8

THE LAW OF PUBLIC EMPLOYMENT

Certain basic principles in the law of public employment apply to anyone who works for government at nearly any level. Those principles could be demonstrated by any line of cases, but because the reader is presently in college and consequently familiar with some of the terminology, we will begin by examining cases in the field of education.

In Chapter 2, which dealt with executive control over agencies through the power of appointment and removal, we learned that only a limited number of policy-making and advisory-level employees serve at the pleasure of the executive. The discussion that follows focuses instead on civil service employees and those who normally do not make policy. Merit, rather than political party considerations, is supposed to guide personnel decisions regarding the employees discussed in the section that follows. Although general principles of the law of public employment will be elucidated, remember, too, that these may be modified from jurisdiction to jurisdiction by labor union contracts and statutes.

Case in Point:
Hale v. Walsh
747 P.2D 1288 (1987)

Dr. Thomas Hale gave up his tenured teaching position at a state university in Louisiana in 1977 to become the untenured chairman of the Department of History at Idaho State University. As part of his teaching load, he was assigned the history seminar that all seniors majoring in history had to take. One student who had transferred to Idaho State University got to the spring semester of his senior year and still had not enrolled in the senior seminar. That spring semester, he was scheduled to student-teach, a role that conflicted with the seminar, and after receiving his degree, he was to begin a teaching position at a local high school. After much negotiation, Dr. Hale agreed to allow this student to complete the senior seminar credits by completion of a research paper. When Dr. Hale received the paper near the end of the semester, he suspected that the paper was plagiarized. After a relatively easy library search, Professor Hale documented the plagiarism and failed the student. As a result of this action, the student would not graduate or get the job.

The student, however, was the son-in-law of a former dean, and the former dean was the best friend of the academic vice president (provost at some universities). The vice president put pressure on Dr. Hale's dean to put pressure on Hale to change the student's grade. Ultimately, the dean's attempts at persuasion failed, so the vice president ordered the dean to threaten Dr. Hale with termination unless the professor changed the grade. Professor Hale refused to compromise academic standards and refused to change the grade. Because of his experience with the Louisiana University system, which is unionized, Professor Hale understood enough of the law of public employment to appreciate that his legal position was precarious and that the university was going to issue him a terminal contract (one more year of teaching at this university); despite the apparent unfairness of the situation, the courts would not hear his case based on the existing situation.

Short of caving in on the academic standard question, Hale could not stop the fact that he was going to lose his job, but he could manipulate the situation so that he could get a court to hear his case. Capitalizing on his previous limited experience with faculty unions in Louisiana, Hale became very active in a union that was trying to become the bargaining agent for the Idaho State faculty (the American Federation of Teachers). Indeed, within a matter of months, he became the chapter president of the union. In that capacity, he made a speech critical of the university president on the steps of the administration building and invited the local media, who gave the event appropriate coverage. Shortly thereafter, Hale received a terminal contract, and a year later, he was out of a job.

Questions

1. It is obvious from the preceding scenario that Hale believed that the union activity and speech would help his legal situation. Do you believe he was right? Why? If so, does that make sense to you?
2. Why was Hale's legal situation hopeless without the union activity and public speech?

Usually, public employees who claim they were unjustly fired must sue under the Fifth Amendment due process clause (if they work for the federal government) or the Fourteenth Amendment due process clause (if they work for state or local government). Both due process clauses prohibit the government from taking an individual's life, liberty, or property without due process of law. Hence, to establish a lawsuit under a due process clause, potential litigants must show that government action is about to take their life or inhibit the exercise of their liberty or the use of their property.

When the government allegedly unjustly fires an employee, is it true that they have taken that employee's property by taking his or her paycheck away? No, not necessarily. The first principle of public employment law is that *the employee must establish either a property interest or a liberty interest to challenge an employment termination in court.* Indeed, one must establish a liberty or property interest to establish a due process suit of any kind.

Property Interest

Almost all employees, whether they work for government or in the private sector, serve a probationary period of employment when they first start a job. Usually, the probationary

period of employment is specified, say, six months, and at the end of that period, a supervisor provides some type of formal evaluation of the probationary employee's work (this process is also typically specified in an employee handbook). A decision is made to either retain or terminate the employee as a result of that formal review process.

If the decision is made to retain the employee, then the employee has what the courts refer to as a continuing expectation of employment. That is what establishes a property interest in the law of public employment under the due process clause. Property interests are normally created by state or local law. If the decision is made not to retain the employee, then there is no continuing expectation of employment and therefore no property interest: The employee cannot sue. Employees who lack the requisite property interest simply cannot challenge their employment termination in court (unless they can demonstrate a liberty interest).

In education, a continuing expectation of employment and hence a property interest is established by obtaining tenure. In secondary schools, the probationary employment period is about three years; in universities, it is often five years but can approach eight or even ten years. The normal probationary period for most other public employees is six months to a year.

Board of Regents v. Roth
408 U.S. 564 (1972)

The opinion is by Justice Stewart, joined by Justices Burger, White, Blackmun, and Rehnquist. Justices Brennan, Douglas, and Marshall dissented; Justice Powell took no part in the decision.

Respondent (Roth), hired for a fixed term of one academic year to teach at a state university, was informed without explanation that he would not be rehired for the ensuing year. A statute provided that all state university teachers would be employed initially on probation and that only after four years' continuous service would teachers achieve permanent employment "during efficiency and good behavior," with procedural protection against separation. University rules gave an untenured teacher "dismissed" before the end of the year some opportunity for review of the "dismissal" but provided that no reason need be given for nonretention of an untenured teacher, and no standards were specified for reemployment. Respondent brought this action claiming deprivation of his Fourteenth Amendment rights, alleging infringement of (1) his free speech right because the true reason for his non-retention was his criticism of the university administration, and (2) his procedural due process right because of the university's failure to advise him of the reason for its decision. The District Court granted summary judgment for the respondent on the procedural issue. The Court of Appeals affirmed.

II

"While this Court has not attempted to define with exactness the liberty guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska,* 262 U.S. 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, e.g., *Bolling v. Sharpe,* 347 U.S. 497, 499–500; *Stanley v. Illinois,* 405 U.S. 645.

There might be cases in which a State refused to reemploy a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau,* 400 U.S. 433, 437. *Wieman v. Updegraff,* 344 U.S. 183, 191; *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123; *United States v. Lovett,* 328 U.S. 303, 316–317; *Peters v. Hobby,* 349 U.S. 331, 352 (Douglas, J., concurring). See *Cafeteria Workers v. McElroy,* 367 U.S. 886, 898. In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's "good name, reputation, honor, or integrity" is at stake.

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury." *Joint Anti-Fascist Refugee Committee v. McGrath* (Jackson, J., concurring). See *Truax v. Raich,* 239 U.S. 33, 41. The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities "in a manner that contravene[s] . . . Due Process," *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238, and, specifically, in a manner that denies the right to a full prior hearing. *Willner v. Committee on Character,* 373 U.S. 96, 103. See *Cafeteria Workers v. McElroy,* supra, at 898. In the present case, however, this principle does not come into play.

To be sure, the respondent has alleged that the non-renewal of his contract was based on his exercise of his right to freedom of speech. But this allegation is not now before us. The District Court stayed proceedings on this issue, and the respondent has yet to prove that the decision not to rehire him was, in fact, based on his free speech activities.

Hence, on the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another. *Cafeteria Workers v. McElroy,* supra, at 895–896.

III

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.

Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg v. Kelly,* 397 U.S. 254. See *Flemming v. Nestor,* 363 U.S. 603, 611. Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, *Slochower v. Board of Education,* 350 U.S. 551, and college professors and staff members dismissed during the terms of their contracts, *Wieman v. Updegraff,* 344 U.S. 183, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued

employment. *Connell v. Higginbotham,* 403 U.S. 207, 208.

Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly,* supra, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Just as the welfare recipients' "property" interest in welfare payments was created and defined by statutory terms, so the respondent's "property" interest in employment at Wisconsin State University–Oshkosh was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.

Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

IV

Our analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities. For it is a written Constitution that we apply. Our role is confined to interpretation of that Constitution. We must conclude that the summary judgment for the respondent should not have been granted, since the respondent has not shown that he was deprived of liberty or property protected by the Fourteenth Amendment. The judgment of the Court of Appeals, accordingly, is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Questions

1. The Court says that "property interests are not created by the Constitution." What does create a property interest?
2. Roth lost this case. Can you explain why?
3. At this point, you should be able to articulate why Hale's legal position was hopeless prior to his union activity and speech. Can you do that?

We return now to *Hale v. Walsh,* at the beginning of this chapter. The problem for Professor Hale was that because he lacked tenure, he had no expectation of continuing employment and so could not demonstrate to a court a property interest. His suit was a due process action, and because that clause protects against deprivations of property or liberty and he had no property interest, his only hope would be a liberty interest.

LIBERTY INTEREST

An employee can establish a liberty interest if, as a result of the termination, the former employee's reputation is damaged or his or her ability to seek employment is inhibited. Normally, a simple decision not to retain an employee does not sufficiently damage either reputation or employability to establish a liberty interest. If, however, a teacher's contract was not renewed and if the former teacher asked why and was publicly told "because you are incompetent and a terrible teacher," that would establish a liberty interest.

For that reason, one of the canons of personnel management in public administration is that probationary employees who are terminated from employment should *never* be told why. The logic goes like this: Because they are probationary employees, they lack a property interest. To discuss with them the reasons for the termination may provide the grounds to establish a liberty interest. Silence, on the other hand, means that the affected employee will have difficulty getting into court because he or she cannot show a property interest; the silence has ensured the lack of ability to demonstrate a liberty interest. Within the university community, an almost cabalistic silence surrounds the decision to deny a faculty member tenure or, as in Professor Hale's case, not to renew a contract.[1]

A terminated public employee may establish a liberty interest in one more ways. Because it is unconstitutional for government to punish an individual as a result of the exercise of a constitutionally protected right (e.g., freedom of speech, freedom of association—i.e., to join a union, to be free from discrimination based on race, gender, age, etc.), it follows that government normally cannot fire an employee for having exercised a constitutional right. Hence, in some cases in which a probationary public employee can demonstrate that the *primary reason* behind a decision to terminate was because the employee exercised a constitutionally protected right, that will establish a liberty interest under the due process clause.

The case presented next, *Pickering v. Board of Education* (1968), is a classic case that discusses the First Amendment protection of public employees. Mr. Pickering was a high school teacher who was fired for writing a letter to the editor in the local paper.

In 1961, the Board of Education for District 205 of Will County submitted two bond issues to the voters; the first was defeated, but the second passed ($5,500,000). Again in 1964, the board submitted two bond issues to the voters, who rejected both. In response to these elections, there were many letters to the editor in the local paper. One of them was sent by Pickering:

> Dear Editor:
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> I enjoyed reading the back issues of your paper which you loaned to me. Perhaps others would enjoy reading them in order to see just how far the two new high schools have deviated from the original promises by the Board of Education. First, let me state that I am referring to the February through November, 1961 issues of your paper, so that it can be checked.

One statement in your paper declared that swimming pools, athletic fields, and auditoriums had been left out of the program. They may have been left out but they got put back in very quickly because Lockport West has both an auditorium and athletic field. In fact, Lockport West has a better athletic field than Lockport Central. It has a track that isn't quite regulation distance even though the board spent a few thousand dollars on it. Whose fault is that? Oh, I forgot, it wasn't supposed to be there in the first place. It must have fallen out of the sky. Such responsibility has been touched on in other letters but it seems one just can't help noticing it. I am not saying the school shouldn't have these facilities, because I think they should, but promises are promises, or are they?

Since there seems to be a problem getting all the facts to the voter on the twice defeated bond issue, many letters have been written to this paper and probably more will follow, I feel I must say something about the letters and their writers. Many of these letters did not give the whole story. Letters by your Board and Administration have stated that teachers' salaries total $1,297,746 for one year. Now that must have been the total payroll, otherwise the teachers would be getting $10,000 a year. I teach at the high school and I know this just isn't the case. However, this shows their "stop at nothing" attitude. To illustrate further, do you know that the superintendent told the teachers, and I quote, "Any teacher that opposes the referendum should be prepared for the consequences." I think this gets at the reason we have problems passing bond issues. Threats take something away; these are insults to voters in a free society. We should try to sell a program on its merits, if it has any.

Remember those letters entitled "District 205 Teachers Speak." I think the voters should know that those letters have been written and agreed to by only five or six teachers, not 98% of the teachers in the high school. In fact, many teachers didn't even know who was writing them. Did you know that those letters had to have the approval of the superintendent before they could be put in the paper? That's the kind of totalitarianism teachers live in at the high school, and your children go to school in.

In last week's paper, the letter written by a few uninformed teachers threatened to close the school cafeteria and fire its personnel. This is ridiculous and insults the intelligence of the voter because properly managed school cafeterias do not cost the school district any money. If the cafeteria is losing money, then the board should not be packing free lunches for athletes on days of athletic contests. Whatever the case, the taxpayer's child should only have to pay about 30 cents for his lunch instead of 35 cents to pay for free lunches for the athletes. In a reply to this letter your Board of Administration will probably state that these lunches are paid for from receipts from the games. But $20,000 in receipts doesn't pay for the $200,000 a year they have been spending on varsity sports while neglecting the wants of teachers. You see we don't need an increase in the transportation tax unless the voters want to keep paying $50,000 or more a year to transport athletes home after practice and to away games, etc. Rest of the $200,000 is made up in coaches' salaries, athletic directors' salaries, baseball pitching machines, sodded football fields, and thousands of dollars for other sports equipment.

These things are all right, provided we have enough money for them. To sod football fields on borrowed money and then not be able to pay teachers' salaries is getting the cart before the horse. If these things aren't enough for you, look at East High. No doors on many of the classrooms, a plant room without any sunlight, no water in a first aid treatment room, are just a few of many things. The taxpayers were really taken to the cleaners. A part of the sidewalk in front of the building has already collapsed. Maybe Mr. Hess would be interested to know that we need blinds on the windows in that building also.

Once again, the board must have forgotten they were going to spend $3,200,000 on the West building and $2,300,000 on the East building.

As I see it, the bond issue is a fight between the Board of Education that is trying to push tax-supported athletics down our throats with education, and a public that has mixed emotions about both of these items because they feel they are already paying enough taxes, and simply don't know whom to trust with any more tax money. I must sign this letter as a citizen, taxpayer

and voter, not as a teacher, since that freedom has been taken from the teachers by the administration. Do you really know what goes on behind those stone walls at the high school?

Respectfully,
Marvin L. Pickering

The letter was printed after the elections were over. The school board determined that portions of Pickering's letter were false and that the letter was "detrimental to the efficient operation and administration of the schools." Pickering, who was fired, argued that his letter was protected speech under the First Amendment. After reviewing the board's decision only to determine whether there was substantial supporting evidence in the record, a state trial court sustained the board's decision. The decision was also affirmed by the Illinois Supreme Court, so Pickering appealed to the U.S. Supreme Court.

Pickering v. Board of Education
391 U.S. 563 (1968)

Justice Marshall wrote the opinion for a unanimous Court.

II

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. E.g., Wieman v. Updegraff, 344 U.S. 183 (1952); Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Board of Regents, 385 U.S. 589 (1967). "[The] theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents, supra, at 605–606. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

III

The Board contends that "the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience." Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not," *New York Times Co. v. Sullivan,* 376 U.S. 254, 280 (1964), should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to

furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

An examination of the statements in appellant's letter objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct, such as statements (1)–(4) of appellant's letter, may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.

We next consider the statements in appellant's letter which we agree to be false. The Board's original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing. So far as the record reveals, Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief. The Board must, therefore, have decided, perhaps by analogy with the law of libel, that the statements were per se harmful to the operation of the schools.

However, the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system (which is precisely the import of that portion of appellant's letter containing the statements that we have found to be false, see Appendix, infra) cannot reasonably be regarded as per se detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest. In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board. For example, Pickering's letter was written after the defeat at the polls of the second proposed tax increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no showing that there was any proposal to increase taxes pending when the letter was written.

More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds

allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter, his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Questions

1. It is clear that Pickering made some factual representations in his letter that turned out to be wrong. Do false statements receive constitutional, protection?
2. It is also clear that Pickering's letter fell on deaf ears and that it was not effective. The Court said, "Pickering's letter was greeted with massive apathy and total disbelief." Do you think a different result would have been reached in this case if Pickering had written prior to the election and the letter was a substantial factor for the defeat of the bond issues? Does the Constitution protect only speech that has no "detrimental" effect?
3. In cases involving a liberty interest, courts will nearly always do a balancing test. Courts will balance the right of the employee (citizen) against the interests of the state (employer). Describe the interests on both sides of the scale.
4. Can you explain now why Professor Hale felt compelled to engage in union activity and give the public speech?

In what other kinds of activities could employees engage that would be constitutionally protected but would upset administrators to the point that they would fire an employee? Professor Aumiller, a homosexual and faculty adviser to the gay rights student organization, gave an interview to the student paper. The university president, fearing a loss of alumni contributions if the alumni sensed that the administration encouraged or tolerated homosexuality, fired Professor Aumiller; the school did not renew his next contract and, of course, refused to say why (*Aumiller v. University of Delaware,* 1973).[2] Professor Duke got fired for teaching Marxism in a Texas state university (*Duke v. North Texas State University,* 1973).[3] Teachers have been fired for criticizing discriminatory conditions in schools (*Givhan v. Western Line Consolidated School District,* 1979;[4] and *Bernasconi v. Tempe Elementary School District,* 1977).[5] Teachers have even been fired for too effectively representing the teacher's union in negotiations with the school board (*Simard v. Board of Education,* 1973).[6] Usually, these cases involve some kind of speech (as in the

Pickering case earlier) or union activity (freedom of association is a constitutionally protected right).

The reader will notice from the discussion in the *Pickering* case that not all speech is protected. The Supreme Court has determined that some forms of expression lie beyond the Constitution's protection. Obscenity is not protected expression. Libel is not protected, nor are "fighting words," or "hate speech." Even though an employee's speech may not fall into one of those categories, it may nevertheless be unprotected speech. If a public employee says something critical about a supervisor or the higher administration, such criticism will be protected only under the following conditions: (a) Ordinarily, it must be a public statement; (b) it must pertain to an issue of public importance; and (c) the expression cannot destroy the working relationship between the employee/employees and administration (for teachers, it cannot disrupt discipline or the orderly educational process). Generally, the speech cannot inhibit the public mission of the employer or the agency.

Absent a property interest then, a probationary public employee can challenge employment termination in a court of law only under the following two conditions: (a) An administrator has publicly discussed the reason for the termination, and that has damaged the former employee's reputation and, consequently, his or her ability to find another job in the field. (b) The administrator has refused to say why employment was terminated, but the employee suspects the primary reason was that he or she may have said something publicly critical of the agency (as in the case of Mr. Pickering).

In the latter types of cases, the plaintiff (terminated employee) must present some evidence to the judge (jury) that some form of constitutionally protected behavior was engaged in and the exercise of that protected behavior was the primary reason for the termination. Once sufficient evidence is presented to that effect, the burden of proof switches to the administration, which can take three courses of action. First, they can try to prove that the exercise of protected behavior was not the primary reason to terminate. Second, and closely related to the first, is the "same decision anyway" defense, which essentially argues that, although the exercise of a protected right may have been part of the decision to terminate, the administration would have reached the decision to terminate on other grounds anyway (say, incompetence or insubordination). Finally, the administration can attempt to argue that the speech is not the kind of speech that is protected under the Constitution (perhaps the speech does not relate to issues of public importance).

So, how did Professor Hale establish a liberty interest sufficient to get his case to court? First, it is important to understand what did not create a liberty interest. Even though the ultimate issue here was the academic integrity of a university, that was not a sufficient enough public issue to clothe it with constitutional protection. Even if Dr. Hale had gone to the press, that would not have turned it into an issue of "public concern." Disputes between the faculty and the administration of a school over academic questions are normally not matters of "public concern" because courts treat such issues as internal squabbling and normally defer to the expertise of the administration. This is true not just for schools but for any public agency.

One can only imagine the conversations that must have taken place between Professor Hale and the dean, but whatever was said, it was not protected speech either. That is because it was not public (although, in some cases, speech between two people has been protected) and ultimately it did not relate to matters of sufficient public interest.

Dr. Hale created a liberty interest by becoming active in union politics and convincing the court that that activity was the primary reason for his nonretention. It was primarily that public speech, clothed in official union activity, created the liberty interest.

The Court has applied the same jurisprudence to the termination of public contracts. In the case of *Board of County Commissioners v. Umbehr* (at the end of this chapter), a small businessman who had a contract with the county to haul trash successfully sued the commissioners when they cancelled his contract because he had publicly criticized the commission.

At this point, the law of public employment should be fairly clear. If an employee has a continuing expectation of employment (a property interest), the employee can only be fired for cause and there must be a pre-termination hearing. Absent a property interest, a public employee can be fired for no reason at all and has no right to demand an explanation; there will be no pre-termination hearing. Employees without a property interest may be able to get a court to hear their case if they can successfully raise a liberty interest (damage to reputation or infringement of a constitutionally protected right).

On March 30, 1981, a would-be assassin shot and wounded President Reagan. Upon hearing the news, Ardith McPherson, a black deputy constable (sheriff) in Harris County, Texas, engaged another black deputy in a conversation about the direction of the Reagan Administration's policies. At the end of that conversation, she said, "If they go for him again, I hope they get him." This statement was overheard by a third deputy, who told the constable. Constable Rankin called McPherson into his office and questioned her about her speech. She admitted making the statement, and Rankin fired her on the spot. McPherson was a probationary employee. Was she rightly or wrongly fired? You should recognize first that as a probationary employee, she had no right to a pre-termination hearing. The issue should narrow for you to whether her statement was protected. You should recognize that to answer that, courts will apply a balancing test.

First, might McPherson's statement be unprotected? The first variable to examine is whether the speech involved matters of public concern. The Court decided that speech about the policy directions of an administration is sufficiently clothed with public concern to potentially qualify as protected speech. Threats to kill a president are not protected speech, but that is not what McPherson did. The Court did not address the fact that this was private speech between two people; it simply said the speech was potentially protected. Having decided that the speech was potentially protected, the Court next balanced the interests. The potentially protected speech can become unprotected if Rankin can carry the burden of proof that the speech somehow undermined the mission of the Constable's office. By his own admission, the speech did not destroy the working relationship between Rankin and McPherson, nor did it interfere with her working relationship with other employees. Because she was a data entry clerk with no law enforcement function, her speech did not undermine the public safety function of the Constable's office. In *Rankin v. McPherson,* 483 U.S. 378 (1987), the Supreme Court said that the speech was protected and the employer could not carry his burden of proof that the speech damaged internal working relationships or that it harmed the mission of the agency.

On the other hand, see *Rowland v. Mud River School District,* 470 U.S. 1009 (1985), 730 F. 2d 444 (1984). Rowland was a high school guidance counselor. When her secretary repeatedly asked her why she was so happy, Rowland responded that she was in love. As the conversation deepened, Rowland revealed that she was in love with another woman. The secretary told the principal, who fired Rowland. Rowland was a probationary employee. The trial court found as a matter of fact that the administration had no internal reason to fire Rowland other than that she had admitted to a bisexual lifestyle. That is, there was no disruption or inhibition of working relationships or discipline, nor was the educational mission

of the school compromised. That court awarded her reinstatement and compensatory damages. The court of appeals reversed with orders to dismiss the suit because the utterance was not a matter of public concern. The Supreme Court denied *certiorari.*

Termination of Public Employees Who Possess a Property Interest

Apparently, it is fashionable these days for students to refer to tenure as "a job for life." Actually, that is not quite accurate. Once a public employee acquires a property interest, he or she has a continuing expectation of employment. That expectation of employment can be interrupted in two ways. First, public employees with a property interest can be fired for cause. Second, their employment with a public agency can be terminated for financial reasons (referred to as financial exigency).

Termination for Cause

Usually, both public and private employers provide employees with a handbook covering all aspects of employment. This handbook includes the specific period of probationary employment, the process of evaluation at the end of probationary employment, the criteria to be considered in the evaluation process, and the specific reasons for which employees can be terminated once they have passed beyond probationary employment. This employee handbook should also describe the procedure the agency must go through to terminate an employee for cause. What constitutes a for-cause termination varies from agency to agency and from state to state, but criteria often include incompetence, insubordination, malfeasance, immoral conduct, dishonesty, and so on. Even with a property interest, people can be (and many have been) fired for cause.

Remember that the combination of the Fifth and Fourteenth Amendment due process clauses forbids government from taking your life, liberty, or property without due process. This due process notion applies only to government, not to private employers, although labor unions have forced private business to accept some degree of due process through collective bargaining agreements. Also, it is not that government cannot take your liberty or property; it is just that it must go through due process first.

What is due process? It is a procedure that government must follow to avoid the arbitrary, capricious, or mistaken taking of an individual's liberty or property (or, obviously, a life as well). Basically, due process consists of a notice (that government is about to take some action that may affect your liberty or property) and a hearing. Just exactly how intricate that hearing must be is a matter of confusion and the cause of considerable litigation. Due process ranges from a notice from the vice principal (or dean of students) that one is about to be suspended from school for a particular reason and a very simple hearing before that same vice principal or dean on the one hand, to the myriad kinds of protection afforded those accused of capital offenses at the other extreme. So the amount of process due under the law depends on the nature of the liberty or property about to be affected. That is why there is renewed debate about the imposition of capital punishment. Even though the procedure is elaborate, it is obvious that it does not protect against "mistaken" deprivations of life and liberty.

In terms of public employment, no typical due process hearing can be described. Usually, strict rules of evidence do not apply, and attorneys may be present but are not

Table 8.1 Disposition of Termination Cases for Litigants With Tenure

Winner	*For Cause*	*Financial Exigency*	*Other*	*Total*
Plaintiff/teacher	43% (84)	38% (22)	57% (12)	118
Defendant/board	57% (111)	62% (36)	43% (9)	156
Total	195	58	21	$N = 274$

SOURCE: Steven Cann, "A Virus in the Ivory Tower," 18 *Educational Considerations* 4344 (1991).

required. If they are allowed to be present, attorneys often may not have input during the hearing. Generally, reviewing courts look at the procedure first to be satisfied that it is fair.

The reader is already aware from the material in Chapter 4 that courts reviewing quasi-judicial decisions (which due process hearings are) will apply the substantial evidence test on review. To terminate a public employee for cause successfully, administrators must first be certain that the procedure (notice and the hearing) is fair and that sufficient evidence supports the specific charge. If all of that is done, then a reviewing court will simply examine the procedure, and should it find no procedural flaws, the court next will apply the substantial evidence test and most often will sustain the decision.

In a study of 500 teacher termination cases, 274, or 55 percent, involved tenured teachers. Contrary to the popular perception that they have "a job for life," tenured teachers dismissed for cause lost in 57 percent of their appeals to the courts[7] (see Table 8.1). In addition, tenured teachers lost 62 percent of the cases involving either financial exigency or forced retirement. That is only to be expected because the administration or employer is forced by the due process hearing to build a reasonably sound case. Indeed, this research shows that the most frequent reason for a plaintiff/teacher to win a challenged termination-for-cause is that the administration failed to provide adequate procedures. However, once a reviewing court is satisfied with the procedure, the most common disposition of these cases is for the reviewing court to find that there was substantial evidence to support the termination (67 percent of the cases).

Termination for Financial Reasons

Suppose that your state loses millions of dollars in revenue due to a recession. Sales tax receipts fall by several million dollars, and corporate tax revenues drop off by an equal percentage. Suppose, further, that the federal government decides to reduce grants and other federal monies that used to be turned back to the states. In such circumstances, the state legislature has only two courses of action open to it—raise taxes or reduce spending (deficit spending is forbidden in many states). Most states facing exactly these choices in the early 1980s, the late 1980s, and early 1990s, and again from 2001 to 2004 chose to reduce state spending. When governmental units are forced to reduce spending, a common way to go about that is to reduce personnel. Because personnel account for about 70 percent of agency budgets, that is a logical place administrators begin looking to cut costs. There are basically three ways to reduce personnel (the public administration term is RIF, which stands for "reduction in force"). The three methods are referred to as "last hired, first fired"; the attrition method; and program assessment (or evaluation). Two of these

options—last hired, first fired and the attrition method—are perhaps the "easier" options for administrators and do not generally involve administrative law or litigation.

The last hired, first fired option means that probationary employees are not offered a contract at the end of the probationary period. The attrition method simply means that as employees die, retire, or transfer, they are not replaced (President Clinton reduced the size of the civilian federal workforce by more than 100,000 employees through the attrition method). Both of these options are easier for administrators than the third option because no due process hearings are required, the actions rarely lead to litigation, and the process is the least disruptive way to accomplish the unpleasant task of reducing the workforce within the agency. However, these two methods are not good options from a planning perspective. To RIF under either of these options could, for example, leave an English Department without faculty to teach, say, creative writing, a business school without someone to teach marketing or finance, a history department without someone to teach early American history; worse yet, a department could be left without a secretary! Indeed, a comptroller general's report concludes that President Clinton's RIF program of attrition had the following consequences: (a) federal agencies are poorly equipped to meet the challenges of the 21st century because employees lack skills in information technology, economics, and management; (b) the reduced influx of young people leaves a void of new knowledge, energy, and ideas and negatively impacts the agency's future leadership; (c) many agencies are left without the manpower to perform their functions.[8]

The third option is to conduct a program assessment, ascertain which programs are not cost-efficient, and eliminate those programs (and their personnel) that are found to be inefficient and/or not necessary to the agency or institution. If the decision is made to RIF an entire program, the likelihood is that employees who possess a property interest will be terminated. That means the institution must provide a due process hearing first.

Usually, reviewing courts will not interfere with administrative decisions relating to financial exigency so long as objective criteria are applied to determine who will be terminated and a due process hearing is available to those who possess a property interest (*Levitt v. Board of Trustees,* 376 F.Supp. 950 [1974]). This assessment of court deference to administrators' RIF decisions is supported by the data in Table 8.1.

Consequences of the Court's Jurisprudence in Public Employment Law

The second-order consequences of the Court's decisions in *Roth* and its progeny have been (a) to create a dual legal subsystem in public employment law, (b) to encourage poor personnel decisions, (c) to encourage disruption (the only way for Professor Hale to get a court to look at his case was to join a union and give a critical speech on the front steps of the administration building), and (d) to cause unnecessary litigation.

The dual legal system in public employment law exists because the Court has created two classes of litigants: those with a property interest, who get administrative law applied to their suits, and those without a property interest, who get constitutional law applied to their cases. Regardless of the reason for the termination, plaintiffs with a property interest have a right to a due process hearing. *A fortiori,* the public employer must make an attempt to provide adequate procedures and supply reasons and evidence at a hearing to support the decision. Because this is a quasi-judicial hearing, the only questions for a reviewing

court to answer are (a) whether the procedure is adequate to meet the dictates of due process and (b) whether there is substantial evidence in the record to sustain the decision (classic administrative law, which public employers win nearly 60 percent of the time). Plaintiffs who do not possess a property interest, however, cannot get their case into court without establishing a liberty interest. These frequently involve questions under the First Amendment or the equal protection clause. That being the case, there is no reason to expect a reviewing court to show deference to agency expertise or concentrate on procedural issues (because there is no procedure involved), and there will be no substantial evidence test (because there is no hearing, there is no record). The court will have to determine whether the alleged protected activity was a primary reason in the decision to terminate and whether the activity falls under the Constitution's protection (classic constitutional law, which the plaintiffs win nearly 60 percent of the time).

Poor personnel decisions fall into two categories. In the first, employees with a property interest are retained when they should be let go because employers fear the inevitable lawsuit. Public administrators need to appreciate the fact that the hearing works to protect both the employee and the employer. If the procedure is fair and there is substantial evidence in the record to sustain the decision, it is unlikely that a reviewing court will interfere with the decision. In the second type of bad personnel decisions, employees without a property interest are terminated for reasons that are not related to job performance.

That this jurisprudence encourages disruption should be evident from the case of Professor Hale. The lesson is simple: Public employees without a property interest who fear termination have only one course of action open if they want protection from the courts—turn the issue into a liberty interest by public criticism of their employer.

Finally, there are three situations that would probably not get litigated if probationary public employees were entitled to an internal due process hearing. In the first, cases like Pickering's and Hale's, the mere existence of an internal hearing (116 in my sample of 500 or nearly one fourth) would modify the administration's behavior in a more constitutional direction. Fewer employees in situations such as these would be terminated, hence fewer lawsuits. In the second category of cases, employers present a successful "same decision anyway" defense. That is, at trial, they are able to satisfy the court that there is sufficient evidence to sustain a specific charge (incompetence, insubordination, etc.). A hearing before a board of peers where such evidence is presented would limit employees' propensity to sue. The third category of suits that would be reduced by a pre-termination hearing for employees without a property interest are those that I will call "frivolous," in which the plaintiff can establish neither a property nor a liberty interest; these cases generally are dismissed at an early stage and would probably be screened out of the courts by an internal hearing. These three categories of cases constituted 35 percent of the suits by untenured litigants in my study.[9]

The law of public employment was, until recently, fairly well settled. A property interest meant that a public employee could be terminated only for cause, and there had to be a pre-termination hearing. Absent the property interest, a plaintiff might be able to litigate over the existence of a liberty interest. Most often, such cases involve an analysis of whether a constitutionally protected right was violated.

The law of public employment involves what legal scholars refer to as "bright line rule" jurisprudence as well as a "balancing" jurisprudence. With a "bright line rule," cases are rather cut and dried, and it is often clear who should win. The Court created a bright line rule in *Roth.* If public employees have a property interest, they cannot be terminated without cause, supported at an internal agency due process hearing. Should such a situation be

litigated, all the court has to do is determine whether there is a continuing expectation of employment (which is created by state law or federal law in the case of federal employees) and whether an appropriate pre-termination hearing was held. The court would go on to see whether there was substantial evidence in the record from the pre-termination hearing to sustain the decision to terminate. There is little room for subjective judgments by the judge to influence who wins.

On the liberty side of public employment due process, the Court created a balancing test in *Pickering.* With a balancing test, it is nearly impossible to predict who will or should win a case. That is because it is never certain whether or not a majority of five on the Supreme Court will determine that an individual's utterance involves a matter of public concern. Even if certain speech should be classified as involving public concerns by its content, it is uncertain whether or not that speech so adversely affected the work atmosphere as to lose its potential constitutional protection. Whenever the Court creates a balancing test rather than a bright line rule, the Court has reserved for itself the subjective determination of who will win and who will lose. It is easy to manipulate the scales in a balancing test. With a bright line rule, the facts of the case rather than a judge's ideology frequently determine the disposition of the case.

Public employment cases are due process cases, but the Court has always applied a different due process jurisprudence to public employment law than it has to due process cases in other administrative law contexts, which are the subject of the next chapter. There you will become familiar with a case called *Mathews v. Eldridge,* made famous because the Court imposed a balancing test on all administrative law due process cases except those involving public employment. Although the Court had not ruled on the issue, most observers assumed that the *Roth* jurisprudence applied to employee discipline as well as termination. That is, public employees could not be disciplined in a way that threatened their property interest without a pre-deprivation hearing. See *Bush v. Lucas* at the end of Chapter 10, in which hearings were held before a NASA engineer was reassigned and demoted. The case below is a little noticed case in which the Court applied the *Mathews* balancing test to a public employee who was suspended without pay. The employee had a continuing expectation of employment and was suspended following his arrest, but the charges were dropped, so ultimately, the reason for the suspension was a "mistake." As you read the case, bear in mind that the reason for a due process hearing is to avoid government deprivations of property or liberty by mistake. This case has important ramifications for public employment law because it applies the balancing test of *Mathews* to the otherwise bright line rule jurisprudence involving public employees with a property interest.

Gilbert v. Homar
520 U.S. 924 (1997)

Justice Scalia delivered the unanimous opinion of the Court.

This case presents the question whether a State violates the Due Process Clause of the Fourteenth Amendment by failing to provide notice and a hearing before suspending a tenured public employee without pay.

I

Respondent Richard J. Homar was employed as a police officer at East Stroudsburg University (ESU), a branch of Pennsylvania's State System of Higher Education. On August 26, 1992, when respondent was at the home of a family friend, he was arrested by the Pennsylvania

State Police in a drug raid. Later that day, the state police filed a criminal complaint charging respondent with possession of marijuana, possession with intent to deliver, and criminal conspiracy to violate the controlled substance law, which is a felony. The state police notified respondent's supervisor, University Police Chief David Marazas, of the arrest and charges. Chief Marazas in turn informed Gerald Levanowitz, ESU's Director of Human Resources, to whom ESU President James Gilbert had delegated authority to discipline ESU employees. Levanowitz suspended respondent without pay effective immediately. Respondent failed to report to work on the day of his arrest, and learned of his suspension the next day, when he called Chief Marazas to inquire whether he had been suspended. That same day, respondent received a letter from Levanowitz confirming that he had been suspended effective August 26 pending an investigation into the criminal charges filed against him. The letter explained that any action taken by ESU would not necessarily coincide with the disposition of the criminal charges.

Although the criminal charges were dismissed on September 1, respondent's suspension remained in effect while ESU continued with its own investigation. On September 18, Levanowitz and Chief Marazas met with respondent in order to give him an opportunity to tell his side of the story. Respondent was informed at the meeting that the state police had given ESU information that was "very serious in nature," but he was not informed that that included a report of an alleged confession he had made on the day of his arrest; he was consequently unable to respond to damaging statements attributed to him in the police report.

In a letter dated September 23, Levanowitz notified respondent that he was being demoted to the position of groundskeeper effective the next day, and that he would receive backpay from the date the suspension took effect at the rate of pay of a groundskeeper. (Respondent eventually received backpay for the period of his suspension at the rate of pay of a university police officer.) The letter maintained that the demotion was being imposed "as a result of admissions made by yourself to the Pennsylvania State Police on August 26, 1992 that you maintained associations with individuals whom you knew were dealing in large quantities of marijuana and that you obtained marijuana from one of those individuals for your own use. Your actions constitute a clear and flagrant violation of Sections 200 and 200.2 of the [ESU] Police Department Manual."

Upon receipt of this letter, the president of respondent's union requested a meeting with President Gilbert. The requested meeting took place on September 24, at which point respondent had received and read the police report containing the alleged confession. After providing respondent with an opportunity to respond to the charges, Gilbert sustained the demotion. . . .

II

The protections of the Due Process Clause apply to government deprivation of those perquisites of government employment in which the employee has a constitutionally protected "property" interest. Although we have previously held that public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process, see *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 578 (1972); *Perry v. Sindermann,* 408 U.S. 593, 602–603 (1972), we have not had occasion to decide whether the protections of the Due Process Clause extend to discipline of tenured public employees short of termination. Petitioners, however, do not contest this preliminary point, and so without deciding it we will, like the District Court, "assum[e] that the suspension infringed a protected property interest," and turn at once to petitioners' contention that respondent received all the process he was due.

A

In *Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532 (1985), we concluded that a public employee dismissible only for cause was entitled to a very limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing. Stressing that the

pretermination hearing "should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action," id., at 545–546, we held that pretermination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story, id., at 546. In the course of our assessment of the governmental interest in immediate termination of a tenured employee, we observed that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." Id., at 544–545.

Relying on this dictum, which it read as "strongly suggesting that suspension without pay must be preceded by notice and an opportunity to be heard in all instances," 89 F.3d at 1015, and determining on its own that such a rule would be "eminently sensible," id., at 1016, the Court of Appeals adopted a categorical prohibition: "[A] governmental employer may not suspend an employee without pay unless that suspension is preceded by some kind of pre-suspension hearing, providing the employee with notice and an opportunity to be heard." Ibid. Respondent (as well as most of his amici) makes no attempt to defend this absolute rule, which spans all types of government employment and all types of unpaid suspensions. This is eminently wise, since under our precedents such an absolute rule is indefensible.

It is by now well established that "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 895 (1961). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). This Court has recognized, on many occasions, that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause. See, e.g., *United States v. James Daniel Good Real Property,* 510 U.S. 43, 53 (1993); *Zinermon v. Burch,* 494 U.S. 113, 128 (1990) (collecting cases); *Barry v. Barchi,* 443 U.S. 55, 64–65 (1979); *Dixon v. Love,* 431 U.S. 105, 115 (1977); *North American Cold Storage Co. v. Chicago,* 211 U.S. 306, 314–320 (1908).

Indeed, in *Parratt v. Taylor,* 451 U.S. 527 (1981), overruled in part on other grounds, *Daniels v. Williams,* 474 U.S. 327 (1986), we specifically noted that "we have rejected the proposition that [due process] always requires the State to provide a hearing prior to the initial deprivation of property." 451 U.S. at 540. And in *FDIC v. Mallen,* 486 U.S. 230 (1988), where we unanimously approved the Federal Deposit Insurance Corporation's suspension, without prior hearing, of an indicted private bank employee, we said: "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." Id., at 240.

The dictum in *Loudermill* relied upon by the Court of Appeals is of course not inconsistent with these precedents. To say that when the government employer perceives a hazard in leaving the employee on the job it "can avoid the problem by suspending with pay" is not to say that that is the only way of avoiding the problem. Whatever implication the phrase "with pay" might have conveyed is far outweighed by the clarity of our precedents which emphasize the flexibility of due process as contrasted with the sweeping and categorical rule adopted by the Court of Appeals.

B

To determine what process is constitutionally due, we have generally balanced three distinct factors:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Mathews v. Eldridge,* 424 U.S. 319,

335 (1976). See also, e.g., *Mallen,* supra, at 242; *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 434 (1982).

Respondent contends that he has a significant private interest in the uninterrupted receipt of his paycheck. But while our opinions have recognized the severity of depriving someone of the means of his livelihood, see, e.g., *Mallen,* supra, at 243; *Loudermill,* 470 U.S. at 543, they have also emphasized that in determining what process is due, account must be taken of "the length" and "finality of the deprivation." *Logan,* supra, at 434. Unlike the employee in *Loudermill,* who faced termination, respondent faced only a temporary suspension without pay. So long as the suspended employee receives a sufficiently prompt postsuspension hearing, the lost income is relatively insubstantial (compared with termination), and fringe benefits such as health and life insurance are often not affected at all.

On the other side of the balance, the State has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers. Respondent contends that this interest in maintaining public confidence could have been accommodated by suspending him with pay until he had a hearing. We think, however, that the government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him. ESU's interest in preserving public confidence in its police force is at least as significant as the State's interest in preserving the integrity of the sport of horse racing, see *Barry v. Barchi,* 443 U.S. at 64, an interest we "deemed sufficiently important . . . to justify a brief period of suspension prior to affording the suspended trainer a hearing," *Mallen,* 486 U.S. at 241.

The last factor in the *Mathews* balancing, and the factor most important to resolution of this case, is the risk of erroneous deprivation and the likely value of any additional procedures. Petitioners argue that any presuspension hearing would have been worthless because pursuant to an Executive Order of the Governor of Pennsylvania a state employee is automatically to be suspended without pay "as soon as practicable after [being] formally charged with . . . a felony." 4 Pa. Code § 7.173 (1997). According to petitioners, supervisors have no discretion under this rule, and the mandatory suspension without pay lasts until the criminal charges are finally resolved. If petitioners' interpretation of this order is correct, there is no need for any presuspension process since there would be nothing to consider at the hearing except the independently verifiable fact of whether an employee had indeed been formally charged with a felony. See *Codd v. Velger,* 429 U.S. 624, 627–628 (1977). Compare *Loudermill,* supra, at 543. Respondent, however, challenges petitioners' reading of the Code, and contends that in any event an order of the Governor of Pennsylvania is a "mere directive which does not confer a legally enforceable right." We need not resolve this disputed issue of state law because even assuming the Code is only advisory (or has no application at all), the State had no constitutional obligation to provide respondent with a presuspension hearing. We noted in *Loudermill* that the purpose of a pre-termination hearing is to determine "whether there are reasonable grounds to believe the charges against the employee are true and support the proposed action." 470 U.S. at 545–546. By parity of reasoning, the purpose of any pre-suspension hearing would be to assure that there are reasonable grounds to support the suspension without pay. *Mallen,* 486 U.S. at 240. But here that has already been assured by the arrest and the filing of charges.

In *Mallen,* we concluded that an "ex parte finding of probable cause" such as a grand jury indictment provides adequate assurance that the suspension is not unjustified. Id., at 240–241. The same is true when an employee is arrested and then formally charged with a felony. First, as with an indictment, the arrest and formal charges imposed upon respondent "by an independent body demonstrate that the suspension is not arbitrary." Id., at 244. Second, like an indictment, the imposition of felony

charges "itself is an objective fact that will in most cases raise serious public concern." Id., at 244–245. It is true, as respondent argues, that there is more reason to believe an employee has committed a felony when he is indicted rather than merely arrested and formally charged; but for present purposes arrest and charge give reason enough. They serve to assure that the state employer's decision to suspend the employee is not "baseless or unwarranted," id., at 240, in that an independent third party has determined that there is probable cause to believe the employee committed a serious crime.

Respondent further contends that since (as we have agreed to assume) Levanowitz had discretion not to suspend despite the arrest and filing of charges, he had to be given an opportunity to persuade Levanowitz of his innocence before the decision was made. We disagree. In *Mallen,* despite the fact that the FDIC had discretion whether to suspend an indicted bank employee, see 64 Stat. 879, as amended, 12 U.S.C. § 1818(g)(1); *Mallen,* supra, at 234–235. We nevertheless did not believe that a presuspension hearing was necessary to protect the private interest. Unlike in the case of a termination, where we have recognized that "the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect," *Loudermill,* supra, at 543, in the case of a suspension there will be ample opportunity to invoke discretion later—and a short delay actually benefits the employee by allowing state officials to obtain more accurate information about the arrest and charges. Respondent "has an interest in seeing that a decision concerning his or her continued suspension is not made with excessive haste." *Mallen,* 486 U.S. at 243. If the State is forced to act too quickly, the decision maker "may give greater weight to the public interest and leave the suspension in place." Ibid.

C

Much of respondent's argument is dedicated to the proposition that he had a due process right to a presuspension hearing because the suspension was open-ended and he "theoretically may not have had the opportunity to be heard for weeks, months, or even years after his initial suspension without pay." But, as respondent himself asserts in his attempt to downplay the governmental interest, "because the employee is entitled, in any event, to a prompt post-suspension opportunity to be heard, the period of the suspension should be short and the amount of pay during the suspension minimal." . . . judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Discrimination in Public Employment

In 1865, a sufficient number of states in the union ratified the proposed Thirteenth Amendment (outlawing slavery) so that it became the law of the land. The Fourteenth Amendment (1868) and the Fifteenth Amendment (1870) soon followed. Collectively referred to as the Civil War Amendments, they were meant to legally end the system of slavery and apartheid in this country. The Fifteenth Amendment prohibits the states from denying the right to vote on the basis of race. It is primarily the Fourteenth Amendment, forbidding the state from denying citizens equal protection of the laws, on which this discussion will focus. The final section of all three amendments gives Congress the power to pass laws to enforce the amendments. Generally, Congress does this in the form of civil rights acts (or voting rights acts in the case of the Fifteenth Amendment).

During the past 125 years, Congress has passed several civil rights acts, including the Civil Rights Act of 1875, which made it a federal crime for owners of public accommodations

(hotels, churches, amusement places, theaters, and common carriers) to discriminate on the basis of race. When the federal government pressed charges against individuals and a railroad for discriminating against blacks, the Supreme Court said that Congress did not have the power to pass such laws regulating private discrimination. The Court reasoned that because the Fourteenth Amendment says "no state shall deny equal protection," the power of Congress to enforce that amendment should be limited to instances of official state discrimination (*Civil Rights Cases,* 109 U.S. 3 [1883]). That precedent, set in 1883, is still valid law today.

Indeed, because of the ruling in the *Civil Rights Cases,* when Congress passed the Civil Rights Act of 1964, it based that act on the commerce clause (banning discrimination in interstate commerce) rather than on the Fourteenth Amendment. Because the federal government's reach is so broad and extensive under the commerce clause (Occupational Safety and Health Administration, minimum wage, pollution control, etc.), that is how the federal government attacks private discrimination today. Recall from the case in point in the preceding chapter that the Court had to define *has.* That was important because an employer or a business does not fall under the jurisdiction of the federal commerce clause unless it *has* 15 or more employees.

Equal Protection of the Law

Generally, administrative law involves government discrimination rather than private discrimination. The aspiring public administrator ought to have some familiarity with equal protection law generally and as it relates to racial discrimination particularly. That is because, as you will discover in Chapter 10, if administrators illegally discriminate against someone, they can and most likely will be sued personally. A court will simply look to see whether the administrator knew or should have known that his or her actions violated someone's rights. The law presumes that mid-level managers and those above them "know or should know" when actions will violate another's constitutional rights.

Although there is no consensus among the nine members of the Supreme Court on the continued use of a three-tiered analysis, the Court presently applies it to equal protection cases. The first and lowest tier is referred to as *the simple rationality test.* It applies only to state regulation of business and assumes that the state's law is constitutional. The party challenging the law has the burden to prove it unconstitutional. Although there is a lack of consensus regarding the precise legislative intent behind the language *equal protection of the laws,* the Supreme Court has come to interpret it as follows: (a) It does not forbid the states from creating categories and treating people differently among the categories, and (b) in the exercise of their police powers, the states are free to create categories so long as the categories are *reasonable and not arbitrary.*[10]

The simple rationality test, then, merely looks to see whether the state had a reason for the category or, as the Court puts it, "a legitimate governmental objective." The City of New York apparently concluded that advertising on the side of vehicles led to increases in accidents, so it passed an ordinance banning advertisement on vehicles but then exempted business advertising on certain business vehicles.[11] The state of Oklahoma passed several measures aimed at putting opticians out of business but then exempted the ready-to-wear glasses industry from the regulations.[12] More recently, the City of New Orleans passed an ordinance banning pushcart vendors in the French Quarter but then exempted any vendor who had been in business prior to January 1, 1972.[13]

In these and similar business regulation cases, the Court simply takes the stated reason for the category and then looks to see whether the legislative body could reasonably have believed, at the time the law was passed, that it would accomplish the goal (e.g., reduce traffic accidents in New York City, protect the eyesight of Oklahoma residents, or preserve the aesthetic character of the French Quarter). The reason this standard of review is so lax is that the Supreme Court is extremely sensitive to charges of substituting its economic preferences for those of a legislative body in the area of business regulation. This is exactly what the Supreme Court did between 1932 and 1937, which is what caused Franklin Roosevelt to propose his "court packing plan." This plan caused Chief Justice Hughes to switch his vote, and that created a majority on the Court willing to accept the expanded role of the federal government discussed in Chapter 1.

The middle-tier equal protection analysis is also a reasonableness test, but here, the Court engages in in-depth analysis to see whether the reason for the category, in fact, will accomplish the desired results. The Court will ask not whether there is simply a *legitimate* governmental objective, but rather whether there is an *important* governmental objective and whether the categories created by the policy are rationally related to the achievement of the important governmental objective. The Court applies this middle-tier analysis to social and economic discrimination that does not fit into either of the other two tiers. Gender discrimination cases are common here, as are cases involving discrimination based on age, legitimate birth, and American citizenship.

The Court found that it was unreasonable for the state of Idaho to give a statutory preference to the male where both a male and female were equally qualified to administer an estate. The Court said Idaho's reason (administrative efficiency) was irrational because it was based on outmoded stereotypes.[14] It was also unreasonable for the military to provide a family allowance to any male who got married, whereas a female had to prove that she supplied over half of the family income before she could qualify for the family allowance.[15] The Court found a Florida scheme that provided a property tax break for widows but not for widowers to be a rational classification. The Court agreed with the Florida legislature that women suffer disproportionately when a spouse dies.[16] The Oklahoma legislature, citing statistics that tended to show drunk driving by young males was a leading cause of accidents, passed a law that banned males from purchasing 3.2% beer until the age of 21 but allowed females to purchase such beer at the age of 18. The Supreme Court said that was an irrational and unreasonable classification.[17] Finally, the Court has said that it is reasonable for a state to require state police to retire at age 50 regardless of physical condition[18] and to limit the teaching profession to U.S. citizens[19] (but it is unreasonable to require notary publics to be U.S. citizens).[20]

The third and highest tier of the equal protection analysis is called *strict scrutiny* or the *compelling interest* test. The Court applies this level of analysis to state discrimination involving a suspect class (i.e., race) or a fundamental right (to vote or to travel).

Here, the assumptions are just the opposite of the first tier. Any state classification based on race is assumed to be unconstitutional, and the state has to show a compelling reason to discriminate on such a basis to save its law. Only rarely can a government meet the compelling-interest standard. The federal government was able to demonstrate a compelling interest in its minority business set-aside program, which required that 10 percent of the funds for public works projects go to minority contractors.[21] The Court allowed this discrimination because the program was experimental and closely supervised, it was intended to remedy past discrimination, and Congress has more constitutional power to do

this sort of thing than the states do. It is extremely difficult for the states to meet the compelling-interest test.

In 1995, the Supreme Court reversed itself on the issue of minority business set-asides (see *Adarand v. Pena,* 515 U.S. 200 (1995). Subsequently, the Clinton Administration began the process of reviewing all federal contracts to assure compliance with the *Adarand* decision (i.e., no federal contract can be awarded solely on the basis of race, absent verifiable evidence of past racial discrimination).

Instances involving official state discrimination against blacks are rare these days, but one such case is *Palmore v. Sidoti,*[22] a custody suit in which the divorced father sued for custody of his daughter because his Caucasian ex-wife was cohabiting with a man (who happened to be black). By the time of the trial, the ex-wife and the black man had married, and the Court found both parents to be fit, so the case turned on the welfare of the child. The trial court found that, despite racial gains, children of racially mixed marriages are subjected to social pressures that children of one-race marriages do not face, and the judge awarded custody to the father. The Supreme Court reversed that decision because it was based solely on race (had the former Mrs. Sidoti married a similarly respectable Caucasian, the result would have been different), and the state's reason was not compelling. Speculation about the effects of private racial prejudice on children of interracial marriages is not a compelling reason, the Court said. Also, in 1997, the U.S. Department of Agriculture (USDA) settled with 1,000 black farmers who were part of a class action suit claiming that local farm service agencies in the South had delayed their federal farm loan applications or approved smaller amounts than were due and did so out of racial prejudice.[23] After State Police in New Jersey shot three black men on the turnpike in 1998, a statewide investigation led to a finding of systematic racial profiling, and a U.S. Justice Department consent decree imposed training and federal supervision on the agency. A federal report issued in July 2004, at the end of federal supervision, concluded that the agency had made "remarkable" progress in eliminating racial profiling.[24] These are examples of official purposeful racial discrimination that violate the equal protection clause.

Today, most discrimination against racial minorities is what we call de facto discrimination—that is, discrimination in fact but not mandated by law. Some cases involve discrimination in the workplace (when less than 1 percent of skilled labor jobs are held by blacks and blacks constitute 30 to 50 percent of the labor force [*United Steel Workers v. Weber*] or when less than 1 percent of the contractors in a city are owned by blacks and blacks constitute 50 percent of the population [*Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*]). Others involve discrimination in education (all-black and all-white schools within a school district or jurisdiction).

The Court has dealt with this type of racial discrimination by requiring a finding that this discrimination is purposeful before the perpetrator is found to have violated the Constitution.[25] For example, in the city of Topeka, Kansas, 40 years after the famous desegregation decision in 1954 (*Brown v. Board of Education of Topeka*),[26] some schools within the district remained more than 80 percent black or 100 percent white. Because the situation is not mandated by law, it is called de facto segregation, and before it can be found unconstitutional, the plaintiffs have to prove that the segregation exists by design of policymakers. If the racial pattern is the result of forces such as migration and housing patterns, such segregation is not unconstitutional. It was not until the summer of 1999 that the federal court in Topeka finally found, as a matter of fact, that the school district was in compliance with the original *Brown* decision.[27]

Affirmative Action

The most common purposeful discrimination engaged in by state and local governments today is affirmative action. The Court has been badly divided on the question of affirmative action. Its decisions in this area have been unpredictable and make little or no jurisprudential sense. The first Supreme Court case to address the merits of an affirmative action program was *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978). That case involved a special admissions program for admission to medical school at the University of California at Davis. The program was aimed at economically disadvantaged applicants who by virtue of exposure to less sophisticated educational programs could not be expected to perform on the Medical Career Aptitude Test (MCAT) at the same level as those whose socioeconomic level had afforded them private prep schools or public education in the suburbs. Although race was not a written factor in the special admissions process, only blacks had benefited from the affirmative action process. Allan Bakke, a Caucasian who was refused admission twice, had both science and overall grade point averages and MCAT scores in excess of many who were admitted under the special program, and he claimed discrimination on the basis of race. The Court noted that UC Davis proffered laudable reasons for such discrimination (reducing the deficit of minorities in medical school and the medical profession, countering societal discrimination, increasing the number of physicians who will practice in areas currently underserved, and achieving a diverse student body). Of those reasons, the Court found compelling only the diverse student body\ but declared the affirmative action program unconstitutional anyway because it was not implemented with the least restrictive means. The compelling interest test has two prongs: the state must have a compelling interest, and it must accomplish its program in a way that affects suspect classes or fundamental rights minimally (least restrictive means). The Court said that affirmative action programs may be race conscious so long as race is not the sole criterion. Race may be one among other criteria in affirmative action programs.

In two reapportionment cases in the mid 1990s, the Court moved to a point where it held race-conscious remedies to be valid only in those cases where they were used to eradicate the effects of specifically identifiable past discrimination.[28]

In the summer of 2003, the Court decided two cases involving the University of Michigan's affirmative action program. One case involved the undergraduate school,[29] and the second involved the law school.[30] Although the process was more complex, one facet of the undergraduate affirmative action program awarded 20 admission points to all minority applicants, and this became the focus of the Court's opinion.

The law school's program required a review of every applicant's "hard" and "soft" admissions variables. Hard variables are LSAT score, grade point average, letters of recommendation and other materials required for with an application. Soft variables are things like the enthusiasm of recommenders and the student's own statement on how she/he would contribute to the diversity of the law school. The program called for review of hard and soft variables plus the concept of *critical mass* to make admissions decisions. Critical mass means there must be enough individuals from an underrepresented group so that an admitted individual would not feel like a spokesperson (read token), and there should be enough individuals from an underrepresented group to provide a truly diverse perspective for the other students at the law school. As it had done in *Bakke* 25 years earlier, the Court recognized student body diversity as a compelling enough reason to discriminate on the basis of

race. However, the undergraduate program ran afoul of the least restrictive means prong of the test. The law school's affirmative action program, by way of contrast, met both prongs of the test.

To the degree that administrative law deals with discrimination of any kind, it is always public or governmental discrimination. Private discrimination is a matter of constitutional law and statutory law under the 1964 Civil Rights Act and, to a lesser degree, the Thirteenth Amendment. Some of you are probably wondering: What about quotas and anti-affirmative action propositions on ballots? Although this is not a matter of administrative law, it is important enough to take the time to clear confusion.

First, it should be obvious to you from the preceding discussion that no state government or state government agency can have a quota system. It cannot have an affirmative action program in which race is the sole criterion, although race can be a factor. To the degree that a state's medical school or law school has a set-aside program, race cannot be the sole criterion.

Although it has become popular to refer to it as *reverse discrimination,* the more appropriate descriptive term is *affirmative action.* There are affirmative action programs of all kinds. Harvard University (and most Ivy League universities as well) gives bonus points to applicants who attended public schools in states such as Kansas, Iowa, Texas, Oklahoma, Georgia, and so on. The theory for this is simple. Students who are the product of such schools cannot compete on the SAT exam with students who are the product of the Eastern private academies. If Harvard did not do something to level the playing field, it would still be a homogeneous elitist university filled only with the children of the rich who could afford private academies (where the curriculum is geared to producing high SAT scores). It is because a diverse student body is seen as essential to a well-rounded education that affirmative programs of all kinds are appropriate for universities. Indeed, the Supreme Court has said that a diverse student body constitutes a "compelling state interest."

Quotas, however, to the degree that they exist anywhere (they are few and far between) are found almost exclusively in the private sector. Generally, they are created by an agreement between management and a union, and their purpose is to remedy empirically verifiable past discrimination. For example, the United Steel Workers forced an employer to accept a program ensuring that 50 percent of all trainees in an in-plant craft training program were black. This quota was to remain in effect until the number of skilled craft workers in the plant matched the proportion of blacks in the local workforce.[31] A federal district court found racial discrimination in a union's admission practices and imposed a goal of 29 percent non-White membership in the union by a set date (the 29 percent matched the non-White percentage in the local labor pool).[32] This is how we get quotas. Although the 1964 Civil Rights Act bans discrimination in interstate commerce, the Supreme Court has noted that the Act's purpose was to promote the employment of Blacks who had previously been excluded from participating in the national economy. So private benign discrimination (to make up for past discrimination) is legal under the 1964 Civil Rights Act.[33] Benign racial discrimination by a government is not constitutional under the equal protection clause.

The final area involving what sounds like quotas is the area of preemployment criteria. Requiring applicants for a job with a state correctional agency to be at least five feet, eight inches tall and weigh at least 160 pounds excludes, without reason, 75 percent of the female population. A specific score on a preemployment examination may disproportionately discriminate against a clearly identifiable minority. In the early 1970s, the Court ruled

unconstitutional preemployment criteria that (a) have a disproportionate impact on a clearly identifiable minority and (b) are not related to job performance.[34] The Court soon overruled that case and began to employ a purposeful discrimination analysis to preemployment criteria cases. That is, preemployment criteria with a clearly identifiable disproportionate impact on a minority were not unconstitutional unless they could be shown to be part of purposeful discrimination. In 1989, the Court decided another case that made it easier for business to justify such criteria.[35] The civil rights bill negotiated and debated so strongly in 1991 (and often referred to as a "quota bill") was meant to reverse decisions of the Rehnquist Supreme Court in this area.[36]

While the Civil Rights Act of 1991 does not impose or even mention quotas, it restores the Court's original two-pronged test (disproportionate impact and criteria unrelated to job performance), and it forbids the application of purposeful discrimination to these kinds of cases. Some have argued that this Act will cause businesses to "voluntarily" impose "quotas" on themselves to avoid a "disproportionate impact."

Sexual Harassment

As a potential public administrator, you should be especially aware that should you make a decision that happens to violate either a client's or an employee's rights, you personally can be held liable. You can also incur liability for the governmental unit that you work for. Given that, you should be well aware of property and liberty interests under the due process clause. You should know enough not to violate someone's rights under the current jurisprudence applicable to the equal protection clause. Equal protection law, however, is beyond the scope of this text but the law will presume that as a trained public administrator you know enough about it to avoid violating someone's rights. An area of the law that is closely related and mushrooming in terms of litigation is gender discrimination in general and sexual harassment in particular.

Constitutionally, government (usually but not always the legislature), cannot create categories of citizens and treat them differently based on gender without a real good reason. The Supreme Court uses the phrase "important governmental objective." Further, the classification scheme must reasonably be a legitimate means of furthering that important objective. By statute, there are two roads to gender discrimination. Title IX of the Education Act prohibits gender discrimination in education. You should already be aware that Title VII of the 1964 Civil Rights Act prohibits gender discrimination in interstate commerce.

Title IX of the Education Act is really an act of Congress under its Article One Section Eight spending power. It applies to any educational institution that receives federal money (almost all public schools from primary, secondary to college), and it forbids gender discrimination. If such discrimination is reported or otherwise suspected, the educational institution is notified and given an opportunity to correct the situation. If no corrective action is taken, federal funds are cut off.[37] There is nothing in the Act that establishes a plaintiff's right to sue an offending educational institution. The Supreme Court, However in *Franklin v. Gwinett Co. Public Schools* 503 U.S. 60 (1992), said there was an implied private right to sue. The case involved a teacher/coach who allegedly sexually harassed and abused a female high school student. The Plaintiff alleged "coercive intercourse" and that the other faculty and administrators were aware of the harassment and did nothing. Finally she alleged that the school district dropped all internal investigations once the teacher/coach resigned. The decision was unanimous albeit with concurring opinions.

In 1998, in a five to four decision, the Court decided that a school district was not liable for a high school teacher's sexual harassment of a female student. The teacher and student were caught having an affair but the administration was not aware of the situation. See *Gebser v. Lago Vista Independent School District,* 524 U.S. 274 (1998). A year later the Court decided another Title IX case that received some attention from the media. The case of *Davis v. Monroe County Board Of Education,* 526 U.S. 629 (1999) involved an allegation that a fifth grade male student sexually harassed one of his female classmates thereby creating a hostile environment. The girl's mother alleged that school authorities were told about the situation and they refused to investigate or to separate the two students. In another five to four decision, this time with Justice O'Connor aligning with Stevens, Souter, Ginsburg and Breyer, she turned the *Gebser* majority into dissenters and decided that the school district was liable. The major variables that seem to incur liability in Title IX cases are whether someone with the authority to resolve a sexual harassment situation is made aware of the problem and whether steps are taken to resolve it. If there is no administrative knowledge, then there is no liability. Administrative knowledge along with insufficient or nonexistent remedies constitutes what courts call *deliberate indifference,* and that will bring damages as well as injunctive relief.

Title VII cases under the 1964 Civil Rights Act are not as clear-cut as the Education Act cases. That is because there are two forms of discrimination involved: discrimination against workers because of their gender and discrimination between males and females in terms of compensation, promotion, assignment, and so on. For example, a study of Texas school superintendents showed that women comprised 75 percent of the teachers, 51 percent of the assistant principals, 47 percent of the principals, and 36 percent of assistant superintendents, but only 8 percent of the superintendents.[38] This is what is known as the "glass ceiling." Second and of more importance to our discussion here, the Equal Employment Opportunity Commission has adopted guidelines on sexual harassment that create two forms of sexual harassment.[39] There is quid pro quo harassment where a person in authority over a worker uses that authority in an attempt to extract sexual favors. There is also a hostile environment where again, usually (but not necessarily), a person in authority makes an employee uncomfortable by sexual innuendo, language, or deeds. More cases involve hostile environment than quid pro quo, but an early case of the latter is *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986). The plaintiff was hired by the defendant, who was a bank vice president. She started as a teller trainee and advanced to teller, supervisor, and eventually branch manager over her four-year employment. During that time, she allegedly had sex with the vice president 40 or 50 times out of fear of losing her job. All parties, however, agree that the promotions were based on merit. Her case was dismissed at the trial court because the judge said that she could not recover under Title VII unless she could demonstrate economic or physical injury from the alleged harassment. The Supreme Court reversed and said that the fact of the harassment *is* the injury under Title VII, and a plaintiff need not show economic or psychological injury to sustain the suit.

One of the first hostile work environment cases was *Harris v. Forklift Systems,* 510 U.S. 17 (1993). Here, the plaintiff alleged that the president of the equipment rental company created an abusive work environment that eventually forced her to quit. This is known in legal parlance as a *constructive discharge.* It means in law, if not in fact, or to put it another way, "as if."[40] It means that the employer made the work environment so hostile that the employee was left with no choice but to quit. At trial, the plaintiff alleged that the president, in front of other employees, called her a "dumb ass woman," suggested that they go

to a hotel to negotiate her raise, asked her to fetch coins out of his front pants pockets, and threw objects on the floor in front of her and asked her to pick them up. The trial judge sided with Forklift Systems, saying that the plaintiff could not show psychological injury from the treatment she had received, which he called a "close call" on the question of creating a hostile work environment. One of the main issues at the Supreme Court was what the plaintiff must show to establish a hostile work environment. Unanimously reversing the trial judge, the Court said that a hostile work environment depends on how frequent and severe the offensive behavior is, whether the offensive behavior is physically threatening or emotionally humiliating, and whether the behavior interferes with the employee's ability to perform the work.

The question before the Court in *Oncale v. Sundowner Offshore Services,* 523 U.S. 75 (1998), was whether a male plaintiff could sue under Title VII for a hostile work environment created by other male employees. The answer is yes; Title VII's prohibition on sex discrimination is not limited to male/female situations.

The concept of vicarious liability, discussed in Chapter 10, is familiar to managers in either the private or the public/nonprofit sector. The concept simply means that sometimes, an employer is liable for the acts of employees. This is the case whether the employer was aware of the employee's behavior or not. The court heard two cases in 1998 that dealt with situations in which an employer could be held liable for the hostile work environment created by management or other employees. One case, *Burlington Industries v. Ellerth,* 524 U.S. 742 (1998), comes from the private sector and the other case, *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998), originated in the public sector. The 1964 Civil Rights Act applies to both.

In the *Burlington Industries* case, the plaintiff was allegedly harassed by a supervisor once removed (not her immediate supervisor), who made threats against her continuing employment if she did not "loosen up" and have sex with him. These threats were never carried out, however, and indeed during the period of harassment, the plaintiff was promoted. She was aware that the company had a policy against sexual harassment, but she never lodged a complaint because she knew it would go through the desk of her harasser. She eventually quit (again a potential constructive discharge) and sued. The question was whether Burlington Industries could be held liable for the sexual harassment of a mid-level manager when it had no knowledge of the behavior. To solve this question, the Court turned to the common law of agency or judge-made law about when one person (employee) acts as the agent of another (employer). It also turned to a concept called the *restatement (second)* of agency. A *restatement,* a legal work published by the American Law Institute, is a compilation by judges, lawyers, and legal scholars that describes the law in a given area and suggests the direction it may go.[41] From these sources, the Court indicated that generally an employer is liable for the acts on an employee if the act occurred within the scope of employment. Also, for the most part, when an employee engages in sexual harassment, it is not within the scope of employment.

There are several exceptions regarding when an employee can incur liability against the employer, even acting outside the scope of employment. If supervisors rely on their apparent authority to accomplish the harassment or if they were aided in the harassment by the existence of the agency relationship, the employer may be liable. Ellerth successfully carried her burden of proof to establish potential liability for Burlington. The Court, however, said that an employer could avoid liability by establishing what is now referred to as the *Ellerth/Faragher defense.* First, if an employer can show that it took reasonable measures

to correct the situation and, second, that the allegedly harassed employee failed to take reasonable action to avoid the situation, the employer can avoid liability. This is what is known as an *affirmative defense,* which means that defendants who attempt to use it will need to carry the burden of proof (by a preponderance of the evidence). Because Burlington might be able to prove that Ellerth failed to take reasonable action to avoid the situation (by not going through the complaint channels), the case was returned to the lower courts. In this case, the Court downplayed the importance of the distinction between quid pro quo and hostile environment because what started out as a quid pro quo situation turned out in the end to be a hostile environment because the threats were not carried out.

In the *Faragher* case, a female ocean life guard for the city of Boca Raton was allegedly forced to quit her job due to uninvited and offensive touching and lewd remarks from her three supervisors. She sued both the supervisors and the city (i.e., the employer). The city raised the defense against liability by saying it had a sexual harassment policy in place and the plaintiff did not avail herself of it. The problem was that the city failed to distribute its policy to all employees, so that neither the three supervisors nor the victim were aware of it; hence, the city had failed to meet its burden in raising the affirmative defense. When constructive discharge is caused by *tangible employment action* (the employer fires, demotes, reassigns, transfers, etc., the affected employee), the affirmative defense to vicarious liability for sexual harassment is not available to employers. The 2004 case of *Pennsylvania State Police v. Suders* addresses that issue and appears at the end of this chapter.

Future Issues in the Law of Public Employment

Look for various forms of clashes between public employees and employers over privacy. Expect expanded demands for urine drug tests as a pre-employment criterion as well as randomly throughout employment. There could be expanded use of lie detectors and videotaping of employees during their entire shift at work. Finally, employers are increasingly looking to see where their employees go on the World Wide Web. Local governments are increasingly requiring that anyone on the payroll live in the jurisdiction, a concept the Supreme Court has upheld.[42]

Summary

1. Public employees can be categorized as either probationary or permanent employees. Only permanent employees have a property interest in their job.
2. The right to a pretermination hearing is contingent on the ability to demonstrate either a property or a liberty interest.
3. Given a property interest, the right to a predeprivation or predisciplinary hearing depends on the balancing interests from *Mathews v. Eldridge.*
4. Because probationary employees lack a property interest, they must rely on the establishment of a liberty interest.
5. Liberty interests are established in one of two ways: (a) if publicly stated reasons for termination cause damage to one's reputation and/or ability to seek employment in the field, and (b) if the primary reason behind the decision to terminate an employee was the employee's exercise of a constitutionally protected right.

6. The range of constitutionally protected expression is more narrow for public employees than it is for all other citizens (expression that hampers the working relationship between an employee and an administrator is not protected).
7. Employees with a property interest can be terminated for cause (or financial exigency), but a pretermination hearing is required.
8. Government discrimination generally falls under the jurisdiction of the equal protection clause of the Fourteenth Amendment or the Civil Rights Act of 1964. Although the Act was aimed at private discrimination initially, it now applies to government discrimination as well because such discrimination has a significant effect on interstate commerce.
    a. Official (as opposed to private), racial discrimination must be purposeful before it can be illegal. If a plaintiff demonstrates that governmental racial discrimination is purposeful, then the burden of proof switches to the government to demonstrate a compelling interest in the policy. Rarely if ever can states meet the equal protection compelling-interest test.
    b. Other forms of social and economic discrimination must meet the middle tier of equal protection analysis. To have the program or policy survive, government must show: (a) an important governmental objective and (b) that the policy is rationally related to the achievement of that objective.
    c. Affirmative action programs are constitutional so long as race is simply one among many criteria, but race cannot be the sole criterion. Indeed, whether affirmative action, redistricting, child custody, USDA loans to farmers, or racial profiling, race conscious decisions always violate the Constitution. The exception is actions to eradicate the effects of specifically identifiable past invidious discrimination.
9. Sexual harassment falls under the 1964 Civil Rights Act.
    a. There two kinds of sexual harassment, quid pro quo and hostile environment, but the distinction makes no difference in vicarious liability suits.
    b. To sue under quid pro quo, a plaintiff must carry the burden of proof that the harassment happened. The plaintiff need not submit evidence of injury in the form of psychological, physical, emotional, or economic injury. The injury is the sexual abuse.
    c. To succeed in a hostile environment suit, the plaintiff needs to prove the working environment was hostile as opposed to uncivil. To do that, the plaintiff needs to show that the offensive behavior: (a) was either frequent or severe, (b) was either physically threatening or emotionally humiliating; and (c) interfered with the ability to perform the work. If the plaintiff can establish the hostility of the working environment, he or she need not necessarily submit evidence of economic injury. The harassing atmosphere is the injury. Legally, the injury is the change in terms or conditions of employment because of sex, which is what the Civil Rights Act forbids. Often, the concept of a constructive discharge comes into play in these cases.
    d. Vicarious liability for the employer can be established by showing that a supervisor: (a) relied on his or her apparent authority to accomplish the harassment or (b) was aided in the harassment by the existence of the agency relationship to the employer.

(1) An employer can defend against vicarious liability by establishing what is now referred to as the *Ellerth/Faragher* defenses: (a) that the employer took reasonable measures to prevent or discourage employees from engaging in sexual harassment or that it discovered the harassing behavior and took reasonable steps to stop it and (b) that the complaining employee failed to take appropriate steps to alleviate the situation (e.g., failed to file an internal harassment grievance). A strong policy against sexual harassment distributed to all employees along with training and accompanied by a procedural short-circuit, so that a complaining employee will not end up routing the complaint to the harasser, will generally establish the first part of the defense.

(2) The *Ellerth/Faragher* defense is not available to an employer where there was a hostile work environment and tangible employment action (discharge, demotion, reassignment, etc.).

(3) A hostile work environment plaintiff who is also suing for constructive discharge under vicarious liability must show that working conditions were so intolerable that a reasonable person would have felt compelled to resign. If there is no tangible employment action, the *Ellerth/Faragher* defense is available. If there is tangible employment action, the employer is liable (no defense is available).

(4) It is the kiss of death for an employer to have evidence presented that the employer was aware of a harassment situation and did nothing. This is also true where an employer perhaps did not know but *should* have known that a problem might exist. An employer should have known, for example, if there was no harassment policy, it was not distributed to all employees, or it existed but was not taken seriously or not enforced (as in the *Faragher* case).

END-OF-CHAPTER CASES

Bishop v. Wood
426 U.S. 341 (1976)

The facts are contained in the opinion written by Justice Stevens, joined by Justices Burger, Stewart, Powell, and Rehnquist. Justices White, Brennan, Marshall, and Blackmun dissented.

The questions for us to decide are (1) whether petitioner's employment status was a property interest protected by the Due Process Clause of the Fourteenth Amendment, and (2) assuming that the explanation for his discharge was false, whether that false explanation deprived him of an interest in liberty protected by that Clause.

I

Petitioner was employed by the city of Marion as a probationary policeman on June 9, 1969. After six months he became a permanent employee. He was dismissed on March 31, 1972. He claims that he had either an express or an implied right to continued employment. A city ordinance provides that a permanent

employee may be discharged if he fails to perform work up to the standard of his classification, or if he is negligent, inefficient, or unfit to perform his duties. Petitioner first contends that even though the ordinance does not expressly so provide, it should be read to prohibit discharge for any other reason, and therefore to confer tenure on all permanent employees. In addition, he contends that his period of service, together with his "permanent" classification, gave him a sufficient expectancy of continued employment to constitute a protected property interest. A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law. The North Carolina Supreme Court has held that an enforceable expectation of continued public employment in that State can exist only if the employer, by statute or contract, has actually granted some form of guarantee. *Still v. Lance,* 279 N.C. 254, 182 S.E. 2d 403 (1971). Whether such a guarantee has been given can be determined only by an examination of the particular statute or ordinance in question. On its face the ordinance on which petitioner relies may fairly be read as conferring such a guarantee. However, such a reading is not the only possible interpretation; the ordinance may also be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures.

We do not have any authoritative interpretation of this ordinance by a North Carolina state court. We do, however, have the opinion of the United States District Judge who, of course, sits in North Carolina and practiced law there for many years. Based on his understanding of state law, he concluded that petitioner "held his position at the will and pleasure of the city." This construction of North Carolina law was upheld by the Court of Appeals for the Fourth Circuit, albeit by an equally divided court. In comparable circumstances, this Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion. In this case, as the District Court construed the ordinance, the City Manager's determination of the adequacy of the grounds for discharge is not subject to judicial review; the employee is merely given certain procedural rights which the District Court found not to have been violated in this case. The District Court's reading of the ordinance is tenable; it derives some support from a decision of the North Carolina Supreme Court, *Still v. Lance,* supra; and it was accepted by the Court of Appeals for the Fourth Circuit. These reasons are sufficient to foreclose our independent examination of the state-law issue.

Under that view of the law, petitioner's discharge did not deprive him of a property interest protected by the Fourteenth Amendment.

II

Petitioner's claim that he has been deprived of liberty has two components. He contends that the reasons given for his discharge are so serious as to constitute a stigma that may severely damage his reputation in the community; in addition, he claims that those reasons were false.

In our appraisal of petitioner's claim we must accept his version of the facts since the District Court granted summary judgment against him. His evidence established that he was a competent police officer; that he was respected by his peers; that he made more arrests than any other officer on the force; that although he had been criticized for engaging in high-speed pursuits, he had promptly heeded such criticism; and that he had a reasonable explanation for his imperfect attendance at police training sessions. We must therefore assume that his discharge was a mistake and based on incorrect information. In *Board of Regents v. Roth,* 408 U.S. 564, we recognized that the nonretention of an untenured college teacher might make him somewhat less attractive to other employers, but nevertheless concluded that it would stretch the concept too far "to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." Id.,

at 575. This same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge.

In this case the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private and also were stated in writing in answer to interrogatories after this litigation commenced. Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his "good name, reputation, honor, or integrity" was thereby impaired. And since the latter communication was made in the course of a judicial proceeding which did not commence until after petitioner had suffered the injury for which he seeks redress, it surely cannot provide retroactive support for his claim. A contrary evaluation of either explanation would penalize forthright and truthful communication between employer and employee in the former instance, and between litigants in the latter. Petitioner argues, however, that the reasons given for his discharge were false. Even so, the reasons stated to him in private had no different impact on his reputation than if they had been true. And the answers to his interrogatories, whether true or false, did not cause the discharge.

The truth or falsity of the City Manager's statement determines whether or not his decision to discharge the petitioner was correct or prudent, but neither enhances nor diminishes petitioner's claim that his constitutionally protected interest in liberty has been impaired. A contrary evaluation of his contention would enable every discharged employee to assert a constitutional claim merely by alleging that his former supervisor made a mistake. The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error.

In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions. The judgment is affirmed.

So ordered.

Waters v. Churchill
511 U.S. 661 (1994)

Opinion is by Justice O'Connor joined by the Chief Justice and Justice Ginsburg. Justice Souter filed a concurring opinion as did Justice Scalia, joined by Justices Kennedy and Thomas. Justice Stevens dissented, joined by Justice Blackmun.

In *Connick v. Myers,* 461 U.S. 138 (1983), we set forth a test for determining whether speech by a government employee may, consistently with the First Amendment, serve as a basis for disciplining or discharging that employee. In this case, we decide whether the Connick test should be applied to what the government employer thought was said, or to what the trier of fact ultimately determines to have been said.

I

This case arises out of a conversation that respondent Cheryl Churchill had on January 16, 1987, with Melanie Perkins-Graham. Both Churchill and Perkins-Graham were nurses working at McDonough District Hospital; Churchill was in the obstetrics department, and Perkins-Graham was considering transferring to that department. The conversation took place at

work during a dinner break. Petitioners heard about it, and fired Churchill, allegedly because of it. There is, however, a dispute about what Churchill actually said, and therefore about whether petitioners were constitutionally permitted to fire Churchill for her statements.

The conversation was overheard in part by two other nurses, Mary Lou Ballew and Jean Welty, and by Dr. Thomas Koch, the clinical head of obstetrics. A few days later, Ballew told Cynthia Waters, Churchill's supervisor, about the incident. According to Ballew, Churchill took "the cross trainee into the kitchen for . . . at least 20 minutes to talk about [Waters] and how bad things are in [obstetrics] in general." Ballew said that Churchill's statements led Perkins-Graham to no longer be interested in switching to the department.

Shortly after this, Waters met with Ballew a second time for confirmation of Ballew's initial report. Ballew said that Churchill "was knocking the department" and that "in general [Churchill] was saying what a bad place [obstetrics] is to work." Ballew said she heard Churchill say Waters "was trying to find reasons to fire her." Ballew also said Churchill described a patient complaint for which Waters had supposedly wrongly blamed Churchill.

Waters, together with petitioner Kathleen Davis, the hospital's vice president of nursing, also met with Perkins-Graham, who told them that Churchill "had indeed said unkind and inappropriate negative things about [Waters]." Also, according to Perkins-Graham, Churchill mentioned a negative evaluation that Waters had given Churchill, which arose out of an incident in which Waters had cited Churchill for an insubordinate remark. The evaluation stated that Churchill "promotes an unpleasant atmosphere and hinders constructive communication and cooperation," and "exhibits negative behavior towards [Waters] and [Waters'] leadership through her actions and body language"; the evaluation said Churchill's work was otherwise satisfactory. Churchill allegedly told Perkins-Graham that she and Waters had discussed the evaluation, and that Waters "wanted to wipe the slate clean . . . but [Churchill thought] this wasn't possible." Churchill also allegedly told Perkins-Graham "that just in general things were not good in OB and hospital administration was responsible." Churchill specifically mentioned Davis, saying Davis "was ruining MDH." Perkins-Graham told Waters that she knew Waters and Davis "could not tolerate that kind of negativism."

Churchill's version of the conversation is different. For several months, Churchill had been concerned about the hospital's "cross-training" policy, under which nurses from one department could work in another when their usual location was overstaffed. Churchill believed this policy threatened patient care because it was designed not to train nurses but to cover staff shortages, and she had complained about this to Davis and Waters. According to Churchill, the conversation with Perkins-Graham primarily concerned the cross-training policy. Churchill denies that she said some of what Ballew and Perkins-Graham allege she said. She does admit she criticized Kathy Davis, saying her staffing policies threatened to "ruin" the hospital because they "seemed to be impeding nursing care." She claims she actually defended Waters and encouraged Perkins-Graham to transfer to obstetrics.

Koch's and Welty's recollections of the conversation match Churchill's. Davis and Waters, however, never talked to Koch or Welty about this, and they did not talk to Churchill until the time they told her she was fired. Moreover, Churchill claims, Ballew was biased against Churchill because of an incident in which Ballew apparently made an error and Churchill had to cover for her.

After she was discharged, Churchill filed an internal grievance. The president of the hospital, petitioner Stephen Hopper, met with Churchill in regard to this and heard her side of the story. He then reviewed Waters' and Davis' written reports of their conversations with Ballew and Perkins-Graham, and had Bernice Magin, the hospital's vice president of human resources, interview Ballew one more time. After considering all this, Hopper rejected Churchill's grievance.

Churchill then sued under 42 U.S.C. § 1983, claiming that the firing violated her First Amendment rights because her speech was protected under *Connick v. Myers,* 461 U.S. 138

(1983). In May 1991, the United States District Court for the Central District of Illinois granted summary judgment to petitioners. The Court held that neither version of the conversation was protected under *Connick*. . . . Therefore, the court held, management could fire Churchill for the conversation with impunity.

The United States Court of Appeals for the Seventh Circuit reversed. 977 F.2d 1114 (1992). The court held that Churchill's speech, viewed in the light most favorable to her, was protected speech under the *Connick* test: It was on a matter of public concern—"the hospital's [alleged] violation of state nursing regulations as well as the quality and level of nursing care it provides its patients," and it was not disruptive.

The court also concluded that the inquiry must turn on what the speech actually was, not on what the employer thought it was.

II

[1] There is no dispute in this case about when speech by a government employee is protected by the First Amendment.

The dispute is over how the factual basis for applying the test—what the speech was, in what tone it was delivered, what the listener's reactions were, is to be determined. Should the court apply the *Connick* test to the speech as the government employer found it to be, or should it ask the jury to determine the facts for itself? The Court of Appeals held that the employer's factual conclusions were irrelevant, and that the jury should engage in its own fact finding. Petitioners argue that the employer's factual conclusions should be dispositive. Respondents take a middle course: They suggest that the court should accept the employer's factual conclusions, but only if those conclusions were arrived at reasonably, something they say did not happen here.

We agree that it is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures. This is why we have often held some procedures—a particular allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review, and so on—to be constitutionally required in proceedings that may penalize protected speech. See *Freedman v. Maryland,* 380 U.S. 51 (1965) (government must bear burden of proving that speech is unprotected); *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767 (1986) (libel plaintiff must bear burden of proving that speech is false); *Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496 (1991) (actual malice must be proved by clear and convincing evidence); *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485 (1984) (appellate court must make independent judgment about presence of actual malice).

[2] These cases establish a basic First Amendment principle: Government action based on protected speech may under some circumstances violate the First Amendment even if the government actor honestly believes the speech is unprotected. . . .

Nonetheless, not every procedure that may safeguard protected speech is constitutionally mandated. True, the procedure adopted by the Court of Appeals may lower the chance of protected speech being erroneously punished. A speaker is more protected if she has two opportunities to be vindicated—first by the employer's investigation and then by the jury—than just one. But each procedure involves a different mix of administrative burden, risk of erroneous punishment of protected speech, and risk of erroneous exculpation of unprotected speech. Though the First Amendment creates a strong presumption against punishing protected speech even inadvertently, the balance need not always be struck in that direction. We have never, for instance, required proof beyond a reasonable doubt in civil cases where First Amendment interests are at stake, though such a requirement would protect speech more than the alternative standards would. . . .

We have never set forth a general test to determine when a procedural safeguard is required by the First Amendment—just as we have never set forth a general test to determine what constitutes a compelling state interest, see *Boos v. Barry,* 485 U.S. 312 (1988), or what categories of speech are so lacking in value that

they fall outside the protection of the First Amendment, *New York v. Ferber,* 458 U.S. 747 (1982), or many other matters—and we do not purport to do so now. But though we agree with Justice Scalia that the lack of such a test is inconvenient, this does not relieve us of our responsibility to decide the case that is before us today. Both Justice Scalia and we agree that some procedural requirements are mandated by the First Amendment and some are not. None of us have discovered a general principle to determine where the line is to be drawn. We must therefore reconcile ourselves to answering the question on a case-by-case basis, at least until some workable general rule emerges.

[3] Accordingly, all we say today is that the propriety of a proposed procedure must turn on the particular context in which the question arises—on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase. And to evaluate these factors here we have to return to the issue we dealt with in *Connick* and in the cases that came before it: What is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?

B

[4] We have never explicitly answered this question, though we have always assumed that its premise is correct—that the government as employer indeed has far broader powers than does the government as sovereign. See, *Pickering,* supra, at 568 (1973); *Connick,* 461 U.S., at 147. This assumption is amply borne out by considering the practical realities of government employment, and the many situations in which, we believe, most observers would agree that the government must be able to restrict its employees' speech.

To begin with, even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees. The First Amendment demands a tolerance of "verbal tumult, discord, and even offensive utterance," as "necessary side effects of . . . the process of open debate," *Cohen v. California,* 403 U.S. 15 (1971). But we have never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public, or to the people with whom they work. "Under the First Amendment there is no such thing as a false idea," *Gertz,* supra, at 339, the "fitting remedy for evil counsels is good ones," *Whitney v. California,* 274 U.S. 357 (1927) (Brandeis, J., concurring). But when an employee counsels her coworkers to do their job in a way with which the public employer disagrees, her managers may tell her to stop, rather than relying on counter-speech. The First Amendment reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). But though a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing. Cf. *Branti v. Finkel,* 445 U.S. 507 (1980). Even something as close to the core of the First Amendment as participation in political campaigns may be prohibited to government employees. *Broadrick v. Oklahoma,* 413 U.S. 601 (1973); *Public Workers v. Mitchell,* 330 U.S. 75 (1947).

[5] Government employee speech must be treated differently with regard to procedural requirements as well. For example, speech restrictions must generally precisely define the speech they target. *Baggett v. Bullitt,* 377 U.S. 360, 367–368 (1964); *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 55 (1988). Yet surely a public employer may, consistently with the First Amendment, prohibit its employees from being "rude to customers," a standard almost certainly too vague when applied to the public at large. Cf. *Arnett v. Kennedy,* 416 U.S. 134, 158–162 (1974) (plurality opinion) (upholding a regulation that allowed discharges for speech which hindered the "efficiency of the service"); id., at 164 (Powell, J., concurring in part and concurring in result in part) (agreeing on this point).

Likewise, we have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative. One could make a respectable argument that political activity by government employees is generally not harmful, see *Public Workers v. Mitchell,* supra, 330 U.S. at 99, 67 S.Ct., at 569, or that high officials should allow more public dissent by their subordinates, see *Connick,* supra, 461 U.S., at 168–169 (Brennan, J., dissenting); Whistleblower Protection Act of 1989, 103 Stat. 16, or that even in a government workplace the free market of ideas is superior to a command economy. But we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential. Compare, e.g., *Connick,* supra, at 151-152; *Letter Carriers,* supra, 413 U.S., at 566–567 with *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 129 (1989); *Texas v. Johnson,* 491 U.S. 397, 409 (1989). Similarly, we have refrained from intervening in government employer decisions that are based on speech that is of entirely private concern. Doubtless some such speech is sometimes nondisruptive; doubtless it is sometimes of value to the speakers and the listeners. But we have declined to question government employers' decisions on such matters. *Connick,* supra, 461 U.S., at 146–149.

[6] This does not, of course, show that the First Amendment should play no role in government employment decisions. Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions, *Pickering v. Board of Ed. of Township High School Dist.,* 391 U.S., at 572. And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished. See, e.g., *Rankin v. McPherson,* 483 U.S. 378, 388 (1987); *Connick,* 461 U.S., at 152; *Pickering,* supra, 391 U.S., at 569–571. Moreover, the government may certainly choose to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment, values central to our social order as well as our legal system. See, e.g., Whistleblower Protection Act of 1989, supra.

[7] But the above examples do show that constitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign. The restrictions discussed above are allowed not just because the speech interferes with the government's operation. Speech by private people can do the same, but this does not allow the government to suppress it.

Rather, the extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. The reason the governor may, in the example given above, fire the deputy is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively.

[8] The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one

when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

C

1

The problem with the Court of Appeals' approach—under which the facts to which the *Connick* test is applied are determined by the judicial fact finder—is that it would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court. The government manager would have to ask not what conclusions she, as an experienced professional, can draw from the circumstances, but rather what conclusions a jury would later draw. If she relies on hearsay, or on what she knows about the accused employee's character, she must be aware that this evidence might not be usable in court. If she knows one party is, in her personal experience, more credible than another, she must realize that the jury will not share that personal experience. If she thinks the alleged offense is so egregious that it is proper to discipline the accused employee even though the evidence is ambiguous, she must consider that a jury might decide the other way.

[9] But employers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores. Such reliance may sometimes be the most effective way for the employer to avoid future recurrences of improper and disruptive conduct. What works best in a judicial proceeding may not be appropriate in the employment context. If one employee accuses another of misconduct, it is reasonable for a government manager to credit the allegation more if it is consistent with what the manager knows of the character of the accused. Likewise, a manager may legitimately want to discipline an employee based on complaints by patrons that the employee has been rude, even though these complaints are hearsay.

[10] On the other hand, we do not believe that the court must apply the *Connick* test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions. Even in situations where courts have recognized the special expertise and special needs of certain decisionmakers, the deference to their conclusions has never been complete. Cf. *New Jersey v. T.L.O.,* 469 U.S. 325, 342–343 (1985); *United States v. Leon,* 468 U.S. 897, 914 (1984); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 490–491 (1951). It is necessary that the decisionmaker reach its conclusion about what was said in good faith, rather than as a pretext; but it does not follow that good faith is sufficient. Justice Scalia is right in saying that we have often held various laws to require only an inquiry into the decisionmaker's intent, see post, at 1895, but, as discussed supra in Part II-A, this has not been our view of the First Amendment.

We think employer decision making will not be unduly burdened by having courts look to the facts as the employer reasonably found them to be. It may be unreasonable, for example, for the employer to come to a conclusion based on no evidence at all. Likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available—if, for instance, an employee is accused of writing an improper letter to the editor, and instead of just reading the letter, the employer decides what it said based on unreliable hearsay.

[11] If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care. This need not be the care with which trials, with their rules of evidence and procedure, are conducted. It should, however, be the care that a reasonable manager would use before making an employment decision—discharge, suspension, reprimand, or whatever else—of the sort involved in the particular case. Justice Scalia correctly points out

that such care is normally not constitutionally required unless the employee has a protected property interest in her job, post, at 1894; see also *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 576–578 (1972); but we believe that the possibility of inadvertently punishing someone for exercising her First Amendment rights makes such care necessary. . . .

Of course, there will often be situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion. In those situations, many different courses of action will necessarily be reasonable. Only procedures outside the range of what a reasonable manager would use may be condemned as unreasonable.

III

[13] Applying the foregoing to this case, it is clear that if petitioners really did believe Perkins-Graham's and Ballew's story, and fired Churchill because of it, they must win. Their belief, based on the investigation they conducted, would have been entirely reasonable. After getting the initial report from Ballew, who overheard the conversation, Waters and Davis approached and interviewed Perkins-Graham, and then interviewed Ballew again for confirmation. In response to Churchill's grievance, Hopper met directly with Churchill to hear her side of the story, and instructed Magin to interview Ballew one more time. Management can spend only so much of their time on any one employment decision. By the end of the termination process, Hopper, who made the final decision, had the word of two trusted employees, the endorsement of those employees' reliability by three hospital managers, and the benefit of a face-to-face meeting with the employee he fired. With that in hand, a reasonable manager could have concluded that no further time needed to be taken. As respondents themselves point out, "if the belief an employer forms supporting its adverse personnel action is 'reasonable,' an employer has no need to investigate further."

[14] And under the *Connick* test, Churchill's speech as reported by Perkins-Graham and Ballew was unprotected. Even if Churchill's criticism of cross-training reported by Perkins-Graham and Ballew was speech on a matter of public concern—something we need not decide—the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had. According to Ballew, Churchill's speech may have substantially dampened Perkins-Graham's interest in working in obstetrics. Discouraging people from coming to work for a department certainly qualifies as disruption. Moreover, Perkins-Graham perceived Churchill's statements about Waters to be "unkind and inappropriate," and told management that she knew they could not continue to "tolerate that kind of negativism" from Churchill. This is strong evidence that Churchill's complaining, if not dealt with, threatened to undermine management's authority in Perkins-Graham's eyes. And finally, Churchill's statement, as reported by Perkins-Graham, that it "wasn't possible" to "wipe the slate clean" between her and Waters could certainly make management doubt Churchill's future effectiveness. As a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value the speech might have had.

[15] This is so even if, as Churchill suggests, Davis and Waters were "[d]eliberately [i]ndifferent," to the possibility that much of the rest of the conversation was solely about cross-training. So long as Davis and Waters discharged Churchill only for the part of the speech that was either not on a matter of public concern, or on a matter of public concern but disruptive, it is irrelevant whether the rest of the speech was, unbeknownst to them, both on a matter of public concern and nondisruptive. The *Connick* test is to be applied to the speech for which Churchill was fired. Cf. *Connick,* supra, 461 U.S., at 149, 103 S.Ct., at 1691 (evaluating the disruptiveness of part of plaintiff's speech because that part was "upon a matter of public concern and contributed to [plaintiff's] discharge" (emphasis added)); *Mt. Healthy,* supra, 429 U.S., at 286–287. An employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements.

Nonetheless, we agree with the Court of Appeals that the District Court erred in granting summary judgment in petitioners' favor. Though Davis and Waters would have been justified in firing Churchill for the statements outlined above, there remains the question whether Churchill was actually fired because of those statements, or because of something else. See *Mt. Healthy,* supra, at 286–287.

Rather, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

So ordered.

Justice Stevens, with whom Justice Blackmun joins, dissenting.

This is a free country. Every American has the right to express an opinion on issues of public significance. In the private sector, of course, the exercise of that right may entail unpleasant consequences. Absent some contractual or statutory provision limiting its prerogatives, a private-sector employer may discipline or fire employees for speaking their minds. The First Amendment, however, demands that the Government respect its employees' freedom to express their opinions on issues of public importance. As long as that expression is not unduly disruptive, it simply may not provide the basis for discipline or termination. The critical issues in a case of this kind are (1) whether the speech is protected, and (2) whether it was the basis for the sanction imposed on the employee.

Applying these standards to the case before us is quite straightforward. Everyone agrees that respondent Cheryl Churchill was fired because of what she said in a conversation with co-workers during a dinner break. Given the posture in which this case comes to us, we must assume that Churchill's statements were fully protected by the First Amendment. Nevertheless, the plurality concludes that a dismissal for speech is valid as a matter of law as long as the public employer reasonably believed that the employee's speech was unprotected. This conclusion is erroneous because it provides less protection for a fundamental constitutional right than the law ordinarily provides for less exalted rights, including contractual and statutory rights applicable in the private sector.

If, for example, a hospital employee had a contract providing that she could retain her job for a year if she followed the employer's rules and did competent work, that employee could not be fired because her supervisor reasonably but mistakenly believed she had been late to work or given a patient the wrong medicine. Ordinarily, when someone acts to another person's detriment based upon a factual judgment, the actor assumes the risk that an impartial adjudicator may come to a different conclusion. Our legal system generally delegates the determination of facts upon which important rights depend to neutral factfinders, notwithstanding the attendant risks of error and overdeterrence.

Federal constitutional rights merit at least the normal degree of protection. Doubts concerning the ability of juries to find the truth, an ability for which we usually have high regard, should be resolved in favor of, not against, the protection of First Amendment rights. See, e.g., *New York Times Co. v. Sullivan,* 376 U.S. 254, 279–280 (1964). Unfortunately, the plurality underestimates the importance of freedom of speech for the more than 18 million civilian employees of this country's Federal, State, and local Governments, and subordinates that freedom to an abstract interest in bureaucratic efficiency. The need for governmental efficiency that so concerns the plurality is amply protected by the substantive limits on public employees' rights of expression. See generally *Connick v. Myers,* 461 U.S. 138 (1983); *Pickering v. Board of Ed. of Township High School Dist.,* 391 U.S. 563 (1968). Efficiency does not demand an additional layer of deference to employers' "reasonable" factual errors. Today's ruling will surely deter speech that would be fully protected under *Pickering* and *Connick*.

The plurality correctly points out that we have never decided whether the governing version of the facts in public employment free speech cases is "what the government employer thought was said, or . . . what the trier of fact ultimately determines to have been said." Ante, at 1882. To me it is clear that the latter must be controlling. The First Amendment assures public employees that they may express their

views on issues of public concern without fear of discipline or termination as long as they do so in an appropriate manner and at an appropriate time and place. A violation occurs when a public employee is fired for uttering speech on a matter of public concern that is not unduly disruptive of the operations of the relevant agency. The violation does not vanish merely because the firing was based upon a reasonable mistake about what the employee said. A First Amendment claimant need not allege bad faith; the controlling question is not the regularity of the agency's investigative procedures, or the purity of its motives, but whether the employee's freedom of speech has been "abridged."

The risk that a jury may ultimately view the facts differently from even a conscientious employer, is not, as the plurality would have it, a needless fetter on public employers' ability to discharge their duties. It is the normal means by which our legal system protects legal rights and encourages those in authority to act with care. Here, for example, attention to "conclusions a jury would later draw," ante, at 1888, about the content of Churchill's speech might have caused petitioners to talk to Churchill about what she said before deciding to fire her. There is nothing unfair or onerous about putting the risk of error on an employer in these circumstances.

Government agencies are often the site of sharp differences over a wide range of important public issues. In offices where the First Amendment commands respect for candid deliberation and individual opinion, such disagreements are both inevitable and desirable. When those who work together disagree, reports of speech are often skewed, and supervisors are apt to misconstrue even accurate reports. The plurality, observing that managers "can spend only so much of their time on any one employment decision," ante, at 1890, adopts a rule that invites discipline, rather than further discussion, when such disputes arise. That rule is unwise, for deliberation within the government, like deliberation about it, is an essential part of our "profound national commitment" to the freedom of speech. Cf. *New York Times,* 376 U.S., at 270. A proper regard for that principle requires that, before firing a public employee for her speech, management get its facts straight.

I would affirm the judgment of the Court of Appeals.

Cleveland Board Of Education v. Loudermill
470 U.S. 532 (1985)

Justice White delivered the opinion of the Court, joined by Chief Justice Burger and Justices Blackmun, Powell, Stevens, and O'Connor. Justice Marshall concurred, Justice Brennan concurred in part and dissented in part, and Justice Rehnquist dissented.

In these cases we consider what pretermination process must be accorded a public employee who can be discharged only for cause.

I

In 1979 the Cleveland Board of Education, petitioner in No. 83–1362, hired respondent James Loudermill as a security guard. On his job application, Loudermill stated that he had never been convicted of a felony. Eleven months later, as part of a routine examination of his employment records, the Board discovered that in fact Loudermill had been convicted of grand larceny in 1968. By letter dated November 3, 1980, the Board's Business Manager informed Loudermill that he had been dismissed because of his dishonesty in filling out the employment application. Loudermill was not afforded an opportunity to respond to the charge of dishonesty or to challenge his dismissal. On November 13, the Board adopted a resolution officially approving the discharge. Under Ohio law, Loudermill was a "classified

civil servant." Such employees can be terminated only for cause, and may obtain administrative review if discharged. Pursuant to this provision, Loudermill filed an appeal with the Cleveland Civil Service Commission on November 12. The Commission appointed a referee, who held a hearing on January 29, 1981. Loudermill argued that he had thought that his 1968 larceny conviction was for a misdemeanor rather than a felony. The referee recommended reinstatement. On July 20, 1981, the full Commission heard argument and orally announced that it would uphold the dismissal. Proposed findings of fact and conclusions of law followed on August 10, and Loudermill's attorneys were advised of the result by mail on August 21.

Although the Commission's decision was subject to judicial review in the state courts, Loudermill instead brought the present suit in the Federal District Court for the Northern District of Ohio. The complaint alleged that § 124.34 was unconstitutional on its face because it did not provide the employee an opportunity to respond to the charges against him prior to removal. As a result, discharged employees were deprived of liberty and property without due process. The complaint also alleged that the provision was unconstitutional as applied because discharged employees were not given sufficiently prompt postremoval hearings. . . .

The Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). The answer to that question is not to be found in the Ohio statute.

III

An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Boddie v. Connecticut,* 401 U.S. 371 (1971). This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. . . .

The need for some form of pretermination hearing, recognized in these cases, is evident from a balancing of the competing interests at stake. These are the private interests in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. See *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.

Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect. See *Goss v. Lopez,* 419 U.S., at 583–584. . . .

The cases before us illustrate these considerations. Both respondents had plausible arguments

to make that might have prevented their discharge. The fact that the Commission saw fit to reinstate Donnelly suggests that an error might have been avoided had he been provided an opportunity to make his case to the Board. As for Loudermill, given the Commission's ruling we cannot say that the discharge was mistaken. Nonetheless, in light of the referee's recommendation, neither can we say that a fully informed decisionmaker might not have exercised its discretion and decided not to dismiss him, notwithstanding its authority to do so. In any event, the termination involved arguable issues, and the right to a hearing does not depend on a demonstration of certain success.

Loudermill's dismissal turned not on the objective fact that he was an ex-felon or the inaccuracy of his statement to the contrary, but on the subjective question whether he had lied on his application form. His explanation for the false statement is plausible in light of the fact that he received only a suspended 6-month sentence and a fine on the grand larceny conviction.

The governmental interest in immediate termination does not outweigh these interests. As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay. . . .

IV

The foregoing considerations indicate that the pretermination "hearing," though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. *Mathews v. Eldridge,* 424 U.S., at 343. Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.

In only one case, *Goldberg v. Kelly,* 397 U.S. 254 (1970), has the Court required a full adversarial evidentiary hearing prior to adverse governmental action. However, as the *Goldberg* Court itself pointed out, that case presented significantly different considerations than are present in the context of public employment. Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. See *Bell v. Burson,* 402 U.S., at 540. . . .

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

VI

We conclude that all the process that is due is provided by a pretermination opportunity to

respond, coupled with post-administrative procedures as provided by the Ohio statute. Because respondents allege in their complaints that they had no chance to respond, the District Court erred in dismissing for failure to state a claim. The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

Board Of County Commissioners, Wabaunsee County v. Umbehr 518 U.S. 669 (1996)

Justice O'Connor delivered the opinion of the Court joined by Chief Justice Rehnquist (except for a small part of the opinion which he disagreed with) and Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. Justices Scalia's dissent was joined by Justice Thomas.

This case requires us to decide whether, and to what extent, the First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of the freedom of speech.

I

Under state law, Wabaunsee County, Kansas (County) is obliged to provide for the disposal of solid waste generated within its borders. In 1981, and, after renegotiation, in 1985, the County contracted with respondent Umbehr for him to be the exclusive hauler of trash for cities in the county at a rate specified in the contract. Each city was free to reject or, on 90 days' notice, to opt out of, the contract. By its terms, the contract between Umbehr and the County was automatically renewed annually unless either party terminated it by giving notice at least 60 days before the end of the year or a renegotiation was instituted on 90 days' notice. Pursuant to the contract, Umbehr hauled trash for six of the County's seven cities from 1985 to 1991 on an exclusive and uninterrupted basis.

During the term of his contract, Umbehr was an outspoken critic of petitioner, the Board of County Commissioners of Wabaunsee County (Board), the three-member governing body of the County. Umbehr spoke at the Board's meetings, and wrote critical letters and editorials in local newspapers regarding the County's landfill user rates, the cost of obtaining official documents from the County, alleged violations by the Board of the Kansas Open Meetings Act, the County's alleged mismanagement of taxpayers' money, and other topics. His allegations of violation of the Kansas Open Meetings Act were vindicated in a consent decree signed by the Board's members. Umbehr also ran unsuccessfully for election to the Board.

The Board's members allegedly took Umbehr's criticism badly, threatening the official county newspaper with censorship for publishing his writings. In 1990, they voted, 2-to-1, to terminate (or prevent the automatic renewal of) Umbehr's contract with the County. That attempt at termination failed because of a technical defect, but in 1991, the Board succeeded in terminating Umbehr's contract, again by a 2-to-1 vote. Umbehr subsequently negotiated new contracts with five of the six cities that he had previously served.

In 1992, Umbehr brought this suit against the two majority Board members in their individual and official capacities under 42 U.S.C. § 1983, alleging that they had terminated his government contract in retaliation for his criticism of the County and the Board. The Board members moved for summary judgment. The District Court . . . held that . . . as an independent contractor, Umbehr was not entitled to the First Amendment protection afforded to public employees. *Umbehr v. McClure,* 840 F.Supp. 837, 839 (D.Kan.1993).

The United States Court of Appeals for the Tenth Circuit reversed holding that "an independent contractor is protected under the First

Amendment from retaliatory governmental action, just as an employee would be."

We agree with the Tenth Circuit that independent contractors are protected, and that the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of their protection. We therefore affirm.

II

This Court has not previously considered whether and to what extent the First Amendment restricts the freedom of federal, state, or local governments to terminate their relationships with independent contractors because of the contractors' speech. We have, however, considered the same issue in the context of government employees' rights on several occasions. The similarities between government employees and government contractors with respect to this issue are obvious. The government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy and responsiveness of service to the public, and to prevent the appearance of corruption. And, absent contractual, statutory or constitutional restriction, the government is entitled to terminate them for no reason at all. But either type of relationship provides a valuable financial benefit, the threat of the loss of which in retaliation for speech may chill speech on matters of public concern by those who, because of their dealings with the government, "are often in the best position to know what ails the agencies for which they work," *Waters v. Churchill,* 114 S.Ct. 1878. Because of these similarities, we turn initially to our government employment precedents for guidance.

Those precedents have long since rejected Justice Holmes' famous dictum, that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," *McAuliffe v. Mayor of New Bedford,* 29 N.E. 517 (1892). Recognizing that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights," *Laird v. Tatum,* 408 U.S. 1 (1972), our modern "unconstitutional conditions" doctrine holds that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech" even if he has no entitlement to that benefit, *Perry v. Sindermann,* 408 U.S. 593 (1972). We have held that government workers are constitutionally protected from dismissal for refusing to take an oath regarding their political affiliation, *Wieman v. Updegraff,* 344 U.S. 183 (1952); *Keyishian v. Board of Regents of Univ. of State of N.Y.,* 385 U.S. 589 (1967), for publicly or privately criticizing their employer's policies, see *Perry,* supra; for expressing hostility to prominent political figures, see *Rankin v. McPherson,* 483 U.S. 378 (1987), or, except where political affiliation may reasonably be considered an appropriate job qualification, for supporting or affiliating with a particular political party, see, *Branti v. Finkel,* 445 U.S. 507 (1980). See also *United States v. Treasury Employees,* 115 S.Ct. 1310 (1995) (government employees are protected from undue burdens on their expressive activities created by a prohibition against accepting honoraria); *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209 (1977) (government employment cannot be conditioned on making or not making financial contributions to particular political causes).

While protecting First Amendment freedoms, we have, however, acknowledged that the First Amendment does not create property or tenure rights, and does not guarantee absolute freedom of speech. The First Amendment's guarantee of freedom of speech protects government employees from termination because of their speech on matters of public concern. See *Connick v. Myers,* 461 U.S. 138 (1983) (speech on merely private employment matters is unprotected). To prevail, an employee must prove that the conduct at issue was constitutionally protected, and that it was a substantial or motivating factor in the termination. If the employee discharges that burden, the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct. See *Mt. Healthy,* supra. And even termination because of protected speech may

be justified when legitimate countervailing government interests are sufficiently strong. Government employees' First Amendment rights depend on the "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering,* 391 U.S., at 568. In striking that balance, we have concluded that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Waters,* 114 S.Ct., at 1888 (plurality opinion). We have, therefore, "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." Id., at 114 S.Ct., at 1887; . . .

Both parties observe that independent contractors in general, and Umbehr in particular, work at a greater remove from government officials than do most government employees. In the Board's view, the key feature of an independent contractor's contract is that it does not give the government the right to supervise and control the details of how work is done. The Board argues that the lack of day-to-day control accentuates the government's need to have the work done by someone it trusts, and to resort to the sanction of termination for unsatisfactory performance. Umbehr, on the other hand, argues that the government interests in maintaining harmonious working environments and relationships recognized in our government employee cases are attenuated where the contractor does not work at the government's workplace and does not interact daily with government officers and employees. He also points out that to the extent that he is publicly perceived as an independent contractor, any government concern that his political statements will be confused with the government's political positions is mitigated. The Board and the dissent retort that the cost of fending off litigation, and the potential for government contracting practices to ossify into prophylactic rules to avoid potential litigation and liability, outweigh the interests of independent contractors, who are typically less financially dependent on their government contracts than are government employees.

Each of these arguments for and against the imposition of liability has some force. But all of them can be accommodated by applying our existing framework for government employee cases to independent contractors. *Mt. Healthy* assures the government's ability to terminate contracts so long as it does not do so in retaliation for protected First Amendment activity. *Pickering* requires a fact-sensitive and deferential weighing of the government's legitimate interests. The dangers of burdensome litigation and the de facto imposition of rigid contracting rules necessitate attentive application of the *Mt. Healthy* requirement of proof of causation and substantial deference, as mandated by *Pickering, Connick,* and *Waters,* to the government's reasonable view of its legitimate interests, but not a per se denial of liability. Nor can the Board's and the dissent's generalization that independent contractors may be less dependent on the government than government employees, justify denial of all First Amendment protection to contractors. The tests that we have established in our government employment cases must be judicially administered with sensitivity to governmental needs, but First Amendment rights must not be neglected. . . .

We therefore see no reason to believe that proper application of the *Pickering* balancing test cannot accommodate the differences between employees and independent contractors.

In sum, neither the Board nor Umbehr have persuaded us that there is a "difference of constitutional magnitude," 414 U.S., at 83, between independent contractors and employees in this context. Independent government contractors are similar in most relevant respects to government employees, although both the speaker's and the government's interests are typically—though not always—somewhat less strong in the independent contractor case. We therefore conclude that the same form of balancing analysis should apply to each. . . .

III

Finally, we emphasize the limited nature of our decision today. Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship.

Subject to these limitations and caveats, however, we recognize the right of independent government contractors not to be terminated for exercising their First Amendment rights. The judgment of the Court of Appeals is, therefore, affirmed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Pennsylvania State Police v. Nancy Drew Suders
542 U.S. 129 (2004)

The facts are contained in the opinion written by Justice Ginsburg, joined by Justices Rehnquist, Stevens, O'Connor, Scalia, and Breyer. Justice Thomas dissented.

Plaintiff-respondent Nancy Drew Suders alleged sexually harassing conduct by her supervisors, officers of the Pennsylvania State Police (PSP), of such severity she was forced to resign. The question presented concerns the proof burdens parties bear when a sexual harassment/constructive discharge claim of that character is asserted under Title VII of the Civil Rights Act of 1964.

To establish hostile work environment, plaintiffs like Suders must show harassing behavior "sufficiently severe or pervasive to alter the conditions of [their] employment." *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 67 (1986); see *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 22 (1993) ("[T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their . . . gender . . . offends Title VII's broad rule of workplace equality."). Beyond that, we hold, to establish "constructive discharge," the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions. In so ruling today, we follow the path marked by our 1998 decisions in *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, and *Faragher v. Boca Raton,* 524 U.S. 775.

I

Because this case was decided against Suders in the District Court on the PSP's motion for summary judgment, we recite the facts, as summarized by the Court of Appeals, in the light most favorable to Suders. In March 1998, the PSP hired Suders as a police communications operator for the McConnellsburg barracks. Suders' supervisors were Sergeant Eric D. Easton, Station Commander at the McConnellsburg barracks, Patrol Corporal William D. Baker, and Corporal Eric B. Prendergast. Those three supervisors subjected Suders to a continuous barrage of sexual harassment that ceased only when she resigned from the force.

Easton "would bring up [the subject of] people having sex with animals" each time

Suders entered his office. He told Prendergast, in front of Suders, that young girls should be given instruction in how to gratify men with oral sex. Easton also would sit down near Suders, wearing spandex shorts, and spread his legs apart. Apparently imitating a move popularized by television wrestling, Baker repeatedly made an obscene gesture in Suders' presence by grabbing his genitals and shouting out a vulgar comment inviting oral sex. Baker made this gesture as many as five-to-ten times per night throughout Suders' employment at the barracks. Suders once told Baker she "'d[id]n't think [he] should be doing this'"; Baker responded by jumping on a chair and again performing the gesture, with the accompanying vulgarity. Further,

Baker would "rub his rear end in front of her and remark 'I have a nice ass, don't I?'" Prendergast told Suders "'the village idiot could do her job'"; wearing black gloves, he would pound on furniture to intimidate her.

In June 1998, Prendergast accused Suders of taking a missing accident file home with her. After that incident, Suders approached the PSP's Equal Employment Opportunity Officer, Virginia Smith-Elliott, and told her she "might need some help." Smith-Elliott gave Suders her telephone number, but neither woman followed up on the conversation. On August 18, 1998, Suders contacted Smith-Elliott again, this time stating that she was being harassed and was afraid. Smith-Elliott told Suders to file a complaint, but did not tell her how to obtain the necessary form. Smith-Elliott's response and the manner in which it was conveyed appeared to Suders insensitive and unhelpful. Two days later, Suders' supervisors arrested her for theft, and Suders resigned from the force. The theft arrest occurred in the following circumstances. Suders had several times taken a computer-skills exam to satisfy a PSP job requirement. Each time, Suders' supervisors told her that she had failed. Suders one day came upon her exams in a set of drawers in the women's locker room. She concluded that her supervisors had never forwarded the tests for grading and that their reports of her failures were false. Regarding the tests as her property, Suders removed them from the locker room. Upon finding that the exams had been removed, Suders' supervisors devised a plan to arrest her for theft. The officers dusted the drawer in which the exams had been stored with a theft-detection powder that turns hands blue when touched. As anticipated by Easton, Baker, and Prendergast, Suders attempted to return the tests to the drawer, whereupon her hands turned telltale blue. The supervisors then apprehended and handcuffed her, photographed her blue hands, and commenced to question her. Suders had previously prepared a written resignation, which she tendered soon after the supervisors detained her. Nevertheless, the supervisors initially refused to release her. Instead, they brought her to an interrogation room, gave her warnings under *Miranda v. Arizona,* 384 U.S. 436 (1966), and continued to question her. Suders reiterated that she wanted to resign, and Easton then let her leave. The PSP never brought theft charges against her.

In September 2000, Suders sued the PSP in Federal District Court, alleging, inter alia, that she had been subjected to sexual harassment and constructively discharged, in violation of Title VII of the Civil Rights Act of 1964. At the close of discovery, the District Court granted the PSP's motion for summary judgment. Suders' testimony, the District Court recognized, sufficed to permit a trier of fact to conclude that the supervisors had created a hostile work environment. The court nevertheless held that the PSP was not vicariously liable for the supervisors' conduct. . . . Suders' hostile work environment claim was untenable as a matter of law, the District Court stated, because she "unreasonably failed to avail herself of the PSP's internal procedures for reporting any harassment." Resigning just two days after she first mentioned anything about harassment to Equal Employment Opportunity Officer Smith-Elliott, the court noted, Suders had "never given [the PSP] the opportunity to respond to [her] complaints." The District Court did not address Suders' constructive discharge claim. . . .

The Court of Appeals for the Third Circuit reversed and remanded the case for disposition on the merits. The Third Circuit agreed with the District Court that Suders had presented evidence sufficient for a trier of fact to conclude

that the supervisors had engaged in a "pattern of sexual harassment that was pervasive and regular." . . . The Court of Appeals then made the ruling challenged here: It held that "a constructive discharge, when proved, constitutes a tangible employment action." Under *Ellerth* and *Faragher,* the court observed, such an action renders an employer strictly liable and precludes employer recourse to the affirmative defense announced in those decisions. The Third Circuit recognized that the Courts of Appeals for the Second and Sixth Circuits had ruled otherwise. A constructive discharge resulting from a supervisor-created hostile work environment, both Circuits had held, does not qualify as a tangible employment action, and therefore does not stop an employer from invoking the *Ellerth/Faragher* affirmative defense. . . . The Third Circuit, however, reasoned that a constructive discharge "'constitutes a significant change in employment status' by ending the employer-employee relationship" and "also inflicts the same type of 'direct economic harm'" as the tangible employment actions *Ellerth* and *Faragher* offered by way of example (discharge, demotion, undesirable reassignment). Satisfied that Suders had "raised genuine issues of material fact as to her claim of constructive discharge," and that the PSP was "precluded from asserting the affirmative defense to liability advanced in support of its motion for summary judgment," the Court of Appeals remanded Suders' Title VII claim for trial.

This Court granted certiorari to resolve the disagreement among the Circuits on the question whether a constructive discharge brought about by supervisor harassment ranks as a tangible employment action and therefore precludes assertion of the affirmative defense articulated in *Ellerth* and *Faragher*. . . . We conclude that an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive discharge; absent such a "tangible employment action," however, the defense is available to the employer whose supervisors are charged with harassment. We therefore vacate the Third Circuit's judgment and remand the case for further proceedings.

II

A

Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. . . . The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?

The constructive discharge concept originated in the labor-law field in the 1930's; the National Labor Relations Board (NLRB) developed the doctrine to address situations in which employers coerced employees to resign, often by creating intolerable working conditions, in retaliation for employees' engagement in collective activities. . . . Although this Court has not had occasion earlier to hold that a claim for constructive discharge lies under Title VII, we have recognized constructive discharge in the labor-law context, . . . We agree with the lower courts and the EEOC that Title VII encompasses employer liability for a constructive discharge.

B

This case concerns an employer's liability for one subset of Title VII constructive discharge claims: constructive discharge resulting from sexual harassment, or "hostile work environment," attributable to a supervisor. Our starting point is the framework *Ellerth* and *Faragher* established to govern employer liability for sexual harassment by supervisors. As earlier noted, . . . those decisions delineate two categories of hostile work environment claims: (1) harassment that "culminates in a tangible employment action," for which employers are strictly liable, . . . (2) harassment that takes place in the absence of a tangible employment action, to which employers may assert an affirmative defense . . . With the background set out above in mind, we turn to the key issues here at stake: Into which *Ellerth/Faragher* category do hostile-environment constructive discharge claims fall—and what proof burdens do the parties bear in such cases.

In *Ellerth* and *Faragher,* the plaintiffs-employees sought to hold their employers vicariously liable for sexual harassment by their supervisors, even though the plaintiffs "suffer[ed] no adverse, tangible job consequences." Setting out a framework for employer liability in those decisions, this Court noted that Title VII's definition of "employer" includes the employer's "agent[s]." We viewed that definition as a direction to "interpret Title VII based on agency principles." . . . We then identified "a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate." A tangible employment action, the Court explained, "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Unlike injuries that could equally be inflicted by a co-worker, we stated, tangible employment actions "fall within the special province of the supervisor," who "has been empowered by the company as . . . [an] agent to make economic decisions affecting other employees under his or her control." The tangible employment action, the Court elaborated, is, in essential character, "an official act of the enterprise, a company act." It is "the means by which the supervisor brings the official power of the enterprise to bear on subordinates." Often, the supervisor will "use [the company's] internal processes" and thereby "obtain the imprimatur of the enterprise." Ordinarily, the tangible employment decision "is documented in official company records, and may be subject to review by higher level supervisors." In sum, we stated, "when a supervisor takes a tangible employment action against a subordinate[,] . . . it would be implausible to interpret agency principles to allow an employer to escape liability." When a supervisor's harassment of a subordinate does not culminate in a tangible employment action, the Court next explained, it is "less obvious" that the agency relation is the driving force. We acknowledged that a supervisor's "power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation." But we also recognized that "there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status [would] mak[e] little difference."

An "aided-by-the-agency-relation" standard, the Court suggested, was insufficiently developed to press into service as the standard governing cases in which no tangible employment action is in the picture. . . . Accordingly, we held that when no tangible employment action is taken, the employer may defeat vicarious liability for supervisor harassment by establishing, as an affirmative defense, both that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

Ellerth and *Faragher* also clarified the parties' respective proof burdens in hostile environment cases. Title VII, the Court noted, "borrows from tort law the avoidable consequences doctrine," under which victims have "a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute," The *Ellerth/Faragher* affirmative defense accommodates that doctrine by requiring plaintiffs reasonably to stave off avoidable harm. But both decisions place the burden squarely on the defendant to prove that the plaintiff unreasonably failed to avoid or reduce harm. . . .

Suders' claim is of the same genre as the hostile work environment claims the Court analyzed in *Ellerth* and *Faragher*. Essentially, Suders presents a "worse case" harassment scenario, harassment ratcheted up to the breaking point. Like the harassment considered in our pathmarking decisions, harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts. Unlike an actual

termination, which is always effected through an official act of the company, a constructive discharge need not be. A constructive discharge involves both an employee's decision to leave and precipitating conduct: The former involves no official action; the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action. . . .

We note, finally, two recent Court of Appeals decisions that indicate how the "official act" (or "tangible employment action") criterion should play out when constructive discharge is alleged. Both decisions advance the untangled approach we approve in this opinion. In *Reed v. MBNA Marketing Systems, Inc.,* 333 F.3d 27 (CA1 2003), the plaintiff claimed a constructive discharge based on her supervisor's repeated sexual comments and an incident in which he sexually assaulted her. The First Circuit held that the alleged wrongdoing did not preclude the employer from asserting the *Ellerth/Faragher* affirmative defense. As the court explained in *Reed,* the supervisor's behavior involved no official actions. Unlike, "e.g., an extremely dangerous job assignment to retaliate for spurned advances," the supervisor's conduct in *Reed* "was exceedingly unofficial and involved no direct exercise of company authority"; indeed, it was "exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed." In contrast, in *Robinson v. Sappington,* 351 F.3d 317 (CA7 2003), after the plaintiff complained that she was sexually harassed by the judge for whom she worked, the presiding judge decided to transfer her to another judge, but told her that "her first six months [in the new post] probably would be 'hell,'" and that it was in her "'best interest to resign.'" The Seventh Circuit held that the employer was precluded from asserting the affirmative defense to the plaintiff's constructive discharge claim. The *Robinson* plaintiff's decision to resign, the court explained, "resulted, at least in part, from [the presiding judge's] official actio[n] in transferring" her to a judge who resisted placing her on his staff. The courts in *Reed* and *Robinson* properly recognized that *Ellerth* and *Faragher,* which divided the universe of supervisor-harassment claims according to the presence or absence of an official act, mark the path constructive discharge claims based on harassing conduct must follow. . . .

. . . Following *Ellerth* and *Faragher,* the plaintiff who alleges no tangible employment action has the duty to mitigate harm, but the defendant bears the burden to allege and prove that the plaintiff failed in that regard. The plaintiff might elect to allege facts relevant to mitigation in her pleading or to present those facts in her case in chief, but she would do so in anticipation of the employer's affirmative defense, not as a legal requirement.

Although most of the discriminatory behavior Suders alleged involved unofficial conduct, the events surrounding her computer-skills exams were less obviously unofficial. [It is the Court's footnote 11.]

NOTES

1. Because it takes, say, five years to get tenure, employment consists of 5 one-year contracts until the tenure decision.
2. 434 F.Supp. 1273 (D. Del., 1977).
3. 469 F.2d 829 (5th Cir., 1972).
4. 439 U.S. 410 (1979).
5. 548 F.2d 857 (9th Cir., 1977).
6. 473 F.2d 988 (2d Cir., 1973).
7. Steven Cann, "A Virus in the Ivory Tower," 18 *Educational Considerations* 43 (1991).
8. Robert Pear, "Financial Problems in Government Are Rife, Nation's Top Auditor Says," *New York Times,* January, 18, 2001, p. A12.
9. Cann, "A Virus," p. 44.
10. For an early interpretation that the Court has continued to sustain, see *Lindsley v. Natural Carbonic Gas Company,* 220 U.S. 61, 78 (1911).
11. *Railway Express Agency v. New York,* 336 U.S. 106 (1949).
12. *Williamson v. Lee Optical Company,* 348 U.S. 483 (1955).
13. *New Orleans v. Dukes,* 427 U.S. 297 (1976).
14. *Reed v. Reed,* 404 U.S. 71 (1971).
15. *Frantinero v. Richardson,* 411 U.S. 677 (1973).

16. *Kahn v. Shevin,* 416 U.S. 351 (1974).
17. *Craig v. Borne,* 429 U.S. 190 (1976).
18. *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976).
19. *Ambach v. Norwick,* 441 U.S. 68 (1979).
20. *Bernal v. Fainter,* 467 U.S. 216 (1984).
21. *Fullilove v. Klutznick,* 448 U.S. 448 (1980).
22. 466 U.S. 429 (1984).
23. Kevin Sack, "To Vestige of Black Farmers, Bias Settlement is Too Late," *The New York Times,* June 1, 1999, p. A1.
24. David Kocieniewski and Robert Hanley, "Racial Profiling Was the Routine, New Jersey Finds," *The New York Times,* November 28, 2000, p. A1; Jessica Bruder, "Progress for State Police," *The New York Times,* July 25, 2004, p. 6.
25. *Washington v. Davis,* 426 U.S. 229 (1976).
26. 347 U.S. 483 (1954).
27. *Brown v. Board of Education* has been in litigation almost constantly since 1954. The Supreme Court, in a 1955 implementation decision, said desegregation had to be implemented "with all deliberate speed" (*Brown II,* 349 U.S. 294 [1955]). There was a *Brown III* in the 1970s (892 F.2d 851 [1979]), and *Brown IV* in the 1980s (892 F.2d 851 [10th Cir., 1989]). In *Brown IV,* the district court found no purposeful discrimination, but the circuit court did. The Supreme Court sent the case back to the circuit court, *Brown v. Board of Education,* 503 U.S. 978 (1992), in light of its recent decision in *Board of Education of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237 (1991). On October 28, 1992, the Tenth Circuit Court of Appeals, after reconsidering *Brown IV,* once again found the requisite purposeful discrimination. The Topeka School Board decided not to litigate further and adopted a magnet school plan for the primary schools. It was not until the summer of 1999 that the Topeka school district was finally found to be in compliance with the 1954 *Brown* decision. The case is still titled *Brown v. Board of Education,* because Linda Brown, the lead child-plaintiff in the original case, had two children who were plaintiffs. See Steven Cann, "Politics in Brown and White: Resegregation in America," 88(2) *Judicature* 74, 76–77 (2004).
28. *Shaw v. Reno,* 509 U.S. 630 (1993); *Miller v. Johnson* 515 U.S. 900 (1995).
29. *Gratz v. Bollinger,* 539 U.S. 244 (2003).
30. *Grutter v. Bollinger,* 539 U.S. 306 (2003).
31. *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979).
32. *Local 28 Sheet Metal Workers Union v. Equal Employment Opportunity Commission,* 478 U.S. 421 (1986).
33. *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979).
34. *Griggs v. Duke Power Company,* 401 U.S. 424 (1971).
35. *Wards Cove Packing v. Atonio,* 490 U.S. 642 (1989).
36. Adam Clymer, "White House and Senate Republicans Reach Agreement on Civil Rights Bill," *The New York Times* [national edition], October 25, 1991, p. A10; Adam Clymer, "Senate Approves Rights Bill, Ending Bitter Job-Bias Rift," *The New York Times* [national edition], October 31, 1991, p. A10; Adam Clymer, "Civil Rights Bill Is Passed by House," *The New York Times* [national edition], November 18, 1991, p. A10.
37. Robert D. Lee Jr. and Paul S. Greenlaw, "Employer Liability for Employee Sexual Harassment: A Judicial Policy-Making Study," 60 *Public Administration Review* 124 (March/April 2000).
38. Kenneth Meier and Vicky Wilkins, "Gender Differences in Agency Head Salaries: The Case of Public Education," 62(4) *Public Administration Review* 405, 407 (July–August 2002).
39. Ibid., p. 125.
40. Ibid., p. 126.
41. Ibid., p. 128.
42. *Hicks v. Miranda,* 422 U.S. 332 (1975); *McCarthy v. Philadelphia Civil Service Commission,* 424 U.S. 645 (1976).