In 2006, a student at the school told her teacher and her parents that she had seen another teacher hugging a minor student. Malleus was a relative of the reporting student and was informed as well. During the ensuing investigation, Malleus shared her concerns about the reporting student's credibility, and volunteered advice to various administrators that they should have more evidence before disciplining the suspect teacher. The teacher was ultimately warned but not fired.

Two years later, the same teacher was arrested after having intercourse with the minor student, and the school district re-opened the investigation of the 2006 incident. Malleus agreed to cooperate because the attorney in charge of the investigation told her that the report would remain confidential, which was the position taken by the school board. Malleus repeated her opinion that the reporting student had a vivid imagination and a history of exaggerating her conclusions about others. The final report also included the details of Malleus's initial interjection into the 2006 investigation. Malleus though this was unfair, but did nothing in the belief that the report was confidential. When the report was later provided to the press, however, Malleus sued, claiming the school officials violated her constitutionally protected expectation of privacy under the Fourteenth Amendment, because she had revealed her opinion about her relative for a limited purpose and with the expectation that it would be kept secret. The district court dismissed the complaint under Fed.R.Civ.P. 12(b)(6), finding it failed to state a claim because the Fourteenth Amendment did not protect that type of communication.

The U.S. Court of Appeals for the Third Circuit affirmed. In order to recover in her 42 U.S.C. § 1983 claim, Malleus had to establish that government actors deprived her of a right secured by the U.S. Constitution, which in this case, amounted to the right to share one's opinion about other individuals privately. However, the Fourteenth Amendment's constitutional privacy protection was limited to information about oneself; further, it traditionally applied only to two kinds of personal information: the interest in avoiding disclosure of one's own intimate information (confidentiality of sexuality, medical records, or financial information), and the interest in "independence in making certain kinds of important decisions" (autonomy).

The information for which Malleus was claiming a privacy right fell under neither: her information was voluntarily shared, non-intimate, an opinion rather than fact, and about someone else; nor was it a matter of independent personal decision-making. "We have not previously recognized a third category of Fourteenth Amendment privacy, and we decline to do so now." *Malleus v. George*, 641 F.3d 560 (3d Cir. 2011).

First Amendment

Employee Speech

Maria Díaz–Bigio was a medical social worker at the health department of the city of San Juan, Puerto Rico. While so employed, she made statements in 2004, in both print and radio media, accusing the department's executive director, E., of having serious conflicts of interest, in that he allegedly had economic interests in companies and a medical group that had been given health department contracts. This, she explained, was the reason for differences in the quality of the conditions in different areas of the hospital to the benefit of E., in that areas that generated money for E. were kept in good condition. The City immediately launched an audit and investigation, and obtained statements under oath from E. and others, denying the allegations. The City twice issued a summons for Díaz–Bigio to testify about her allegations, but, despite being expressly directed to go by her supervisor, she refused. The investigation concluded that the charges were false and groundless. The City notified Díaz–Bigio that she would be terminated and had the right to an administrative hearing on the issue. Díaz–Bigio again refused to testify at that hearing and was fired. The letter of termination gave, as reasons, her failure to comply with laws and regulations governing her obligations as a public employee (her false and groundless allegations and her failure to comply with the summons of the investigating body). Díaz–Bigio did not dispute these facts, but sued the City and its officials under 42 U.S.C. § 1983, alleging that she was fired in retaliation for statements she made on matters of public concern in violation of the First Amendment. The district court denied summary judgment to the individual defendants in their personal capacities on grounds of qualified immunity, and the defendants brought an interlocutory appeal.

Generally, the speech of an employee speaking as a citizen on a matter of public concern was protected, provided the employee's interests in the speech outweighed the government's interests as an employer in avoiding disruption in the workplace. The pivotal issue on appeal was whether a reasonable public official could have concluded that terminating Díaz–Bigio's employment in the circumstances would not violate her First Amendment rights. A claim of qualified immunity demanded "deference to the objectively reasonable beliefs and actions of the defendants as to the constitutionality of their actions, even if the beliefs [were] mistaken."

The U.S. Court of Appeals for the First Circuit held that the defendants were entitled to summary judgment because the outcome of the "fact-intensive" balancing of interests was not so clear as to put all reasonable officials on notice that firing Díaz–Bigio would violate the law: "Reasonable officials could well have concluded there was no First Amendment violation on these facts." Although the allegation that a senior public official had a conflict of interest that potentially violated the law was speech on a clear matter of public concern, the speech was one that could also be highly disruptive to the workplace. Further, Díaz–Bigio's allegations and conduct (failing to cooperate with the investigation in defiance of a direct order) "could have been reasonably seen as part of a broader disciplinary problem." Here, the City terminated her only after establishing that there was no basis for her accusations, and the truth or falsity of an employee's speech was itself a factor that was relevant in balancing the interests of the parties. On the facts, "a reasonable public official even could have concluded that Díaz–Bigio made the allegations with reckless indifference

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to the truth, and that this in itself permitted termination." *Diaz-Bigio v. Santini*, No. 09-2575, 2011 WL 2557003 (1st Cir. June 29, 2011).

Labor and Employment

"Retaliatory" Budget Cuts

The Montgomery County, Maryland Fire and Rescue Service (FRS) was operated by both the County and a collection of independent local fire and rescue departments (FRDs), which provided fire, rescue and emergency medical services in conjunction with County employees in the FRS. Each FRD was an independent corporation under state law, but traditionally, the County allocated public funds to pay for administrative support positions at the FRDs. These support employees, however, were employees of the FRD, and not the County.

In 2010, the County Council passed Budget Resolution 16–373, approving the budget for fiscal year 2011, which included an allocation of $1.58 million for the personnel costs of the FRDs (20 positions). This was contingent on the County adopting a budget savings plan for 2011. Part of the anticipated County revenues for 2011 was $14 million from a new Emergency Medical Services Transport fee, being a charge for ambulance use. This fee was fiercely opposed through a petition campaign and the fee was placed on the ballot for a referendum vote. The FRDs and other volunteer fire/rescue groups were particularly active in their opposition. Anticipating that the fee would fail, the County Executive proposed a savings plan for 2011 that would, among other things, eliminate the funding for the 20 FRD employees, at a savings of $592,000. At the council meeting on the plan, one council member appeared to blame the FRDs for the defeat of the fee and the subsequent budget crunch, and he stated that he thought FRD budgets should be cut even further than called for.

The plaintiffs, a group of local volunteer FRDs and several of their former administrative employees, sued, claiming that the County and certain county officials specifically targeted their public funding for elimination in retaliation for the plaintiffs' opposition to the ambulance fee legislation, in violation of the First Amendment of the U.S. Constitution, Article 40 of the Maryland Declaration of Rights, and the County's own regulations. The defendants moved to dismiss or, in the alternative, for summary judgment.

The district court dismissed the claims. It was undisputed that the budget savings plan was a facially valid piece of legislation. Based on *U.S. v. O'Brien*, 391 U.S. 367 (1968), where a plaintiff challenged a facially valid statute of general applicability, the courts could not look to the legislative motive to demonstrate a violation of the First Amendment. *O'Brien* also applied "with full force" to First Amendment challenges based on alleged political retaliation. This conclusion was not changed by the "isolated comment of a single legislator," as that was insufficient to adequately state a First Amendment claim based on political retaliation. Even if the plaintiffs could rely on alleged legislative motives to challenge the savings plan, the individual defendants would still possess legislative immunity from suit. Accordingly, the plaintiffs failed to state a claim under the First Amendment and Article 40. The County also could not be held liable on an abusive discharge claim, as the administrative support staff affected by the cuts were not County employees. *Kensington Volunteer Fire Dept., Inc. v. Montgomery County*, No. JFM-11-273, 2011 WL 2160743 (D. Md. May 31, 2011).

Search and Seizure

Private E-mails and Fourth Amendment

Steven Warshak owned and operated Berkeley Premium Nutraceuticals, Inc., which sold herbal supplements including Enzyte, a "male sexual enhancement" product. Enzyte was heavily advertised on television and in print media. These ads cited a 2001 independent customer study, a 96% customer satisfaction rating, and referenced the product's creation by a pair of qualified physicians. The data and doctors cited were entirely fake; the only enlargement was to the company profits, with annual sales that topped out at around $250 million in 2004. Part of this was due to the fact that many customers were enrolled in an automatic renewal program ("auto-ship") without any express authorization by, or disclosure to, the customer. In 2003, after massive complaints, the company added the auto-ship disclosure information to its phone scripts, but this was done after the credit-card information was already taken. In addition, the company policy was to make refunds almost impossible to get. To process credit-card transactions, the company obtained lines of credit from several merchant banks, but, due to the high rate of disputed credit-card charges that resulted, various banks began to terminate these arrangements. To line up new banks, Warshak came up with various strategies devised to artificially inflate the number of its sales transactions (thus drive down the percentage of disputed charges).

E-mail was "a critical form of communication among" Warshak and the company personnel. The government applied, pursuant to the Stored Communications Act (SCA), 18 U.S.C. §§ 2701 *et seq.*, to Warshak's internet service providers (ISPs) to preserve (and later produce) approximately 2,700 private e-mails to or from Warshak's e-mail account. Warshak was not informed that his messages were being archived. He was later charged with several criminal charges (conspiracy, mail fraud, wire fraud, bank fraud, money laundering, and obstruction) relating to his operation of the company. He moved to exclude the e-mails that the government obtained on the basis that the government's warrantless, ex parte seizure of his private e-mails constituted a violation of the Fourth Amendment's prohibition on unreasonable searches and seizures. The government's position was that, even if agents violated the Fourth Amendment in obtaining the e-mails, they relied in good faith on the SCA, a statute that allowed the government to obtain certain electronic communications without procuring a warrant. Second, it claimed that any

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