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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Fourth Amendment violation was harmless. A jury convicted Warshak on 93 counts.

The U.S. Court of Appeals for the Sixth Circuit made an important ruling in the ensuing appeal: that Warshak enjoyed a reasonable expectation of privacy in his e-mails vis-a-vis his ISP, and the government agents violated his Fourth Amendment rights by compelling his ISP to produce the e-mails without first obtaining a warrant based on probable cause. However, the exclusionary rule did not apply because the agents relied in good faith on the provisions of the SCA. Warshak "plainly manifested an expectation that his emails would be shielded from outside scrutiny," and had a subjective expectation of privacy in the contents. On the question of whether society was prepared to recognize his expectation as reasonable, the court held it did: "Given the fundamental similarities between email and traditional forms of communication [letters or phone calls], it would defy common sense to afford emails lesser Fourth Amendment protection." A subscriber enjoyed a reasonable expectation of privacy in the contents of emails that were stored with, or sent or received through, a commercial ISP, and because the ISP was the functional equivalent of a post office or a telephone company, agents of the government could not compel a commercial ISP to turn over the contents of an e-mail without triggering the Fourth Amendment (but adding, "we are unwilling to hold that a subscriber agreement will *never* be broad enough to snuff out a reasonable expectation of privacy"). To the extent that the SCA purported to permit the government to obtain such emails warrantlessly, the SCA was unconstitutional. *U.S. v. Warshak*, 631 F.3d 266 (6th Cir. 2010). ML

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Washington, D.C. April 22-24

2013 MID-YEAR SEMINAR
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2014 ANNUAL CONFERENCE
–200th Anniversary of the
Battle of Ft. McHenry
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