

THE MURKY WORLD OF DUE PROCESS IN DISCIPLINING PUBLIC EMPLOYEES: THE SUPREME COURT'S RULING IN *GILBERT v. HOMAR*

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ABSTRACT

The Supreme Court ruled in *Gilbert v. Homar* (1997) that a public employer need not give an employee notice and hearing before suspending that employee without pay. The Court held three factors were to be considered in determining what due process was to be afforded: the employee's interest, government's interest, and the risk of erroneous deprivation through the procedures used. The *Homar* case raises issues of what constitutes procedural due process and substantive due process as pertaining to property rights and due process as it relates to the right of liberty. The implications of the *Homar* decision are explored.

As a result of a Supreme Court decision in 1985, public employers have been required to afford their employees some due process when taking the first steps toward terminating the employees. At the time of the decision in *Cleveland Board of Education v. Loudermill* [1], employers were concerned that the Court was tilting unfairly in the direction of employees, that employers could not take decisive action when needed for fear that the action would be regarded by the courts as violating employees' due process rights.

In 1997, the Supreme Court handed down a major decision in this area, the first since 1985. In *Gilbert v. Homar*, the Court held unanimously that a public employer need not give an employee notice and hearing before suspending that employee without pay [2]. The Court provided important guidance as to what due process is required in disciplinary action [2].

This article considers due process requirements when disciplining public employees. The discussion begins with a summary of the events surrounding the

Homar case, followed by an overall view of employer/employee rights. Then attention is directed to due process in what is known as the predeprivation stage of action, which is at the heart of the *Loudermill* and *Homar* cases. Next, substantive due process and liberty due process are discussed. These topics were of concern at the district court and circuit court levels in the *Homar* case but were not addressed by the Supreme Court. Finally, the implications of the *Homar* ruling are explored.

AN OVERVIEW OF THE FACTS IN THE HOMAR CASE

As can be seen from the timeline presentation in Table 1, Richard J. Homar was a police officer for East Stroudsburg University (E.S.U.), an institution owned and operated by the Commonwealth of Pennsylvania. Homar was arrested in 1992 on a variety of drug charges stemming from his being arrested at a friend's home when state police raided the home. Homar was promptly suspended without pay, and although the charges were dismissed within a few days, E.S.U. kept the suspension in place. Approximately three weeks after the arrest, Homar met with university officials who told him they had received from the state police "some evidence of a serious nature" about him, but they did not reveal they had a copy of a state police report in which Homar was quoted as allegedly confessing to possession.

Less than a week later, E.S.U. notified Homar he was being demoted from police officer to groundskeeper. Then, at Homar's request, he met with the university's president, James E. Gilbert, and had an opportunity to respond to the charges against him. Gilbert followed through by sustaining Homar's suspension.

The issue of the case is whether this chain of events was a fair method for treating Homar. Did East Stroudsburg University provide him with adequate due process?

PUBLIC EMPLOYER AND EMPLOYEE RIGHTS

Space limitations allow here only a cursory discussion of the complex set of legal relations that exist between public employers and employees [4]. Government, in acting on behalf of the citizenry, has a right to make demands upon its employees, but that right does not make slaves of workers, making them chattel without any rights of their own. Indeed, employees may use a vast array of civil rights laws to protect themselves against discrimination based on race, sex, age, disability, and the like. The Supreme Court has ruled public employees have a right to free speech as guaranteed by the First Amendment. Workers may not be disciplined for voicing their opinions, including criticizing their administrative supervisors and elected officials [5, 6, 7].

Table 1. Timeline for Disciplinary Action and Court Proceedings
in *Homar* Case

August 26, 1992

- Richard J. Homar arrested in a drug raid by Pennsylvania state police at a friend's home.
- State police file criminal charges against Homar for possession of marijuana, for possession with intent to deliver, and for criminal conspiracy.
- Police contact Homar's employer, East Stroudsburg University (E.S.U.), where he is a police officer.

August 27, 1992

- E.S.U.'s human resources (HR) director sends letter to Homar suspending him without pay.

September 1, 1992

- Human resources director, representatives of the E.S.U. police, and representatives of the state police meet. At this meeting, E.S.U. is provided by the state police with a report quoting Homar as allegedly admitting he received marijuana and was aware of drug dealing.

September 18, 1992

- Homar accompanied by union representative meets with HR director and E.S.U. police chief.
- HR director tells Homar E.S.U. has received "some evidence very serious in nature" from the state police.

September 23, 1992

- HR director writes letter to Homar indicating he is being demoted from police officer to groundskeeper due to the admissions Homar allegedly made to the state police on August 26.

September 24, 1992

- At Homar's request, he meets with James E. Gilbert, E.S.U.'s president.
- Gilbert gives Homar an opportunity to respond to charges and then sustains suspension.

March 17, 1995

- U.S. District Court issues summary judgment in favor of Gilbert and other university defendants.

July 18, 1996

- U.S. Court of Appeals for the Third Circuit, with one judge dissenting in part, overturns summary judgment on grounds that 1) Homar was entitled to notice and a hearing before being suspended without pay and 2) there were issues of fact pertaining to whether procedural and substantive due process had been afforded Homar.
- The circuit court failed to find that Homar's liberty interest had been violated by E.S.U.

July 9, 1997

- U.S. Supreme Court, by unanimous vote, rules circuit court was in error in requiring notice and hearing before E.S.U. could suspend Homar without pay.
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Sources: [2, 3].

Central to issues of disciplining public employees is a well-known provision found in the Fifth Amendment applying to the federal government and in the Fourteenth Amendment applying to state and local governments. Government may not deny anyone of “life, liberty or property without due process of law.” The rights to life and liberty are considered inherent in all of us, but critical for the analysis here is that property is a created right [6, at 2709]. A job is a form of property, and associated with a job are a variety of factors that pertain to what work is to be performed, what pay and benefits will be forthcoming, and what job security exists, particularly regarding disciplining and dismissing a worker. If an employee is regarded as permanent or tenured, then s/he has a property right in the job and may be entitled to due process when government takes an adverse action against the worker. Conversely, at-will employees, who serve at the pleasure of their employers, lack any property interest and are unable to avail themselves of the protections afforded by the Fifth and Fourteenth Amendments [8, 9].

PREDEPRIVATION AND PROCEDURAL DUE PROCESS

Employee discipline needs to be seen in a broad perspective, namely, what rights and responsibilities government has *before* depriving a worker of a property right. “Predeprivation due process” is the term used. The Supreme Court has dealt with predeprivation rights in a variety of arenas besides public employment, including termination of welfare benefits [10], suspension of a driver’s license [11], parole revocation [12], suspension from school [13], termination of Social Security disability benefits [14], recoupment for government overpayment of Social Security retirement benefits [15], suspension of a harness-racing trainer’s license [16], suspension of a bank official [17], and admission to a mental hospital on a presumed voluntary basis [18].

These cases generally hold that some due process is essential prior to deprivation so that the person affected has knowledge of why the action is being initiated and has an opportunity to respond. The presumption is that more thorough due process should be afforded at some indefinite time after the deprivation.

In the employment field, the *Loudermill* decision has provided primary guidance since its issuance in 1985 [1]. The case involved two employees who had been fired by their respective school boards. *Loudermill* was a security guard who was found to have stated on his job application that he had never been convicted of a felony when in fact he had been convicted of grand larceny. The other employee, a school bus mechanic, was fired for having failed an eye examination. The school boards followed procedures prescribed by Ohio statute, which did not require the schools to give the employees any predeprivation due process [1].

The *Loudermill* Court took issue with the Ohio statute, stating that once a property right was created by the statute, the constitutional protection of due

process applied regardless of what the statute might provide. The Court quoted from a plurality opinion in *Arnett v. Kennedy*, a case that involved the dismissal of a federal worker: “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” [19, at 167]. Justice Rehnquist strongly dissented in *Loudermill*, suggesting “we ought to recognize the totality of the State’s definition of the property right in question. . . .” [1, at 561]. In Rehnquist’s view, the state should be allowed to create a property right in a job and at the same time limit that right, as had been done in the Ohio statute.

The *Loudermill* decision created what came to be known as a “Loudermill hearing,” namely, some degree of predeprivation due process being afforded public employees. “We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with posttermination administrative procedures . . .” [1, at 547-548]. At such a pretermination meeting, an employee could refute the allegations, offer an explanation or any attenuating circumstances, and plead for leniency given his/her personal situation.

While Justice Rehnquist dissented and thought the Ohio statute was acceptable, both Justices Marshall and Brennan wrote separate opinions concurring with the majority but expressing the view that more due process—not less—was needed than was provided by the majority. Both were of the view that an employee might well dispute the alleged facts being used for disciplining the employee and as a consequence more due process was needed beyond simply being able to respond to the charges. Justice Marshall maintained that prior to terminating someone’s wages a full hearing should be held, at which witnesses could be called to testify and could be cross-examined.

Turning to the *Homar* case, the Court of Appeals for the Third Circuit applied its view of the *Loudermill* decision. The court reasoned that given the nature of the facts—that a university police officer has been arrested for possession of marijuana and criminal conspiracy—Homar’s immediate suspension without a hearing was appropriate. However, since Homar had been suspended without pay, the circuit court held that a hearing was necessary. “. . . We find that Homar’s due process rights were violated because he was suspended without pay” [3, at 1015]. The circuit court relied on a statement made in the *Loudermill* case: “. . . 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” [1, at 544-545]. The Supreme Court later in overturning the circuit court’s decisions noted this quote was merely dictum and not central to the *Loudermill* ruling.

The Supreme Court, rather than relying largely on *Loudermill* in writing the *Homar* decision, instead built its opinion on an earlier nonemployment case. In 1976, the Court ruled on predeprivation due process rights in the case of *Mathews v. Eldridge*, involving the termination of Social Security disability benefits for

someone who presumably no longer met the eligibility criteria [14, at 319]. The Court said that while a hearing was required in making a final determination to deprive someone of a property right, predeprivation proceedings need not include an evidentiary hearing in which witnesses are called and a judgment made exclusively on the evidence presented [14].

The Court stressed in the *Eldridge* case that due process is a flexible concept necessarily conditioned by the specifics of any given situation. Three factors were said to determine which specific due process was required in a situation, and it was these three on which the *Homar* Court relied.

- “First the private interest that will be affected by the official action” [14, at 335]. The *Eldridge* Court contrasted deprivation of welfare benefits, which could be a person’s sole basis of sustenance, with deprivation of disability benefits, which are awarded simply on the basis of a handicapping condition and irrespective of financial need. Deprivation in the first situation could be a severe action but not necessarily be a severe action in the second one.
- “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” [14, at 335]. If the government has irrefutable evidence against someone, then what is to be gained through a predeprivation hearing? Erroneous deprivation in such a situation is an impossibility. On the other hand, if the evidence is less than conclusive, then some due process could be useful and would reduce the risk of erroneously disciplining a worker.
- “Finally, the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail” [14, at 335]. Government, as representative of taxpayers, has an obligation to limit the costs of administration. Increased due process rights translate into additional costs for both “the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision” [14, at 347]. The *Eldridge* Court further noted that beyond financial concerns is the objective of fairness and that transplanting a judicial model to the administrative process is not “the most effective method of decisionmaking in all circumstances” [14, at 348].

How do these three factors apply to the *Homar* situation? In regard to the first factor, the *Homar* Court downplayed the importance of the “private interest.” The police officer had only been temporarily suspended without pay, unlike the workers in the *Loudermill* case who faced termination. This, however, may be splitting hairs, in that *Homar*’s suspension was quickly converted into a drastic demotion to groundskeeper. The demotion resulted in a substantial pay cut, although a key advantage for *Homar* over dismissal was that he retained his health

and retirement benefits. (The demotion makes one wonder whether this is a sound method for hiring groundskeepers.)

The private interest at stake in a job suspension, the Court noted, is a function of the suspension's duration. A lengthy suspension obviously is more damaging to a worker than a shorter one. A postsuspension hearing should be prompt, and whether that occurred in Homar's situation is unclear. The job suspension occurred on August 27, but criminal charges were dropped on September 1. Eighteen days later Homar had some degree of a hearing with the human resources (HR) director and the E.S.U. police chief, and another six days later, had a meeting with the university president. The Supreme Court did not deal with the adequacy of the postsuspension process, in that the lower courts had not addressed the matter.

The Court next considered the third factor in the *Eldridge* schema, namely the government's interest. The university was said to have a major interest in guaranteeing the integrity of its police positions since they involve "great public trust and high public visibility." The Court said that immediately suspending Homar but with pay was unwarranted. ". . . The government does not have to give an employee charged with a felony a paid leave at taxpayer expense" [2, at 1813]. Moreover, were the government to continue paying a suspended worker, then additional expenses might be accrued either through overtime pay to other workers or possibly for hiring a replacement worker.

Eldridge's second factor, the Court said, was the most determinative in the *Homar* case. What degree of risk was there of erroneous deprivation and what would be the value of additional procedural protections? The arrest and filing of charges against Homar were considered reasonable grounds for the suspension, albeit the charges were dismissed a few days after the suspension went into effect. The Court allowed that an indictment would have been a firmer foundation for the suspension but that the filing of charges against Homar was sufficient justification for the suspension.

By directing attention to the *Eldridge* schema, the Court side-stepped a key concern of *Loudermill* as to whether Homar was notified of the charges against him and had an opportunity to respond. Clearly, no due process was afforded him between his arrest and his suspension, since those events were one day apart. When Homar did meet on September 18 with the HR director and the university police chief, he was not given a copy of the state police report that had been provided to the university and was unaware that the report quoted him as confessing to the possession charge. Without having this information, Homar's ability to respond effectively to the charges was severely handicapped.

Also, the Supreme Court side-stepped the circuit court's concern about the relationship between pre- and postdeprivation procedures. One position is that in some situations predeprivation rights may be curtailed but that "postdeprivation hearings provide sufficient due process of law" [20, at 1435]. A competing view is that no amount of postdeprivation due process can correct having denied

someone adequate predeprivation due process. For instance, suspending someone without pay and then months later awarding back pay following a hearing that exonerates the employee fails to recognize that the employee's personal finances most likely will have been in great turmoil during that period. Justice Marshall, concurring in the *Loudermill* decision, wrote, ". . . It is in no respect certain that a prompt postdeprivation hearing will make the employee economically whole again, and the wrongfully discharged employee will almost inevitably suffer irreparable injury" [1, at 550].

SUBSTANTIVE DUE PROCESS

If the legal requirements of procedural due process are murky, those of substantive due process are even murkier. In general, substantive due process violations entail the abuse of rights independent of whatever procedural protections are afforded. As the Supreme Court has stated, abuse of substantive due process offends ". . . those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses" [21, at 165]. When such a breach of one's rights occurs, the action is regarded as complete. This conception is contrary to some views of procedural breaches, such as postdeprivation procedures possibly correcting violations of procedural due process that occurred in the predeprivation stage. The remedies in the two forms of due process abuse are different. In substantive abuse, compensatory damages are sought, whereas in procedural abuse an equitable remedy is sought, such as a proper postdeprivation hearing and in the case of employment, the person being reinstated in a job [22].

Not all rights carry with them substantive due process protections. The Supreme Court has said it ". . . has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this uncharted area are scarce and open-ended" [23, at 125]. Life and liberty as part of the Due Process clauses in the Fifth and Fourteenth Amendments are afforded greater protection than property rights. For instance, government may create a property right of providing citizens with water service, but that is not considered a fundamental right protected by substantive due process [24].

Since employment is a property right, its status in the realm of substantive due process is ambiguous. The circuit courts are divided on this matter. The Eleventh Circuit has interpreted the Supreme Court's 1976 decision in *Bishop v. Wood* [8] to mean that public employment is not covered by substantive due process [22]. The Third Circuit, which is the court that heard the *Homar* case, does consider employment as possibly being covered.

The Third Circuit has said that violation of substantive due process is proven when either the government lacked a legitimate interest in an action it took or the government acted with "bias, bad faith or improper motive" [25; 26, at 683]. The

former is a matter to be decided by a court, and the latter by a jury. “Inadvertent errors, honest mistakes, agency confusion, or even negligence in the performance of official duties do not rise to a violation of substantive due process” [26, at 683]. In regard to the first factor, a city in denying applications for all-night dance halls may have a legitimate interest in considering their influence on “traffic, safety, crime, community pride, or noise” but may not simply act according to “unfounded fears or speculation” of the public [26, at 683]. A court needs to determine whether a seemingly legitimate government action is but a pretext for an illegal action, such as inappropriately using building codes as a means of excluding all-night dance halls. Regarding employment, government has a legitimate motive in requiring urinalysis tests for drugs of firefighters named by someone who confessed to be dealing in drugs [27].

As part of having a legitimate interest, government is proscribed from acting capriciously or arbitrarily. The Court of Appeals for the Federal Circuit found the Navy had acted appropriately when suspending an employee who had been charged by authorities for a variety of sexual offenses against his sixteen-year-old daughter [28]. In another case, the Third Circuit ruled that the Pittsburgh School Board had not arbitrarily and capriciously fired a teacher who used an unorthodox teaching method and refused to use the curricula approved by the board [29].

Bad faith occurs when government acts in one manner but has an ulterior motive. For instance, the City of Philadelphia was found to violate the substantive due process rights of a firm that under a lease arrangement operated a parking garage owned by the city [25]. The city simultaneously was forcing the company to make repairs to the garage and was taking steps to close the garage due to alleged safety concerns. The city’s motivation was that it would benefit financially by breaking the company’s lease.

Was Homar a victim of bad faith on the part of East Stroudsburg University? Although the Supreme Court did not address this issue, the circuit court did think there were grounds for concern that the university had acted in bad faith, *providing* Homar was found to have a property claim worthy of substantive due process protection. Failure of the HR director on September 18 to notify Homar of the university’s possession of the state police report and failure to give Homar a copy could be seen as acting in bad faith in giving him an opportunity to respond to charges. Also, the director took a poll among E.S.U. police officers asking whether Homar should be allowed to resume his job. Such action could be construed as a bad faith effort to determine Homar’s fate. Another possible bad faith action was demoting Homar and then giving him an opportunity to meet with the university president. This meeting would have come more appropriately prior to the demotion and at the university’s suggestion and not Homar’s request. These factors were cited by the circuit court as requiring attention by the district court, providing it was determined that Homar’s job was protected by substantive due process.

LIBERTY AND DUE PROCESS

The *Homar* case also raised the issue of whether the police officer had been unconstitutionally denied due process in the deprivation of liberty. The matter, while dismissed by the Third Circuit and not addressed by the Supreme Court, is worthy of attention.

The courts have recognized that the denial of liberty includes much more than being incarcerated in a prison. The Supreme Court has said:

Without doubt, it [liberty] 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 [30].

One can be officially free to pursue his/her interests as any other citizen but in reality not be free, as a result of having been wrongfully accused of something, such as child molestation, by government but not actually being accused of any crime. In other words, a stigmatizing effect can severely restrict one's liberty. Liberty is restricted when government negatively affects "a person's good name, reputation, honor or integrity" [6, at 573].

In 1961, the Supreme Court dealt with the liberty question in *Cafeteria and Restaurant Workers Union v. McElroy* [31]. An employee of a firm contracted to provide cafeteria services at a U.S. military installation was required to relinquish her identification badge and therefore denied entrance to the installation and her job on the grounds that she did not meet "security requirements." In a five to four decision, the Court ruled her Fifth Amendment due process rights had not been violated even though she was not told the charges against her and was denied a hearing. In the Court's view, she had not been denied liberty, since she "remained entirely free to obtain employment as a short-order cook or to get any other job, either with M & M [her employer] or with any other employer. All that was denied her was the opportunity to work at one isolated and specific military installation [31, at 896].

The four-member minority in the case said that the cook's dismissal as a "security risk" could have a "sinister meaning" and could be interpreted as her being a Communist or being disloyal. In fact, the cook's only flaw might have been she was careless with her identification badge or was careless in talking about where she worked, a facility that developed highly classified weapons. Her being denied an identification badge could be construed as awarding her a "badge of infamy" that would hamper her liberty in obtaining employment elsewhere.

The courts have held that when a stigmatizing effect occurs and a liberty interest is at stake, the individual has a right to a hearing, since a stigmatizing effect has not occurred [6, at 564]. If a police officer refuses to take a polygraph

examination and is fired for insubordination, that too is said not to rise to a stigmatizing level [32]. Refusal to take the polygraph test constitutes insubordination and grounds for dismissal. Charges of dishonesty or immorality, on the other hand, could trigger a liberty interest.

If government does not take action that could have a stigmatizing effect, the employee must deny the allegations in order to be able to claim a liberty violation. In one case decided by the Supreme Court in 1977, a police trainee had been fired because he allegedly “put a revolver to his head in an apparent suicide attempt” [33, at 626]. This action, which made him unfit for duty, was reported in his permanent record. The crux of the case was that the trainee had not been stigmatized in the fact that he failed to deny the allegation. In a more recent Third Circuit case, police officers who had been dismissed lost their case for claiming that “unconfirmed and unsubstantiated” but not necessarily untrue allegations had been the basis for their dismissals [34]. The city had issued a press release stating that sufficient evidence existed to investigate the officers and that they were fired when they refused to submit to urinalysis.

Returning to the *Homar* case, the police officer claimed his liberty had been denied by the university having released some information to a local newspaper. According to the Third Circuit, no specifics were revealed and at that point in time, the university had yet to take disciplinary action. *Homar's* view was that information had been released and that his demotion had become known, thereby creating a stigmatization effect on any efforts he might make to find alternative employment. However, two factors worked against *Homar*. First, he had not sought other employment and therefore lacked evidence that the situation harmed him. Second, he did not claim as false the information the university had released and the newspaper had published.

DISCUSSION AND CONCLUSION

By stressing in the *Homar* decision that due process as applied to public employment is essentially a flexible concept that requires careful attention to the specifics of any situation, the Supreme Court has left this field as murky as ever. The decision has not provided a brightline that serves as a guiding beacon for both employers and employees. The earlier *Loudermill* decision [1], in contrast, did provide guidance in insisting that employees had a right to know the charges against them and had an opportunity to respond before being terminated. However, while the *Loudermill* Court was divided, leaving Court observers wondering whether the Court might subsequently shift its position, the *Homar* Court was unanimous in holding that the police officer was not entitled to any due process before being suspended without pay.

The flexibility emphasized in *Homar* encourages employers to test how flexible due process really is and can be seen as weakening the dictates of the *Loudermill* decision. The case also invites suits by disgruntled employees, who

claim they have been denied constitutionally protected due process rights. For example, The Ninth Circuit in a post-*Homar* decision upheld the actions of a university medical center that called five employees to interviews where they were suspended without pay and then fired [35]. The workers had not been told in advance that they would be accused of using and selling drugs on medical center property during working hours. This court, referring to the *Homar* decision, emphasized that suspension was less serious than termination and therefore required less due process.

The *Homar* case raises important issues regarding substantive due process and liberty rights as relating to due process, but nothing was resolved, since the Supreme Court did not address the issues. *Homar* may have had his substantive due process rights violated if the university had acted in bad faith in dealing with him. Regarding the liberty issue, the university apparently was careful in responding to media requests for information and thereby avoided violating *Homar's* liberty rights. No stigmatizing effect was shown to have occurred.

The case raises important concerns about how to deal with the press in such sensitive situations. On the one hand, government administration should not be cloaked in secrecy. A free press is fundamental to our society and serves as an important source of information for the citizenry. Since tax dollars obviously are involved in the administration of a public university, citizens have a right to know about such problems as public employees being arrested on criminal charges. Citizens, taxpayers, and government clients—in this case, students and their parents—have a right to know about the integrity of workers responsible for public safety. On the other hand, workers surely must be entitled to some privacy. Finding a suitable balance here is elusive. The *Homar* case, however, makes clear the need for government employers to act only after careful deliberation to avoid treading on employee liberty rights.

The *Homar* case underscores the very real set of problems administrators face in disciplining employees for conduct off the job and especially for employees in jobs that are related to public safety. Officers sworn to enforce the law should not, themselves, be violators of the law. Police officers, fire fighters, and transit workers should not be illegal drug users, since such dependency can endanger fellow workers and the public. Employees who work with children—school teachers, day-care center workers, and the like—should not have records of child abuse. Prison personnel may be unfit for duty if they have a record of using excessive force and beating family members.

Does a comparison of the *Loudermill* and *Homar* rulings suggest that employers can avoid many legal hassles by using suspension rather than termination? That is one possible interpretation of these rulings [35]. The Supreme Court has suggested that suspension is less drastic and need not be accompanied with pay. While the Court says pay is not required by the Due Process clauses of the Fifth and Fourteenth Amendments, statutes in some jurisdictions may require some due process. When pay is not required for a suspended worker, should it be

provided anyway? And what about employee benefits? Should health insurance be continued during an employee's suspension? Surely a paycheck and employee benefits are extremely important to the vast majority of public workers. In an era of the two-income family, eliminating one of those incomes through suspension can have a devastating effect, contrary to the Supreme Court's view that ". . . the lost income is relatively insubstantial compared with termination" [2, at 1813].

If a suspension is lifted, an additional concern is whether the employee is entitled to back pay. One view is that since the employee did not work during the suspension, s/he is not entitled to back pay. Another approach is to say that back pay is permissible retroactive to when charges were dropped against an employee or when the employee was acquitted. And, of course, the remaining alternative would be to award back pay retroactive to the initial suspension or termination. State and federal laws may limit the use of back pay [36]. East Stroudsburg University provided back pay to Homar up to when he was reassigned as a groundskeeper, but initially offered to provide pay only at the groundskeeper rate. Later, the school relented to pay him at the police officer rate.

Another concern raised in the *Homar* case is the proper relationship between a public employer and a police department that has arrested an employee. Pennsylvania state police clearly worked closely with East Stroudsburg University officials when Homar was arrested. As was discussed, E.S.U. received a copy of the state police report, but neither the police nor E.S.U. provided Homar with a copy until later in the process. In a case such as this one, arresting officers may be called to testify at an evidentiary hearing used to determine whether the employee should be disciplined and in what manner. When charges are dropped, however, or when an arrest record is expunged for whatever reason, officers may be excluded from testifying [37]. An all-too-cozy relationship can develop between law enforcement officers and public employees at the expense of the public employee.

Finally, the *Homar* case raises the age-old issue of to what extent one's personal life should affect one's professional life. The days are gone when a woman could be fired because she married; the logic was that she should stay at home tending to the needs of her husband and should relinquish her job for someone who really needed it. Gone are the days when failing to attend church on a regular basis could be grounds for dismissal. Being gay or lesbian, while still a confused legal area regarding employment, is diminishing as a ground for dismissal.

Entanglements with law enforcement officers, however, are in another arena. Violations of law are different from the "offense" of being gay. The citizenry has a right to expect law enforcement officers, including university police, to conduct their personal lives within the law. A campus police officer who uses marijuana not only engages in a crime but furthers the continuation of drug trafficking. Such an officer is open to being forced into other illegal acts under threat of being revealed to authorities.

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ENDNOTES

1. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).
2. *Gilbert v. Homar*, 117 S.Ct. 1241 (1997).
3. *Homar v. Gilbert*, 89 F.3d 1009 (3rd Cir. 1996).
4. R. D. Lee, *Public Personnel Systems* (3rd Edition), Aspen Publishers, Gaithersburg, Maryland, 1993.
5. *Perry v. Sinderman*, 408 U.S. 593 (1972).
6. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).
7. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).
8. *Bishop v. Wood*, 426 U.S. 341 (1976).
9. *King v. Town of Hanover*, 116 F.3d 965 (1st Cir. 1997).
10. *Goldberg v. Kelly*, 397 U.S. 254 (1970).
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