

1998

Constitutional Law - Procedural Due Process - Employment - Suspension - State Employees

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Recommended Citation

Matthew Q. Ammon, *Constitutional Law - Procedural Due Process - Employment - Suspension - State Employees*, 36 Duq. L. Rev. 951 (1998).

Available at: <https://dsc.duq.edu/dlr/vol36/iss4/9>

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Recent Decisions

CONSTITUTIONAL LAW — PROCEDURAL DUE PROCESS — EMPLOYMENT — SUSPENSION — STATE EMPLOYEES — The Supreme Court of the United States held that a state university employee suspended without pay due to his arrest on drug-related charges was not entitled under the Due Process Clause to notice and a hearing prior to his suspension.

Gilbert v. Homar, 117 S. Ct. 1807 (1997).

East Stroudsburg University (“ESU”) employed Richard J. Homar (“Homar”) as a campus police officer.¹ On August 26, 1992, while at the home of a friend, police arrested and charged Homar with possession of marijuana, possession with intent to deliver, and criminal conspiracy to violate the controlled substance law.² Police notified Homar’s supervisor, David Marazas (“Marazas”), of Homar’s arrest and the charges pending against him.³ Marazas then notified Gerald Levanowitz (“Levanowitz”), the University’s Director of Human Resources, who immediately suspended Homar without pay.⁴ On August 27, 1992, Homar called Marazas and learned of his suspension.⁵ Police dismissed the charges against Homar on

1. *Gilbert v. Homar*, 117 S. Ct. 1807, 1810 (1997). ESU is a university in Pennsylvania. *Id.*

2. *Id.* at 1810. Officers of the Pennsylvania State Police arrested Homar as part of a drug raid on the premises. *Id.*

3. *Id.* Marazas was Chief of ESU’s University’s Police. *Id.*

4. *Id.* ESU President James Gilbert (“Gilbert”) had given Levanowitz the power to discipline University employees. *Id.*

5. *Id.* Homar also received a letter from Levanowitz, confirming that his suspension was effective on August 26, 1992, the day before he spoke to Marazas. *Id.* Levanowitz’s letter stated that Homar would be suspended during the investigation into the charges against him. *Id.* It also explained that ESU reserved the right to take action against Homar that did not necessarily relate to the status of the criminal charges. *Id.*

September 1, 1992, but his suspension from ESU remained in effect.⁶

Homar had an opportunity to give his rendition of the events to his employer on September 18, 1992 when he met with Levanowitz and Marazas.⁷ Levanowitz and Marazas informed Homar that they had received very serious information about him from the state police.⁸ They did not tell Homar, however, that the information included an alleged confession he had made the day the police arrested him.⁹ Levanowitz notified Homar, in a letter dated September 23, 1992, of his immediate demotion to groundskeeper based upon admissions he had allegedly made to the police.¹⁰ The president of Homar's union met with ESU President James Gilbert on September 24, 1992.¹¹ During this meeting, Homar first learned of his "confession."¹²

Homar filed suit against Gilbert, Marazas, Levanowitz, and Curtis English ("English"), Vice President of ESU, under 42 U.S.C. section 1983, in the United States District Court for the Middle District of Pennsylvania.¹³ Judge Vanaskie entered summary judgment for the ESU officials (collectively "Gilbert").¹⁴ Homar appealed, and the United States Court of Appeals for the Third Circuit reversed.¹⁵ Gilbert appealed the decision of the Third Circuit, and the Supreme Court of the United States granted certiorari.¹⁶

6. *Gilbert*, 117 S. Ct. at 1810. ESU's investigation was still continuing at this time. *Id.*

7. *Id.* at 1810.

8. *Id.*

9. *Id.* Therefore, Homar was unable to defend himself against these allegations. *Id.*

10. *Id.* The letter also stated that Homar would receive back pay from the date of his suspension, but at the pay rate of a groundskeeper. *Id.* However, Homar eventually received back pay at the rate of his former position, a police officer. *Id.* The letter informed Homar that the demotion was made

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.

Id. at 1810-11.

11. *Id.* at 1811.

12. *Id.* at 1811. Gilbert gave Homar a chance to respond to the allegations, but sustained his demotion. *Id.*

13. *Id.* Homar's claims were against the ESU officials in their official and individual capacities. *Id.* Homar contended that his due process rights were violated when ESU suspended him without pay without providing him with notice and before he was granted an opportunity to explain his side of the story. *Id.*

14. *Id.*

15. *Gilbert*, 117 S. Ct. at 1811.

16. *Id.* "Certiorari" is a discretionary device used by a superior court to require an

The Court considered whether the government violates a state employee's right to due process when he is suspended without pay and without prior notice or an opportunity for a hearing on the charges against him.¹⁷ Justice Scalia, writing for the Court, noted that due process protects government employees who have a property interest in their tenure.¹⁸ However, the Court recognized that it had never decided whether these due process protections also extended to suspensions.¹⁹ Justice Scalia examined the Third Circuit's holding that a government employee is entitled to a pre-suspension hearing when suspended without pay, to ensure that the government affords the employee notice and the opportunity to plead his case.²⁰ The Court questioned this broad rule and noted that *Homar* did not defend the Court of Appeals' position.²¹ Justice Scalia cited precedent that held if giving notice is impractical or if immediate action is required, no predeprivation notice is necessary, if postdeprivation process satisfies due process requirements.²²

The Court then determined the factors necessary for determining the type of process that is due: (1) the private interest affected; (2) the risk associated with any errant deprivation of that interest and

inferior court to produce a certified record of a particular case tried therein in order to review the proceedings and determine whether any irregularities exist. BLACK'S LAW DICTIONARY 228 (6th ed. 1990).

17. *Id.* at 1810.

18. *Id.* at 1811. Public employees who may be dismissed only for "cause" have a protected property interest in their tenured positions, and dismissal without due process violates this interest. *Id.* (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578 (1972); *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972)).

19. *Id.* The petitioners (ESU officials) in *Homar* did not challenge the existence of a protected property interest when suspension (and not termination) is the alleged violation. *Id.* Thus, the Court assumed that there was a violation of *Homar's* property interest in his tenure when he was suspended without pay. *Id.*

20. *Gilbert*, 117 S. Ct. at 1811. The Third Circuit relied on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), in which the Supreme Court held that a government employee dismissible only for cause is entitled to a pre-suspension hearing with a more in-depth post-suspension hearing to follow. *Gilbert*, 117 S. Ct. at 1811 (citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545-46 (1985)). The pre-suspension hearing guards against dismissal if the charges are false, and involves only written or oral notice of the charges and the evidence, and an opportunity for the employee to give his rendition of the events. *Id.* However, an employer may forgo the pre-suspension hearing and suspend the employee with pay. *Id.*

21. *Gilbert*, 117 S. Ct. at 1811-12.

22. *Id.* at 1812 (citing *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993); *Zinerman v. Burch*, 494 U.S. 113, 128 (1990); *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, 314-20 (1908); *Parratt v. Taylor*, 451 U.S. (1981); *FDIC v. Mallen*, 486 U.S. 230 (1988)).

the value of any procedural safeguards; and (3) the government's interest in the matter.²³ Homar argued that he had an interest in receiving a paycheck on a regular basis, but the Court found that he faced only a temporary deprivation of pay.²⁴ The Court then examined the government's interest, concluding that the State's interest is great when public employees in positions of trust and high visibility are charged with felonies.²⁵ Justice Scalia's examination of the third factor briefly discussed an Executive Order issued by the Governor of Pennsylvania.²⁶ Justice Scalia concluded that an arrest and formal charge is sufficient to create a reasonable belief that the employee committed the crime and to guard against any erroneous deprivation.²⁷ Despite Homar's contention that Levanowitz should have given him the opportunity to explain his actions, the Court did not agree and found that no pre-suspension hearing was necessary to protect Homar's interests.²⁸ Justice Scalia distinguished a termination from a

23. *Gilbert*, 117 S. Ct. at 1812. Justice Scalia relied on *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), *FDIC v. Mallen*, 486 U.S. 230, 242 (1988), and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). *Id.*

24. *Gilbert*, 117 S. Ct. at 1813. Justice Scalia focused on the fact that *Mallen* and *Loudermill* determined the need for a finding as to the length of the deprivation. *Id.* He reasoned that as long as there is a prompt post-suspension hearing, the lost income is relatively nominal, benefits are not affected, and there is no real interest affected. *Id.*

25. *Id.* Homar would have preferred suspension with pay, but Justice Scalia believed that this would give employees charged with a felony, "a paid leave at taxpayer expense." *Id.* When an employee can provide no valuable service to the employer after charges are filed, the Court would not have the employer shoulder the burden of continued payment. *Id.* Justice Scalia also gave deference to ESU's interest in preserving public confidence in its police force (making an analogy to the state's interest in preserving the good name of horse racing), a sufficiently important interest to justify suspension prior to a hearing. *Id.* (citing *Barry v. Barchi*, 443 U.S. 55, 64 (1979); *FDIC v. Mallen*, 486 U.S. 230, 241 (1988)).

26. *Id.* Under that order, according to the ESU officials, a state employee is to be suspended without pay as soon as practical after being formally charged with a felony. *Id.* (citing 4 PA. CODE § 7.173 (1997)). Homar contended that the order is merely suggestive and not binding upon the state employer. *Gilbert*, 117 S. Ct. at 1813. Justice Scalia found no urgent reason to decide this dispute because there was no constitutional obligation to provide Homar with a pre-suspension hearing. *Id.*

27. *Id.* at 1814. Justice Scalia found that the purpose of a pre-suspension hearing was to assure that adequate grounds existed for suspension without pay. *Id.* at 1813. He then determined that arrest and formal charges serve the same purpose, and an indictment further bolsters the reliability of the charges, because an independent third party (the police) has determined that probable cause exists to believe the accused committed the crime. *Id.* at 1814.

28. *Id.* Levanowitz had discretion whether to suspend Homar, and Homar contended that this fact made a pre-suspension hearing necessary. *Id.* Justice Scalia noted that in *Mallen*, the FDIC had discretion whether to suspend its employee and the Court still found no necessity to provide for a pre-suspension hearing. *Id.* (citing *FDIC v. Mallen*, 486 U.S. at 234-35; 64 Stat. 879, as amended by 12 U.S.C. § 1818(g)(1)).

suspension by finding that in a termination, the only way to permit a decisionmaker to exercise his or her discretion is to provide for a pre-termination hearing.²⁹

Homar's argued that prompt action is necessary to prevent a prolonged suspension, but the Court found this argument supports the idea that a prompt post-suspension hearing will guard against any real harm to an employee's interest.³⁰ Justice Scalia found that whether Homar actually received a prompt post-suspension hearing was a separate question that neither the district court nor the Third Circuit had addressed.³¹ Therefore, the Court, in holding that a state employee is not entitled to due process protection from suspension without pay without prior notice and hearing when arrested on felony drug charges, reversed the judgment of the Third Circuits and remanded for consideration of whether Homar received a prompt post-suspension hearing.³²

In *Goldberg v. Kelly*,³³ the Supreme Court of the United States considered whether procedural due process is required before discontinuing welfare payments.³⁴ The *Goldberg* Court examined whether the government denied procedural due process to a public assistance recipient by terminating payments without a pre-termination evidentiary hearing.³⁵ In an opinion authored by Justice Brennan, the Court held that due process requires a pre-termination evidentiary hearing prior to termination of welfare payments, and that a post-termination hearing is not enough to protect the recipient's due process guarantees.³⁶

The Court found that welfare provides the necessary money for food, clothing, shelter, and medical care, and that termination of these benefits may deprive the recipient of the required means to

29. *Gilbert*, 117 S. Ct. at 1814. In the case of a suspension, there is the opportunity to invoke the discretion later, and a delay actually is a benefit to the suspended employee whereby he has the opportunity to seek clarification about the arrest and charges. *Id.* Justice Scalia determined that Homar had an interest in the speedy determination of his situation but that forcing an employer to act too quickly might work against an employee's interests by causing too much emphasis to be placed on the public perception of a felony charge. *Id.* (citing *FDIC v. Mallen*, 486 U.S. at 243).

30. *Id.*

31. *Id.* The Court has previously held that 90 days is not an overly long period to wait for a post-suspension hearing. *Id.* (citing *FDIC v. Mallen*, 486 U.S. at 243).

32. *Id.* at 1814-15.

33. 397 U.S. 254 (1970).

34. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

35. *Goldberg*, 397 U.S. at 255.

36. *Id.* at 261.

live.³⁷ It found that the government's interest in conserving resources does not outweigh the private interests involved.³⁸ The Court also expressed concern that the stakes are too high to terminate assistance without a chance for the recipient to protest and produce evidence of need.³⁹ Justice Brennan determined that the pre-termination appearance serves to evaluate the validity of the discontinuance, and that an in-person appearance may replace written submissions that are not an option for illiterate recipients.⁴⁰ He concluded that welfare recipients are entitled to a predeprivation evidentiary hearing to comport with due process rights fully.⁴¹

In *Mathews v. Eldridge*,⁴² the Supreme Court of the United States determined the requisite due process to be afforded under a particular set of facts and circumstances.⁴³ The Court in *Eldridge* explored whether the Due Process Clause of the Fifth Amendment provides an opportunity for an evidentiary hearing to a Social Security disability benefit recipient prior to termination of his benefits.⁴⁴ Justice Powell, writing for the Court, held that no evidentiary hearing is required before termination of disability benefits and that present administrative procedures fully satisfy due process guarantees.⁴⁵

The *Eldridge* Court noted that it has not always insisted upon a pre-termination hearing, but some type of procedure based upon a factual determination.⁴⁶ The Court devised three factors for examination when due process is at issue: the private interest

37. *Id.* at 264.

38. *Id.* at 265. In fact, it is a social policy to assist the impoverished, and any concern about money can be reduced with prompt post-termination hearings. *Id.* at 265-66.

39. *Id.* at 266.

40. *Goldberg*, 397 U.S. at 269. Another benefit of an in-person appearance is the opportunity to confront and cross-examine adverse witnesses. *Id.* at 270.

41. *Id.*

42. 424 U.S. 319 (1976).

43. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

44. *Eldridge*, 424 U.S. at 323.

45. *Id.* at 349. An unsatisfied worker must provide a medical assessment of his physical or mental condition stating that he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." *Id.* at 343 (quoting 42 U.S.C. § 423(d)(3) (Supp. III 1970)). The State Social Security Agency ("SSA") also sends a detailed questionnaire to the worker to substitute for a personal appearance. *Id.* at 345. The worker also has full access to all information gathered by the SSA. *Id.* at 345-46. Prior to termination of benefits, the SSA informs the worker of its decision, the rationale, and any evidence relied upon. *Id.* at 346. Workers may then challenge the information and the SSA's conclusions. *Id.*

46. *Id.* at 334 (citing *Morrissey v. Brewer*, 408 U.S. 471 (1972)).

affected; the risk of an erroneous deprivation of property rights if the procedures provided are used and the value of any safeguards afforded; and the government's interest.⁴⁷ Justice Powell determined that the private interest affected was the uninterrupted receipt of income.⁴⁸ He found a small risk of wrongful deprivation under the facts because the government required medical assessments from unbiased physicians, the recipient had a chance to respond through a questionnaire, and the recipient had the opportunity to examine all records.⁴⁹ The government's interest in the dispute, according to the Court, was the risk of increased cost associated with hearings prior to termination of benefits and the required payments while decisions are pending.⁵⁰

The Court distinguished the private interest from the public interest in *Goldberg*, by noting that eligibility for benefits in *Goldberg* was based upon financial need, while the interest in *Eldridge* was based upon disability.⁵¹ Therefore, the Court concluded that the existing procedures were adequate and no due process violations would occur without a pre-termination hearing.⁵²

The Supreme Court of the United States directly applied the *Eldridge* test in *Cleveland Board of Education v. Loudermill*.⁵³ The issue before the Court in *Loudermill* was what pre-termination process the government must accord a public employee dismissible only for cause.⁵⁴ The Court held that the only process due was a pre-termination opportunity to respond, coupled with post-termination administrative procedures.⁵⁵

47. *Id.* at 335.

48. *Id.* at 340. The Court noted that the hardship imposed upon a recipient who is wrongfully deprived is significant, but that other sources of government assistance exist, such as welfare and food stamps. *Id.* at 342-43 n.27.

49. *Eldridge*, 424 U.S. at 343-46. The Court felt that the value of a hearing was diminished because of these safeguards. *Id.*

50. *Id.*

51. *Id.* at 340-41. The Court found this to be not as significant a deprivation as that in *Goldberg*. *Id.*

52. *Id.* at 349.

53. 470 U.S. 532 (1985).

54. *Loudermill*, 470 U.S. at 535.

55. *Id.* at 547-48. The Ohio statute which creates the property right provides that dismissed employees be provided with a copy of the removal order along with the reasons cited, which is dually filed with the Director of Administrative Services. *Id.* at 539-40 n.6. Within ten days of that filing, the dismissed employee may file an appeal with the State Personnel Board of review or the Cleveland Civil Service Commission. *Id.* The Board or Commission notifies the employer and schedules a hearing within thirty days of the employee's filing. *Id.* After hearing the dispute, the Board or Commission may affirm, disaffirm, or modify the judgment of the employer. *Id.* If a party remains unsatisfied, they

The Court in *Loudermill* stated that state law creates property interests,⁵⁶ and then went on to apply the *Eldridge* test.⁵⁷ The Court found that the private interest at stake in *Loudermill* was continued employment, and that wrongful deprivation would cause severe consequences.⁵⁸ The Government's interest in limiting administrative burdens and delays, the Court concluded, did not outweigh the private interests.⁵⁹ The Court noted that an employer concerned with the hazard of a particular employee remaining on the job may suspend him with pay.⁶⁰ In light of these interests, the Court required a pre-termination hearing that included notice and an opportunity to respond, relying upon the existence of a full, post-termination hearing to protect the worker's due process rights fully.⁶¹

Although the Court faced a deprivation of employment in *Loudermill*, the situation was different from in the instant case.⁶² In *Loudermill*, the government terminated an employee for lying on his job application about a previous felony conviction.⁶³ Homar was suspended due to his arrest, while employed at ESU, on drug charges.⁶⁴ The difference in severity is in the time of the occurrence of the improper act. The *Loudermill* Court did not necessarily agree with *Loudermill's* actions, but merely ordered pre-termination process.⁶⁵ Here, the Court found that no predeprivation process was necessary, because as Justice Scalia stated, "for present purposes arrest and charge give reason enough.

may file an appeal in the State Court of Common Pleas. *Id.*

56. *Id.* at 538.

57. *Id.* at 542. For a description of the *Eldridge* test, see the analysis of *Mathews v. Eldridge*, *supra* note 44 and accompanying text.

58. *Id.* at 542-43. The Court reasoned that dismissals often involve factual disputes, which serves to bolster the argument that employees should have the opportunity to present their side of the story, even if success is not probable. *Id.* at 543-44.

59. *Loudermill*, 470 U.S. at 544. The Court added that the government has an interest in avoiding disruptions in the workplace, as it is better to keep a skilled employee than train a new replacement. *Id.* An interest also exists in keeping its citizens gainfully employed rather than on public assistance. *Id.*

60. *Id.* at 545.

61. *Id.* at 545-46. Any more process, the Court noted, would intrude upon the government's interest. *Id.* at 546.

62. *Id.* at 532.

63. *Id.* at 535. The dishonest act was discovered after *Loudermill* had been working for eleven months. *Id.*

64. *Gilbert v. Homar*, 117 S. Ct. 1807, 1810 (1997). Homar was accused of possession and possession with the intent to deliver marijuana, and criminal conspiracy, all acts supposedly occurring while Homar was actively employed at ESU. *Id.*

65. *Loudermill*, 470 U.S. at 547-48.

They serve to assure that the state employer's decision to suspend the employee is not 'baseless or unwarranted,' in that an independent third party has determined that there is probable cause to believe the employee committed a serious crime."⁶⁶ Although the government later dismissed the charges against Homar⁶⁷ and Loudermill was actually convicted of grand larceny,⁶⁸ it appears that the *Homar* Court may have put greater weight on the fact that Homar was charged with a crime while employed by the state, while Loudermill was convicted of a felony before his employment began.

This view is supported by Justice Scalia's holding that the Court sanction paid vacations for government employees at taxpayers' expense.⁶⁹ He also noted the importance of maintaining public confidence in ESU's police force.⁷⁰

Justice Ginsburg, during oral argument, questioned the increased costs to the state that would result from requiring predeprivation hearings.⁷¹ Her question suggests that the Court's view is that the *threat* of improper conduct by a current government employee is more serious, from the government's point of view as the employer, than *actual* improper conduct before the government employs a worker.

The Court dealt with a different type of deprivation in *Homar* than that in *Goldberg*⁷² or in *Eldridge*.⁷³ In *Homar*, the government suspended an employee from his employment, while in *Goldberg* and *Eldridge*, the government terminated purely economic benefits.⁷⁴ This may serve as an explanation of why the Court afforded no predeprivation process to Homar.

The interests threatened in *Goldberg* and *Eldridge* are more necessary to basic survival than the Homar's property interest in his employment, because the government awards welfare and Social Security benefits only after a showing of need.⁷⁵ Without

66. *Gilbert*, 117 S. Ct. at 1813-14 (quoting *FDIC v. Mallen*, 486 U.S. 230, 240 (1988)).

67. *Id.* at 1810.

68. *Loudermill*, 470 U.S. at 535.

69. *Gilbert*, 117 S. Ct. at 1813.

70. *Id.*

71. *Gilbert v. Homar*, No. 96-651, 1997 WL 143823, at *34 (1997).

72. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

73. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

74. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

75. Most often, these benefits are awarded to people who cannot work due to various considerations. For example, welfare is sometimes awarded to parents in need to provide support for their children. Social Security benefits are awarded due to a disability that prevents the recipient from working.

these government-furnished benefits, recipients may not have any other means of providing basic support for themselves.

However, suspension from one's job is not as severe. Although the suspended employee may not be able to work at his or her current place of employment, other positions are available. Suspended employees, unlike welfare or Social Security recipients, are capable of supporting themselves adequately by working.

The Court's holding in *Gilbert v. Homar* was correct.⁷⁶ Government employers should have the ability to remove problematic employees without delay when they jeopardize the state's interests in maintaining the public trust and reducing costs to taxpayers. If the charges against the employee are found to be false, the government should promptly return the employee to the same relative status he would have been in had the state not taken action, including back pay and reimbursement for expenses incurred that the employer would have covered as benefits. Prompt postdeprivation process ensures that the deprivation, if groundless, will be corrected before any permanent damage to the employee can occur.

The next logical step is to extend the *Homar* rule to non-government employees as well. Private employees do not differ much from their state counterparts in that both share the same interests in continued employment and an opportunity to plead their case. Private employers also have many of the same interests as state employers. Public opinion is equally important to private employers because they rely on consumers' opinions as expressed by their spending. Because private employers are in business primarily to make a profit, the interest of preventing potential troublemakers from receiving paid vacations is also very important. The Court should not hesitate to extend the *Homar* rule to private employees.

Matthew Q. Ammon

76. 117 S. Ct. 1807 (1997).