each meeting, viewed in the aggregate, was protected by the First Amendment. Lastly, the court ruled that the Academy was not liable under a respondeat superior theory for the prior restraint, speech or association claims, as Marlatt was not the final policymaker, and her directives did not constitute Academy policy. The court remanded the case back to the district court. *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175 (10th Cir. 2010).

Personnel and Employment

FLSA Overtime and "Dual Assignment"

Cremeens and other fire investigators for the City of Montgomery fire department sought overtime pay based on the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, and the U.S. Department of Labor (DOL) "dual assignment"

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