University of Dayton Law Review

Volume 23 | Number 2 Article 8

1-1-1998

The First Amendment Fails to Protect Lesbian Love in the Eleventh Circuit

Allison Dawn Gough
University of Dayton

The First Amendment Fails to Protect Lesbian Love in the Eleventh Circuit

Cover Page Footnote

I would like to thank Professor Richard B. Saphire for his helpful comments. This Note is dedicated to my parents, Donald and Mary Gough, and to Robert Aaron Michael, for all their love and support.

NOTES

THE FIRST AMENDMENT FAILS TO PROTECT LESBIAN LOVE IN THE ELEVENTH CIRCUIT: *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997)

Allison Dawn Gough[*]

TABLE OF CONTENTS

I. INTRODUCTION

Twelve years ago in the case of *Bowers v. Hardwick*,[1] the Eleventh Circuit Court of Appeals acknowledged a connection between homosexual

---

[*] Executive Editor, 1998-99, University of Dayton Law Review. J.D. expected, May 1999, University of Dayton School of Law; B.A., 1996, Wright State University. I would like to thank Professor Richard B. Saphire for his helpful comments. This Note is dedicated to my parents, Donald and Mary Gough, and to Robert Aaron Michael, for all their love and support.

[1] Bowers v. Hardwick, 760 F.2d 1202 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986).

sodomy and the intimate association of marriage.[2] According to the court, the benefits of marriage, such as the intimate association inherent in marriage, could inure to individuals, including homosexuals, who engaged in conduct outside of the traditional marital relationship.[3] Based on this conclusion, the court held that Georgia's anti-sodomy law[4] implicated fundamental privacy rights, under the Ninth and Fourteenth Amendments to the United States Constitution, of a homosexual actively engaging in sodomy.[5]

The Eleventh Circuit's decision was only a brief victory for the homosexual community, as the decision was overturned on appeal.[6] However, for one shining moment, one court had lent constitutional credibility to what homosexuals had been crying out all along: Sex for homosexuals can, and in at least some instances does, serve the purpose of forming and/or fostering the bonds which lie at the heart of a constitutionally protected intimate association.[7]

The Eleventh Circuit in *Hardwick* did not hesitate to compare the intimate association arising from homosexual sodomy to the intimate association founded in heterosexual marriage.[8] For this reason, the Eleventh Circuit's refusal only twelve years after *Hardwick* to affirmatively place the committed homosexual relationship securely within the ambit of the First Amendment's intimate association protection is surprising. The opportunity to do so arose in the case of *Shahar v. Bowers*.[9] Georgia's Attorney General, Michael Bowers, revoked a job offer he had made to an attorney, Robin Joy Shahar, upon hearing of her plans to marry another woman in a religious ceremony.[10] Shahar brought suit against Bowers, claiming that the revocation of the job offer violated

---

[2] *Id.* at 1212.

[3] *Id.*

[4] GA. CODE ANN. § 16-6-2 (1984).

[5] The court held that the acts of sodomy in which Hardwick wished to engage were private and intertwined with an intimate association between himself and his partner, and that these rights were protected by the Ninth and Fourteenth Amendments to the United States Constitution. *Hardwick*, 760 F.2d at 1211-12. The court remanded the case to the trial court, where the anti-sodomy statute would have to survive strict scrutiny. *Id.* at 1213. However, this never happened because Attorney General Bowers appealed the case to the United States Supreme Court, where the Eleventh Circuit was reversed. *Hardwick*, 478 U.S. at 196 (1986).

[6] *Hardwick*, 478 U.S. at 196.

[7] *See* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1639 (1993); *Hardwick*, 760 F.2d at 1212.

[8] *Hardwick*, 760 F.2d at 1212.

[9] Shahar v. Bowers, 836 F. Supp. 859 (N.D. Ga. 1993), *aff'd in part, vacated in part*, 70 F.3d 1218 (11th Cir. 1995), *reh'g en banc granted, opinion vacated*, 78 F.3d 499 (11th Cir. 1996), *aff'd*, 114 F.3d 1097 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

[10] *Shahar*, 114 F.3d at 1101.

her constitutional rights of freedom of association, freedom of religion, equal protection, and substantive due process.[11]

Shahar marks the Eleventh Circuit Court of Appeals' first opportunity to consider whether or not a committed homosexual relationship is protected as an intimate association under the First Amendment and, if so, to define the level of constitutional protection it should be afforded in a government employment context. At the end of its opinion, the court had resolved the case without deciding these issues. The court assumed that Shahar's relationship with her female partner was protected by the First Amendment, but only for the purposes of the decision.[12] The court then employed the *Pickering* balancing test,[13] which required the court to weigh Shahar's presumed intimate association right against Bowers' interest as a government employer in the effective functioning of the Attorney General's office.[14] The court determined that the scales tipped in Bowers' favor.[15]

This Note argues that the Eleventh Circuit's en banc decision in *Shahar* was inherently flawed from the outset. In order for a court to employ the *Pickering* balancing test, a government employee must establish that an adverse employment decision made by one's employer implicates his or her constitutional right(s).[16] Instead of determining whether or not Shahar had a constitutionally protected intimate association right in her lesbian relationship, the court assumed the existence of the right.[17] Although precedent does not proscribe this,[18] a determination of whether Shahar indeed had an intimate association right was necessary in

---

[11] *Id.* The dismissal of Shahar's substantive due process claim was not contested on appeal to the en banc Eleventh Circuit, and therefore is not at issue in the case. This Note focuses only on Shahar's intimate association right and the court's treatment of that right. Shahar's expressive association, freedom of religion, and equal protection claims, as presented on appeal, are beyond the scope of this Note.

[12] *Id.*

[13] The test originated in the case of *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). *See infra* notes 90-114 and accompanying text for a full discussion of the *Pickering* balancing test.

[14] *Shahar*, 114 F.3d at 1103, 1106.

[15] *Id.* at 1110.

[16] *See, e.g.*, Connick v. Myers, 461 U.S. 138, 146 (1983) (determining that if a constitutional right is not at issue, there is no need to review the adverse employment decision and, therefore, no need to go on to the *Pickering* balancing test).

[17] *Shahar*, 114 F.3d at 1100.

[18] As will be discussed in the Analysis section of this Note, there is no precedent on point concerning the assumption of an intimate association right for *Pickering* balancing purposes. *See infra* notes 117-21 and accompanying text. However, in support of its decision to assume Shahar's right, the majority points to two cases, *Kemp v. State Bd. of Agric.*, 803 P.2d 498, 505 (Colo. 1990) (en banc), *cert. denied*, 501 U.S. 1205 (1991), and *Barnard v. Jackson County*, 43 F.3d 1218, 1223 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 63 (1995), in which the courts assumed the right of freedom to petition and freedom of speech, respectively, for *Pickering* balancing test purposes.

order to properly assign a corresponding weight to the right for balancing purposes. Therefore, as a threshold matter, the court needed to affirmatively decide whether Shahar had a First Amendment right of intimate association in her relationship with her female partner in order to proceed to the balancing test.

This Note also argues that if the court had decided this issue by drawing from and analyzing surrounding case law, the court would have determined that Shahar's relationship does indeed qualify as an intimate association, and that the intimate association at issue was of the type that is closest to the core of the First Amendment.[19] Consequently, Shahar's right should have been given the highest weight contemplated by the First Amendment for the purpose of balancing the competing interests presented in the case.[20] Finally, this Note argues that had Shahar's right been afforded the highest weight possible for balancing purposes, Shahar's right would have outweighed Bowers' interests in the effective functioning of the Attorney General's office.[21]

Part II of this Note sets forth the procedural and factual background of the *Shahar* case and the issues raised therein.[22] Part II further sets out the reasoning behind the court's majority, concurring, and dissenting opinions.[23] Part III begins with a brief description of the *Pickering* balancing test and how courts utilize the test in the government employment context to determine whether adverse employment decisions violate the constitutional rights of government employees.[24] Part III then analyzes the court's obligation to determine whether Shahar had a constitutionally protected right of intimate association in her relationship in order to proceed to the *Pickering* balancing test, as a weight could not be assigned to the right without first defining the right.[25] Part III also analyzes the proper weight that should have been given to Shahar's right, as well as the impact that affording the right the correct weight would have had on the court's ultimate decision.[26] Finally, Part IV concludes that if the court had embarked on the task of determining whether Shahar had an intimate association right in her homosexual relationship, it would have found that based on the surrounding case law, she indeed had the right, the right was

---

[19] *See infra* notes 122-60 and accompanying text.

[20] *See infra* notes 161-65 and accompanying text.

[21] *See infra* notes 166-90 and accompanying text.

[22] *See infra* notes 28-60 and accompanying text.

[23] *See infra* notes 61-89 and accompanying text. The dissenting opinions of Judges Godbold, Kravitch, Birch, and Barkett have been condensed and presented under the heading "The Dissents."

[24] *See infra* notes 90-114 and accompanying text.

[25] *See infra* notes 122-60 and accompanying text.

[26] *See infra* notes 161-90 and accompanying text.

entitled to full weight for balancing purposes, and that Shahar should have prevailed under the *Pickering* balancing test.[27]

II. BACKGROUND

A. Factual and Procedural Background of Shahar v. Bowers

In 1990, during the summer following her second year of law school, Robin Joy Shahar clerked for the Georgia State Attorney General's office.[28] Attorney General Michael Bowers, in September of 1990, offered Shahar a position as a Staff Attorney upon her graduation from law school.[29] Shahar accepted the position and was to begin work in September of 1991.[30] Although Shahar had openly talked about the fact that she was a lesbian to a few other staff members during her 1990 summer clerkship,[31] the Attorney General stated that at the time he made the job offer to Shahar, he had no idea that she was a lesbian.[32]

Shahar completed an official application for the position of Staff Attorney at the Attorney General's office in November of 1990.[33] In the family status section of the application, in response to a question regarding marital status, Shahar crossed out the options and wrote "engaged."[34] Next, in the space provided for the name of the applicant's spouse, Shahar added the word "future" in front of the word "spouse," and then wrote the name "Francine Greenfield."[35] The Attorney General's office filed Shahar's application without fully reviewing it.[36]

In June of 1991, Shahar called Deputy Attorney General Coleman to discuss the date upon which her employment would start.[37] Shahar informed Coleman that because she was getting married in July, changing her last name to Shahar, and honeymooning in Greece, she would not be

---

[27] *See infra* note 191 and accompanying text.

[28] Shahar v. Bowers, 114 F.3d 1097, 1100 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998). At the time of her summer clerkship, Shahar was known as Robin Brown. *Id.* at 1100 n.4. After she married, she legally changed her name to Shahar. *Id.*

[29] *Id.*

[30] *Id.*

[31] *Shahar*, 70 F.3d at 1220.

[32] *Shahar*, 114 F.3d at 1101.

[33] *Id.* at 1100.

[34] *Id.*

[35] *Id.*

[36] *Shahar*, 70 F.3d at 1220.

[37] *Shahar*, 114 F.3d at 1100.

able to start until the middle of September.[38] At no time during this conversation did Shahar mention that she would be marrying another woman.[39] Senior Assistant Attorney General Milsteen, who had been in Coleman's office during the call, overheard Coleman congratulating Shahar on her upcoming wedding.[40] Later, Milsteen told Rutherford, a Department Attorney, about Shahar's upcoming wedding, at which time Rutherford told him that Shahar was marrying another woman.[41]

Although Attorney General Bowers was not in the office that week, his five senior aides met several times to discuss the potential conflicts of having a lesbian who claimed to be married to another woman on the Legal Department staff.[42] When Bowers returned to the office, his aides apprised him of the situation.[43] Bowers was informed that Shahar had indicated she was marrying another woman on the personnel application form she had completed in November of 1990.[44] Bowers was also told of Shahar's conversation with Coleman about her upcoming wedding, a chance restaurant meeting between Shahar, Greenfield, and two female staff members during which Shahar told the women about her upcoming wedding, and the fact that some office staff had received invitations to Shahar's wedding.[45]

After further meetings with his senior aides and other staff attorneys, Bowers decided to withdraw the job offer to Shahar.[46] On July 9, 1991, Bowers wrote a letter revoking the offer, which was handed to Shahar in a meeting with his aides.[47] The letter stated in pertinent part:

> [This action] has become necessary in light of information which has only recently come to my attention relating to a purported marriage between you and another woman. As chief legal officer of this state, inaction on my part would constitute tacit approval of this purported marriage and jeopardize the proper functioning of this office.[48]

---

[38] *Id.* at 1101.

[39] *Id.*

[40] *Id.*

[41] *Id.* Rutherford had run into Shahar and Greenfield at a restaurant in the spring of 1991, at which time Shahar told Rutherford that she and Greenfield were making plans for their upcoming wedding. *Shahar*, 70 F.3d at 1220.

[42] *Shahar*, 114 F.3d at 1101.

[43] *Id.*

[44] *Shahar*, 70 F.3d at 1220-21.

[45] *Id.* at 1221.

[46] *Shahar*, 114 F.3d at 1101.

[47] *Id.*

[48] *Id.*

On July 28, 1991, Shahar and Greenfield were married in a traditional Jewish ceremony as members of the Reconstructionist Movement of Judaism.[49] In October of 1991, after the wedding and honeymoon, Robin Shahar filed suit against Bowers in the Federal District Court for the Northern District of Georgia, under 42 U.S.C. § 1983.[50] Shahar alleged that by revoking the job offer, Bowers violated her constitutional rights of freedom of association, freedom of religion, equal protection, and substantive due process.[51]

The district court applied the *Pickering* balancing test to Shahar's claims.[52] The test is used only in a government employment context, and calls for a court to balance the interests of a government employer in maintaining the efficient and effective functioning of his or her office against the constitutional rights of the employee in order to determine whether the challenged employment decision burdened those rights in violation of the Constitution.[53] After the balancing analysis, the district court granted summary judgment to Bowers on all claims.[54]

Shahar appealed to the Eleventh Circuit Court of Appeals, reasserting every claim except the substantive due process claim.[55] The Eleventh Circuit determined that using the *Pickering* balancing test was inappropriate in this case, as the test was usually employed in a free speech context.[56] Instead, the court decided that strict scrutiny should be applied to Shahar's claims.[57] The court then affirmed the district court's grant of summary judgment to Bowers on Shahar's substantive due process claim,

---

[49] *Shahar*, 70 F.3d at 1221, 1223-24. Both Shahar and her partner, Greenfield, are active members of the Reconstructionist Movement of Judaism. *Shahar*, 836 F. Supp. at 866. The Reconstructionists do recognize and perform homosexual marriages, which resemble traditional Jewish marriage celebrations in almost every respect. *Shahar*, 70 F.3d at 1222-23. Shahar and Greenfield, years prior to their wedding, had bought a house together and had qualified for special marriage rates on their insurance policy. *Id.* at 1224. Also prior to their wedding, both Shahar and Greenfield understood that upon marrying, they would be recognized by the Reconstructionist Movement and its adherents as a married couple who had publicly affirmed their commitment to each other and the Jewish community. *Id.* Shahar's wedding was a traditional weekend celebration, and resembled any other heterosexual Jewish wedding in almost every respect. *Id.* About 100 family members and friends attended the wedding, the couple signed the traditional *Kutubah*, a marriage contract, and exchanged rings under the *huppah*, or canopy. *Id.* at 1223-24. After the ceremony, the newlyweds changed their last name to Shahar, which is Hebrew for "search for God." *Id.* at 1221.

[50] *Shahar*, 70 F.3d at 1220.

[51] *Shahar*, 836 F. Supp. at 862.

[52] *Id.* at 864.

[53] *See infra* notes 90-119 and accompanying text.

[54] *Shahar*, 836 F. Supp. at 869.

[55] *Shahar*, 70 F.3d at 1220.

[56] *Id.* at 1224.

[57] *Id.*

since it was not reasserted on appeal, and vacated and remanded Shahar's claims of freedom of association, freedom of religion, and equal protection to the district court to be analyzed using strict scrutiny.[58]

Bowers then requested a rehearing of the Eleventh Circuit en banc, which was granted.[59] Shahar asserted to the en banc Eleventh Circuit that the decision of the Eleventh Circuit was correct, and that strict scrutiny should be applied to her freedom of association, freedom of religion, and equal protection claims.[60]

B. The Majority Opinion

The Eleventh Circuit Court of Appeals sitting en banc affirmed the decision of the district court and granted summary judgment to Bowers on all claims.[61] The court, after assuming *arguendo* that Shahar had a constitutional right to intimately associate with her female partner, applied the *Pickering* balancing test and determined that Bowers' interests in the effective functioning of the Attorney General's office outweighed Shahar's assumed right.[62] Because the case arose in a government employment context, strict scrutiny was not used.[63]

The Eleventh Circuit sitting en banc accepted Bowers' prediction that retaining a lesbian staff attorney who purported to be married to another woman would tarnish the credibility of the office.[64] The court also accepted Bowers' claim that by employing Shahar, public perception of the office would be harmed in that the public would find it inconsistent for the Department to enforce Georgia's sodomy law while maintaining an employee who was consistently breaking the law.[65] Bowers felt Shahar's purported marriage would likely affect her and the Department's credibility, impede the Department's ability to deal with controversial matters, hinder the Department's efforts to enforce Georgia's laws against homosexual sodomy, and create other difficulties within the Department.[66] Bowers also argued that by marrying another woman, Shahar demonstrated that she did not appreciate the importance of appearances and the need to

---

[58] *Id.* at 1226.

[59] *Shahar*, 78 F.3d 499.

[60] *Shahar*, 114 F.3d at 1102.

[61] *Id.* at 1110-11.

[62] *Id.*

[63] *Id.* at 1103.

[64] *Id.* at 1109.

[65] *Id.* at 1109-10.

[66] *Id.* at 1110.

shield the Department from controversy.[67] He stated that, in general, he no longer believed that Shahar would exercise good judgment on behalf of the Department.[68]

In finding that Shahar's right of intimate association was outweighed by Bowers' interests as a government employer, the court offered additional rationales. The court stated that in addition to Bowers' asserted interests, the scales tipped in Bowers' favor because the employment involved in this case was of a special kind.[69] Shahar's position would require her to have access to Bowers' confidences, to act as Bowers' spokesperson, and to make policy.[70] "[F]urthermore, the employment in this case is employment with responsibilities directly impacting on the enforcement of a state's laws: a kind of employment in which appearances and public perceptions and public confidences count a lot."[71] The court further declared that even the associational rights involved in a legal marriage can be overcome by the government's interests in the effective functioning of a government office.[72]

Although the court stated that Shahar had an assumed constitutional right to intimately associate with her partner, the court did not discuss the type of intimate association at issue.[73] Similarly, although the court declared that Shahar's assumed association right would be given substantial weight in the balancing, the court did not define the corresponding weight that the assumed right would have for *Pickering* balancing purposes.[74]

C. Judge Tjoflat's Concurrence

Judge Tjoflat took the majority to task for failing to answer the First Amendment questions raised in this case. He agreed that Shahar's intimate association claim was outweighed by Bowers' interests, but asserted that the majority needed to address the question of whether Shahar's

---

[67] *Id.* at 1101, 1110.

[68] *Id.*

[69] *Id.* at 1110.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 1106. The court referred to *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994). In *McCabe*, the government's interests were held to outweigh the intimate association right McCabe had in her marriage. *Id.* at 1574. However the court did not explicitly employ the *Pickering* balancing test in making that determination. *Id.*; *see infra* notes 109-14 and accompanying text.

[73] *Shahar*, 114 F.3d at 1106.

[74] *Id.*

relationship was constitutionally protected in order to determine whether Bowers' actions were lawful.[75] Judge Tjoflat went on to find that Shahar's intimate association right was not actually protected by the First Amendment, despite the fact that the majority assumed Shahar had the right for balancing purposes, because her homosexual relationship was not deeply rooted in the culture and traditions of the Nation.[76] Therefore, Judge Tjoflat agreed with the majority that the district court's grant of summary judgment in favor of Bowers on Shahar's intimate association claim was appropriate.[77]

D. The Dissents

The four dissenting judges agreed on one important point: Bowers' predictions of harm were unsubstantiated and should not have been accepted uncritically by the majority. Judge Godbold found that Bowers violated Shahar's intimate association right by not acting reasonably in revoking the job offer.[78] He reasoned that Bowers falsely believed that Shahar was holding herself out as married in a civil sense when the evidence proved the marriage was purely religious in nature.[79] Judge Godbold stated that Bowers revoked the job offer based on misconceptions and misunderstandings.[80]

Judge Kravitch found that Shahar's relationship with her partner qualified as an intimate association and should have been protected under the First Amendment.[81] She criticized the majority, asserting that the majority need not have accepted Bowers' predictions of harm uncritically.[82] Because Bowers' predictions of harm were not substantiated, Shahar's constitutional right of intimate association outweighed Bowers' interests.[83]

Judge Birch stated that Shahar's relationship with Greenfield qualified as a protected First Amendment right to associate.[84] He declared

---

[75] *Id.* at 1111-13.

[76] *Id.* at 1115.

[77] *Id.*

[78] *Id.* at 1118.

[79] *Id.* at 1118-19.

[80] *Id.* at 1122.

[81] *Id.* at 1124.

[82] *Id.* Judge Kravitch cited to the case of *Waters v. Churchill*, 511 U.S. 661 (1994), to support this proposition. In *Waters*, the Supreme Court stated, "[w]e do not believe that the court must apply the [balancing] test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions." *Id.* at 677.

[83] *Shahar*, 114 F.3d at 1125.

[84] *Id.*

that in light of *Romer v. Evans*,[85] which recognized that homosexuals as a class are entitled to some protection under the equal protection clause, the scale should have tipped in Shahar's favor.[86] Judge Birch went on to state that Bowers' predictions of harm were based on assumptions and unsupported inferences and, therefore, they could not weigh heavily on his side of the scale.[87]

Judge Barkett declared that, in effect, the majority merely applied rational review to Bowers' burden of Shahar's rights.[88] He found that the majority misapplied the *Pickering* balancing test by deferring to Bowers without requiring any proof to substantiate his predictions of harm.[89]

III. ANALYSIS

A. The Evolution of the Pickering *Balancing Test*

In order to fully appreciate the court's decision in *Shahar* and its impact, it is necessary to trace the roots of the precedents under which this case was decided. This entails a brief analysis of the origin and development of the *Pickering* balancing test. An explanation of the reasons the test was created, and insight on how the test was first intended to be applied will prove useful in an overall understanding of the *Shahar* court's decision.

The *Pickering* balancing test emerged almost thirty years ago in the United States Supreme Court case of *Pickering v. Board of Education*.[90] Pickering, a public school teacher, was dismissed for exercising his freedom of speech via a letter to the local newspaper criticizing the Board of Education and superintendent of schools.[91] The Board dismissed Pickering, basing its decision on its determination that Pickering's letter was "detrimental to the efficient operation and administration of the schools of the district."[92] Pickering subsequently brought suit against the Board, claiming that the letter was protected by the First and Fourteenth

---

[85] 116 S. Ct. 1620 (1996).

[86] *Shahar*, 114 F.3d at 1126.

[87] *Id.* at 1126-27.

[88] *Id.* at 1129.

[89] *Id.* at 1130.

[90] 391 U.S. 563 (1968).

[91] *Id.* at 564. Pickering criticized the Board and superintendent for their mishandling of proposals to raise revenue for the district's schools. *Id.*

[92] *Id.*

Amendments.[93] The Board rejected Pickering's claim, and both the Illinois Circuit Court and the Illinois Supreme Court affirmed the Board's decision.[94]

Pickering appealed to the United States Supreme Court, which reversed the lower courts.[95] The Supreme Court determined that there was a difference between the state acting as employer and the state acting as sovereign.[96] The Court stated, "[t]he 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."[97] *Pickering* concerned the most protected form of speech under the First Amendment: speech concerning a matter of public importance.[98] Accordingly, the weight given to Pickering's side of the scale in the balancing test was the highest available to the free speech right.[99] After weighing the competing interests, the Supreme Court decided that Pickering's First Amendment free speech right outweighed the Board's interest in promoting the efficiency of its services.[100]

Almost fifteen years after *Pickering*, the Supreme Court in *Connick v. Myers*[101] was faced with a different category of speech in the government employment context: speech which was essentially on a matter of private concern.[102] In finding for the government employer, the *Connick* Court reasoned that the thrust of the employee's free speech claim involved speech on a matter of private concern.[103] Consequently, the employee's

---

[93] *Id.* at 565.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 568.

[97] *Id.*

[98] *Id.* at 573.

[99] *Id.* at 574.

[100] *Id.* at 574-75.

[101] 461 U.S. 138 (1983).

[102] In *Connick*, an Assistant District Attorney was dismissed from her position after she circulated a questionnaire within her office. *Id.* The Court found that the major part of the questionnaire, with the exception of a question concerning political campaigns, consisted of speech on private matters. *Id.* at 139. However, because the speech did slightly touch on matters of public concern, the Court proceeded to the *Pickering* balancing test. *Id.* at 149-50. The Court heavily deferred to the District Attorney's decision to terminate Myers, and concluded that the Attorney General's interests in the efficient functioning of the office outweighed Myers' free speech right. *Id.* at 154. However, the Court cautioned that had the speech consisted mainly of matters of public concern, a stronger showing on the Attorney General's part may have been necessary. *Id.* at 152.

[103] *Id.* at 139.

free speech right was assigned a lesser weight for balancing purposes than it would have been given if the speech had been purely political.[104]

The *Connick* decision stands for the premise that the type of speech involved in a given case determines the weight given to the employee's right of free speech when balanced against the interest of the government employer. Hence, the more valuable the content of the speech under the First Amendment, the more weight to be accorded the government employee's right on the *Pickering* balancing scale.[105]

The *Pickering* balancing test, although initially used to decide free speech issues in the government employment context, was soon applied by the courts to other types of government employee rights. For instance, in the case of *Hatcher v. Board of Public Education*,[106] the *Pickering* balancing test was applied to an employee's expressive association right.[107] Thus, the *Pickering* balancing test was broadened to apply to a non-speech right.[108]

Finally, only a year before *Shahar v. Bowers* first appeared in the courts, the Eleventh Circuit decided the case of *McCabe v. Sharrett*.[109] McCabe was transferred by her boss, the police chief, to a less desirable job because of her marriage to a department police officer.[110] McCabe brought suit against the city and Sharrett, claiming that she was demoted because of her marriage in violation of her right to freedom of intimate association.[111] The court, while not explicitly employing the *Pickering* balancing test, engaged in a detailed balancing of McCabe's asserted right

---

[104] *Id.* at 152.

[105] The *Pickering* balancing test has been described as, "not all-or-nothing but rather a sliding scale under which 'public concern' is weighed against disruption." Nieto v. San Perlita Indep. Sch. Dist., 894 F.2d 174, 179 (5th Cir. 1990). This lends further support to the fact that the more important the constitutional right at issue, the more disruption of the workplace the government employer must demonstrate in making adverse employment decisions against the employee which burden that right.

[106] 809 F.2d 1546 (11th Cir. 1987).

[107] In *Hatcher*, the Eleventh Circuit weighed the expressive association right of an employee against the interest of her employer in the effective operation of a school system. *Id.* at 1557-58. Hatcher claimed that she was demoted from her job as Duresville School Principal to the position of media specialist at a high school in violation of her procedural and substantive due process rights, as well as her First Amendment expressive association right. *Id.* at 1548.

[108] *See* Stough v. Board of Educ., 579 F. Supp., 1091 (M.D. Ala. 1983), *aff'd*, 744 F.2d 1479, 1481 (11th Cir. 1984) (approving the district court's application of the *Pickering* balancing test to a parent/public school teacher's fundamental right to educate her own children as she saw fit).

[109] 12 F.3d 1558 (11th Cir. 1994).

[110] *Id.* at 1560. McCabe had been a secretary for the former police chief of Plantation City since 1982. *Id.* at 1559. In 1990, Sharrett, the new police chief, took over the job and became McCabe's new boss. *Id.* at 1560. Soon after, Sharrett transferred McCabe because of what he deemed to be a confidentiality and loyalty problem due to McCabe's marriage to a department police officer. *Id.*

[111] *Id.*

of intimate association against the asserted interests of the police chief in the effective functioning of the department. The court considered the following factors, which had been identified in the Supreme Court case of *Rankin v. McPherson*:[112] (1) whether the employee's exercise of the right "impairs discipline by superiors or harmony among co-workers"; (2) whether the employee's exercise of the right "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary"; and (3) whether the employee's exercise of the right "impedes the performance of the [employee's] duties or interferes with the regular operation of the enterprise."[113] The court concluded that McCabe's right was outweighed by the police chief's interests; consequently, his action in transferring her out of the department based on her marriage was constitutional.[114]

The *Pickering* balancing test has clearly evolved from its inception. Once used only in the free speech context, the test has now been applied when weighing a variety of government employees' constitutional rights against the interests of their government employers. And so it was used by the Eleventh Circuit Court of Appeals sitting en banc in *Shahar v. Bowers* in order to weigh Shahar's assumed intimate association right against the interests of Attorney General Michael Bowers in the efficient functioning of the Attorney General's office. However, before applying the *Pickering* balancing test to the facts of the case, the Eleventh Circuit, as a threshold matter, should have first definitively decided whether Shahar's intimate association right indeed existed.

B. Does Shahar Have a Right of Freedom of Intimate Association in Her Homosexual "Marital" Relationship?

The en banc Eleventh Circuit bypassed the most important issue in *Shahar*: whether Shahar's committed homosexual relationship should be protected as an intimate association under the First Amendment. The court determined early on that judicial restraint called for the avoidance of unnecessarily deciding this constitutional issue.[115] The court instead assumed, for the sake of argument only, that Shahar had the right of intimate association and proceeded to balance the assumed right against the interests of Bowers as a government employer.[116]

---

[112] 483 U.S. 378, 388 (1987).

[113] *Id.* (citing Pickering v. Board of Educ., 391 U.S. 563, 570-73 (1968)).

[114] *McCabe*, 12 F.3d at 1574.

[115] Shahar v. Bowers, 114 F.3d 1097, 1100 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

[116] *Id.*

The idea of assuming the existence of a constitutional right for the purpose of the *Pickering* balancing test is not new. However, while the court cited the Colarado Supreme Court case of *Kemp v. State Board of Agriculture*[117] and the Eighth Circuit case of *Barnard v. Jackson County*[118] as support for assuming Shahar's right, these cases, as well as all others where rights are assumed for *Pickering* balancing purposes, involve rights different from the intimate association right before the court in *Shahar*. In *Kemp* and *Barnard*, for example, the *Pickering* balancing test was applied in the context of the rights to petition and free speech respectively. These rights are generally well-established, in contrast to the relatively new right of intimate association.[119]

Judge Tjoflat, in his concurring opinion, pointed out that these cases do not provide a basis for the majority to have assumed Shahar's right of intimate association for one very important reason.[120] In the cases cited by the court, the assumed rights were assigned their definitive weight for balancing purposes—they were given the highest possible weight.[121] In contrast to *Kemp* and *Barnard*, the *Shahar* court assumed Shahar's right of intimate association, but did not go on to the next vital step; that is, the court did not determine whether the right should be assigned the highest weight, or some lesser weight, by first deciding whether Shahar's relationship was one closest to the core of the First Amendment's protection of intimate association.

Therefore, the court's assumption of Shahar's intimate association right for *Pickering* balancing purposes was unprecedented. Moreover, given the varying levels of protection afforded the different types of relationships contemplated by the First Amendment, the existence or non-existence of the intimate association right in this case required an affirmative decision, rather than a general assumption.

---

[117] 803 P.2d 498, 505-06 (Colo. 1990) (en banc), *cert. denied*, 501 U.S. 1205 (1991) (assuming plaintiff's First Amendment right to petition existed, and assigning the right the maximum weight for balancing purposes).

[118] 43 F.3d 1218, 1223 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 53 (1995) (assuming plaintiff's First Amendment right of freedom of speech was implicated, that plaintiff's speech was on a matter of public concern, and assigning the right the highest weight for balancing purposes).

[119] For some early Supreme Court cases in which the First Amendment right of freedom of speech was interpreted, see *Schenck v. United States*, 249 U.S. 47 (1919) and *Abrams v. United States*, 250 U.S. 616 (1919). As discussed *infra* notes 122-45 and accompanying text, the right of intimate association is relatively new and was first defined in 1984 in the case of *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

[120] *Shahar*, 114 F.3d at 1112 n.3 (Tjoflat, J., specially concurring).

[121] *See supra* notes 117-18 and accompanying text.

The freedom of intimate association was first discussed in *Roberts v. United States Jaycees*.[122] Justice Brennan, writing for the majority, noted the Court has emphasized that the First Amendment protects those relationships including family relationships that presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."[123] The Supreme Court determined that various associational bonds support greater and lesser claims to constitutional protection.[124] Justice Brennan further stated, "[d]etermining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."[125] The Court went on to state that factors which will be relevant in determining the relationship's position on this spectrum include, "size, purpose, policies, selectivity, congeniality, and other characteristics."[126]

After *Roberts*, various courts have embarked on the task of determining whether a particular relationship is protected as an intimate association under the First Amendment. In the case of *Thorne v. City of El Segundo*,[127] the Ninth Circuit determined that an affair between a policewoman and another officer was a protected intimate association under the First Amendment.[128] The court stated that the government employer's inquiry into the plaintiff's relationship "bears on those matters acknowledged to be at the core of the rights protected by the [C]onstitution's guarantees of privacy and free association—appellant's interest in family living arrangements, procreation and marriage."[129] Likewise, the Eleventh Circuit itself in the case of *Wilson v. Taylor*[130] held that a dating relationship was an intimate association protected by the First Amendment.[131]

---

[122] 468 U.S. at 629 (holding that the Act which compelled the Jaycees to accept women as members was not violative of the Jaycees' intimate association rights).

[123] *Id.* at 620.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] 726 F.2d 459 (9th Cir. 1983), *cert. denied*, 469 U.S. 979 (1984).

[128] *Id.* at 469.

[129] *Id.*

[130] 733 F.2d 1539 (11th Cir. 1984) (holding that a police officer dating the daughter of a convicted felon had a right of intimate association in the relationship).

[131] *Id.* at 1544.

The Supreme Court in *FW/PBS, Inc. v. City of Dallas*[132] denied that relationships formed in hotel rooms which are rented for less than ten hours could constitute intimate associations in stating, "[a]ny 'personal bonds' that are formed from the use of a motel room for fewer than 10 hours are not those that have 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.'"[133] Thus, one general theme transcends all of the cases dealing with the First Amendment right of intimate association: The relationship must be located on the spectrum of relationships between family and business associates in order for the court to determine the amount of protection to which a particular relationship is entitled.

Shahar claimed that her relationship with her female partner should have been protected as an intimate association under the First Amendment.[134] The Eleventh Circuit en banc assumed that it was so protected.[135] However, assuming that a relationship falls under the protection of the right of intimate association is only the first step in the analysis. There are many types of relationships, and as the Supreme Court stated in *Roberts*, various relationships have greater or lesser claims to First Amendment protection.[136]

Had the Eleventh Circuit applied the *Roberts*[137] factors in analyzing Shahar's relationship, it should have determined that it is indeed protected as an intimate association under the First Amendment. Judge Godbold, writing for the Eleventh Circuit majority in the decision below, described Shahar's relationship with Greenfield as, "intimate and highly personal in the sense of affection, commitment, and permanency."[138] Further, Shahar herself described Greenfield as her "life partner."[139] Shahar went on to state, "Fran is my best friend and she is my main confidante, and there is just a certain closeness with her that I don't share with others."[140] Judge Kravitch, concurring in part with Judge Godbold's opinion, stated, "[w]here intimacy and personal identity are so closely intertwined as in the

---

[132] 493 U.S. 215 (1990).

[133] *Id.* at 237 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984)).

[134] Shahar v. Bowers, 114 F.3d 1097, 1101 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

[135] *Id.* at 1100.

[136] *Roberts*, 468 U.S. at 620.

[137] The factors considered, once again, are "size, purpose, policies, selectivity, congeniality, and other characteristics." *Id.*

[138] *Shahar*, 70 F.3d at 1225.

[139] *Id.* at 1229 n.2 (quoting Shahar's Dep. at 5-6).

[140] *Id.*

relationship between Shahar and Greenfield, the core values of the intimate association right are at stake."[141]

The Eleventh Circuit has previously determined that marriage is a protected intimate association under the First Amendment.[142] However, it is unlikely that the en banc Eleventh Circuit, in analyzing Shahar's relationship, would have explicitly defined it as a marriage, given that homosexuals cannot be legally married in Georgia.[143] Instead, the Supreme Court in *Roberts* provides the basis for determining whether Shahar's relationship should be afforded protection as an intimate association under the First Amendment.

In *Roberts*, the Court stated that, at a minimum, the right of intimate association encompasses the personal relationships "that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives."[144] Whether the right extends to other relationships depends on the extent to which those attachments share the qualities distinctive to family relationships, such as "relative smallness" and "seclusion from others in critical aspects of the relationship."[145]

Thus, in determining whether Shahar's relationship should be protected under the First Amendment as an intimate association, the Eleventh Circuit sitting en banc should have determined whether Shahar's relationship consisted of the same types of qualities found in other protected relationships, such as the heterosexual marriage or the family. Based on the information that the Eleventh Circuit was given concerning the nature of Shahar's relationship, it is difficult to imagine that a thoughtful analysis of that relationship would have yielded anything but an overwhelmingly apparent similarity between the contours of Shahar's relationship and that of any heterosexual marriage.

---

[141] *Id.* at 1229.

[142] McCabe v. Sharrett, 12 F.3d 1558, 1563 (11th Cir. 1994). The Eleventh Circuit in *McCabe* based its findings on both *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984) (right to be married is protected by intimate association right of First Amendment), and *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (right to marriage is fundamental).

[143] GA. CODE ANN. § 19-3-30(b)(1) (1984) (stating persons of the same sex cannot legally be issued a marriage license in the state of Georgia). Shahar never claimed that she was married to Greenfield in a legal or civil sense. *Shahar*, 114 F.3d at 1118. Rather, Shahar claimed she was married in a religious sense, and that claim was substantiated by the fact that her marriage is recognized in the Jewish Reconstructionist faith to which she and Greenfield adhere. *Id.* at 1119.

[144] *Roberts*, 468 U.S. at 619 (citations omitted). In describing the family relationship, the Court stated that "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Id.* at 619-20.

[145] *Id.* at 620.

Shahar's relationship was small in size and excluded others.[146] The purpose of the relationship in its marital form was to celebrate Shahar and Greenfield's Jewish religious beliefs.[147] The deep attachment and commitment that Shahar and Greenfield shared was demonstrated by the fact that they made a life-long commitment to each other in front of their rabbi and over one hundred family members and friends.[148] Further, there can be no doubt that Shahar and Greenfield shared a special community of thoughts, experiences, and beliefs in at least one respect: the two shared their mutual and deep religious beliefs.[149] In describing Greenfield as her "life partner," "main confidante," and "best friend," there can also be no doubt that Shahar and Greenfield shared the most intimate aspects of their lives with each other. They also shared a home together, just as any other married couple would.[150]

While a homosexual relationship has never been established as an intimate association protected by the First Amendment, the similarity between Shahar and Greenfield's relationship and that of any heterosexual married couple is undeniable. Despite this, two differences between Shahar's relationship and its heterosexual counterpart must be addressed.

First, what could be perceived as a major difference between Shahar's relationship and a heterosexual marriage is that Shahar and her partner are unable to procreate. However, the Eleventh Circuit in *Bowers v. Hardwick* previously stated that "the intimate associations protected by the Constitution are not limited to those with a procreative purpose."[151] The Eleventh Circuit also cited to *Zablocki v. Redhail*[152] for the proposition that

---

[146] The marriage contemplated by the Jewish Reconstructionist Movement involves two individuals. *Shahar*, 114 F.3d at 1121 (Godbold, J., dissenting).

[147] This rendered the relationship an expressive association as well. However, such discussion is beyond the scope of this text. For a general discussion of the right to expressive association see Gerald L. Edgar, Note, Roberts v. United States Jaycees: *Does the Right of Free Association Imply an Absolute Right of Private Discrimination?*, 1986 UTAH L. REV. 373 (1986) and Laura C. Sloan, Note, *Constitutional Law—First Amendment Right of Association*—Roberts v. United States Jaycees, 33 KAN. L. REV. 771 (1985).

[148] *Shahar*, 70 F.3d at 1223.

[149] Shahar and Greenfield were significant participants in the Jewish Reconstructionist Movement, often attended synagogue together, and were recognized as a committed couple by the other members of their religion, even before their wedding ceremony. *Id.* at 1223.

[150] *Id.* at 1224. At a minimum, this would indicate a stronger commitment than a dating relationship, and a dating relationship has already been established as an intimate association by the Eleventh Circuit. *See infra* notes 157-59.

[151] Bowers v. Hardwick, 760 F.2d 1202, 1211 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986) (citing Griswold v. Connecticut, 381 U.S. 479 (1965) and Eisenstadt v. Baird, 405 U.S. 438 (1972)). In overruling the Eleventh Circuit, the Supreme Court did not explicitly deal with the intimate association aspect of this case. However, because this statement by the Eleventh Circuit was not affirmed by the Supreme Court, it is not a part of the current common law.

[152] 434 U.S. 374 (1978).

the associational interests found in marriage and procreation were separate interests.[153]

The fact that procreative considerations should be deemed irrelevant for the purpose of determining whether Shahar's relationship is protected as an intimate association is underscored by the fact that there are many married couples who cannot, or do not want to, have children. There is no indication by any court that lack of procreative ability or desire is fatal to intimate association protection.

The second difference between Shahar's relationship and that of any heterosexual marriage is briefly mentioned by the majority, and detailed by Judge Tjoflat in his concurrence. It is the fact that a homosexual relationship is not one that has "played a critical role in the culture and traditions of the Nation."[154] The passage to which the majority and Judge Tjoflat referred was originally stated in *Roberts*. The *Roberts* Court, in describing the types of relationships which may be able to claim constitutional protection as intimate associations, stated, "we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs."[155]

While it may or may not be true that a homosexual relationship has not played a critical role in the culture and traditions of the nation, such a determination of this issue was not necessary in *Shahar*. First, there is currently no mandatory authority which categorically holds that a relationship must play a critical role in the culture and traditions of our nation in order to be protected by the First Amendment.[156] Second, and perhaps more important, the Eleventh Circuit itself in *Wilson v. Taylor*[157] held that a dating relationship was a protected intimate association under

---

[153] *Id.* at 385-86.

[154] *Shahar*, 114 F.3d at 1114 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984)). Judge Tjoflat stated that "'the culture and traditions of the Nation' are critical to the determination of whether a particular relationship is entitled to protection as an intimate association." *Id.* at 1114. Judge Tjoflat based this conclusion on the case of *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990). *See supra* notes 132-33 and accompanying text. The *Shahar* majority simply asserted in the outset of the opinion that, "[g]iven the culture and traditions of the Nation, considerable doubt exists that Plaintiff has a constitutionally protected federal right to be 'married' to another woman: the question about the right of intimate association." *Shahar*, 114 F.3d at 1099. The majority also cited to *FW/PBS*, as well as *Roberts*. *Id.*

[155] *Roberts*, 468 U.S. at 618-19.

[156] The *Roberts* Court prefaced its critical role test with the warning that the Court was not "precisely identifying every consideration that may underlie [the] type of constitutional protection." *Id.* at 618. Therefore, it is clear that other considerations may be taken into account besides whether the relationship satisfies the critical role test.

[157] 733 F.2d 1539 (11th Cir. 1984).

the First Amendment.[158] In so holding, the court made no mention of *Roberts*' critical role test.[159] If satisfaction of the test was unnecessary for the Eleventh Circuit in *Wilson*, why would the supposed inability of Shahar's relationship to satisfy the critical role test cast doubt on whether the committed homosexual relationship can claim intimate association protection? Neither the majority nor Judge Tjoflat addressed this glaring contradiction.

It is well established that marriage is an intimate association entitled to protection under the First Amendment. Shahar's relationship shared many qualities with those relationships typically protected as intimate associations.[160] Therefore, the court should have held that Shahar's relationship was of the type contemplated by the First Amendment.

While a determination that Shahar has an intimate association right in her relationship with her female partner comprises one step in advancing to the *Pickering* balancing test, the second crucial step remains: How much weight should her intimate association right be given for balancing purposes?

C. *How Much Weight Should Be Given to Shahar's Intimate Association Right for* Pickering *Balancing Purposes?*

Before engaging in the balancing of Shahar's assumed intimate association right, the court made a somewhat ominous statement: "A person often knows that 'x' outweighs 'y' even without first determining exactly what either 'x' or 'y' weighs."[161] This statement is automatically problematic because what the court is dealing with in *Shahar* is the right of intimate association—a right which must be weighed against the interests of Attorney General Bowers. From the ideas already established through *Roberts* and its progeny, there is a wide spectrum of relationships contemplated by the First Amendment's freedom of association.[162] Some relationships are closer to the core of the First Amendment, and other relationships, while still afforded protection, are more peripheral.[163]

The true flaw in the court's decision emerges when one considers the following two points. First, the Eleventh Circuit sitting en banc never

---

[158] *Id.* at 1544.

[159] *Id.* The Eleventh Circuit en banc also failed to engage in comparing the dating relationship to other relationships which, according to the Supreme Court in *Roberts*, satisfy the critical role test.

[160] *See supra* notes 122-26 and accompanying text.

[161] Shahar v. Bowers, 114 F.3d 1097, 1106 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

[162] *See supra* notes 122-36 and accompanying text.

[163] *Id.*

determined whether Shahar had an intimate association right, let alone did the court define the type of intimate association right she had, if any. Second, once an intimate association right is established, it must be located on the *Roberts* spectrum to determine the amount of constitutional protection to which it is entitled. It was simply necessary for the court to complete step one before proceeding to step two.

Judge Kravitch in the Eleventh Circuit's decision below stated that "[there is a] sliding-scale scrutiny inherent in a balancing test that weighs intimate associations closer to the core of the First Amendment right more heavily than those closer to the periphery."[164] This statement, coupled with the Supreme Court's decision in *Connick*,[165] lends further support to the notion that the court's failure to determine the existence of the right of intimate association, to define the right, and to then assign a corresponding weight to the right renders the *Shahar* decision flawed.

As discussed *supra*, Shahar's relationship very closely resembles any heterosexual marriage in every relevant way. For this reason, her relationship should have been given the highest possible weight for *Pickering* balancing purposes.

D. Should Shahar's Right Have Outweighed Bowers' Interests?

Simply determining that Shahar's right of intimate association should be given the highest weight possible for *Pickering* balancing purposes does not resolve the big question in *Shahar*: Does even the weightiest intimate association right outweigh the interests of Bowers in the effective functioning of his office?[166] This question can only be answered by examining how the Eleventh Circuit has previously dealt with analogous situations involving core First Amendment rights of government employees in the *Pickering* balancing context.

As the Supreme Court made clear in *Connick*,[167] the burden upon the state in justifying discharge will depend on the nature of the right at issue.[168] The stronger the employee right at issue, the heavier the burden on the state to justify an employee dismissal resulting from the exercise of that right.[169] While the actual balancing is left to the court as a matter of law,[170]

---

[164] *Shahar*, 70 F.3d at 1232 n.12.

[165] *See supra* notes 101-05 and accompanying text.

[166] The en banc Eleventh Circuit in *Shahar* stated that Shahar's assumed intimate association right would be given "substantial weight" in the balancing. *Shahar*, 114 F.3d at 1106.

[167] *See supra* notes 101-05 and accompanying text.

[168] Connick v. Myers, 461 U.S. 138, 147 (1983).

[169] *Id.*

"whether a governmental employer has improperly infringed on an employee's First Amendment rights turns on the specific facts of the particular case: a 'case-by-case' analysis is required."[171]

As an analysis of the *Pickering* balancing test cases has revealed,[172] courts have more readily deferred to a government employer's predictions of harm in the balancing when the employee right at issue is one which is entitled to lesser First Amendment protection.[173] It follows, then, that in *Shahar*, when faced with a First Amendment right entitled to the highest protection, the court should not have deferred to the asserted interests of Bowers. Rather, the court should have placed a higher burden on Bowers to justify Shahar's discharge.

In *McCabe v. Sharrett*, the Eleventh Circuit had previously determined, without explicitly applying the *Pickering* balancing test, that even the intimate association right embodied in the marital relationship could be outweighed by the interests of a government employer in the efficient operation of his office.[174] At first glance, this would seem to negatively impact Shahar's chances of overcoming the interests of Bowers in the balance. However, a closer look at the court's reasoning in *McCabe* reveals that the rationale which led the court to uphold the constitutionality of McCabe's job transfer can be applied to Shahar's case to tip the scale in her favor.

The common cry of government employers who discharge their employees for exercising their constitutional rights, as revealed in *Pickering* and its progeny, is that the employees are somehow disrupting the workplace by exercising those rights.[175] The disruption takes various forms depending on the unique facts of each case, the position of the employer or employee, and the government office in question.[176] Where an employee's constitutional right, which is entitled to the highest protection, is weighed against the government employer's interest in avoiding disruption, the prediction of disruption must be objectively reasonable.[177] A government employer's subjective fear of disruption in such a case is not enough; rather, the employer must offer objective evidence that disruption

---

[170] *Id.* at 150-54.

[171] Bates v. Hunts, 3 F.3d 374, 378 (11th Cir. 1993).

[172] *See supra* notes 90-114 and accompanying text.

[173] *See supra* notes 90-114 and accompanying text

[174] *See supra* notes 109-14 and accompanying text.

[175] *See supra* notes 90-114 and accompanying text.

[176] *See supra* notes 90-114 and accompanying text.

[177] Williams v. Roberts, 904 F.2d 634, 638 (11th Cir. 1990).

will occur if the employee is allowed to continue working for the government office.[178]

In *McCabe*, the Eleventh Circuit not only determined that McCabe's job transfer was objectively reasonable in light of the exercise of her intimate association right, but it was also *necessary* to avoid disruption to the police department.[179] While the government employer, Police Chief Sharrett, had not provided evidence of actual disruption to the workplace, he did offer ample evidence of potential disruption as justification for transferring McCabe to a less desirable job.[180]

In *Shahar*, the dissenting justices all agreed that no such objectively reasonable showing of actual or potential disruption of the Attorney General's office was shown by Bowers so as to justify his revocation of Shahar's job offer.[181] The actual standard that the majority used to gauge the predictions of harm and disruption asserted by Bowers was embodied in the statement, "[w]e must defer to Georgia's Attorney General's judgment . . . unless his judgment is definitely outside of the broad range of reasonable views."[182] Despite the fact that the court claimed to have assumed that Shahar indeed enjoyed a First Amendment intimate association right, the court, by its own admission, deferred to Bowers' assertions.[183] This was simply inconsistent. Also, the court's reliance on *Connick* and *Waters v. Churchill*[184] to support this deference was misplaced.

Both *Connick* and *Waters* were cases involving less than fully protected rights of government employees.[185] Therefore, in those cases it is expected that the court would more generously defer to the predictions of disruption asserted by the government employer.[186] Further, as Judge Kravitch noted in her dissent, the Supreme Court in *Waters* made it clear that the court must consider the reasonableness of the government

---

[178] *Id.*

[179] McCabe v. Sharrett, 12 F.3d 1558, 1572 (11th Cir. 1994).

[180] *Id.* at 1573. In fact, the evidence offered by Sharrett as justification for transferring McCabe was so strong that the Eleventh Circuit, while not explicitly employing a strict scrutiny standard, nevertheless stated that the adverse employment decision could have survived even strict scrutiny. *Id.* at 1574. No such assertion was made by the Eleventh Circuit in *Shahar*.

[181] *See supra* notes 78-89 and accompanying text. All four dissenting justices preceeded this finding with the assertion that Shahar did indeed have a First Amendment right of intimate association in her relationship with her female partner.

[182] Shahar v. Bowers, 114 F.3d 1097, 1109 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

[183] *Id.*

[184] 511 U.S. 661 (1994) (government employee's speech is unprotected by First Amendment).

[185] *Connick* involved speech essentially on matters of private concern. *See supra* notes 101-05 and accompanying text. *Waters*, 511 U.S. 661, involved what the court called unprotected speech.

[186] *See supra* notes 101-05 and accompanying text.

employer's asserted predictions of harm or disruption when applying the *Pickering* balancing test.[187]

Unlike the employees' constitutional rights at issue in *Connick* and *Waters*, Shahar's right, even when assumed for balancing purposes by the court, was never explicitly deemed less than fully protected.[188] However, as evidenced by the court's deference to Bowers' predictions of harm, the court did treat Shahar's right as if it were entitled to lesser protection.

Had the Eleventh Circuit en banc afforded Shahar's intimate association right the highest possible weight for balancing purposes, the scales would have tipped in Shahar's favor. Neither *Connick* nor *Waters* would have offered any precedential value to the court in uncritically deferring to Bowers' assertion of perceived harms that Shahar's exercise of her right would cause his office. Therefore, Bowers would have had to offer some objective evidence to support his assertions.[189] Bowers offered no such proof, and his assertions were mere speculation.[190]

The Eleventh Circuit professed to afford an "assumed" intimate association protection to Shahar's relationship with her female partner. However, it is evident that her right was not given the fullest protection under the First Amendment and, therefore, the heaviest weight possible for *Pickering* balancing purposes. Had the court given Shahar's right the absolute heaviest weight, a heavier burden would have been placed on Bowers to offer proof of his predictions of harm. Because no credible, objective evidence was forthcoming, the *Pickering* balancing scale should have tipped in favor of Shahar.

IV. CONCLUSION

In assuming Shahar's committed homosexual relationship was protected by the First Amendment as an intimate association for the purpose of balancing the right against the interests of Bowers in the efficient functioning of the Attorney General's office, the court made the first of two errors in the *Shahar* decision. Determining whether the relationship was protected would have forced the court to contemplate the type of relationship at issue, and perhaps the qualities or characteristics that the relationship shared with other types of relationships which have already

---

[187] *See supra* notes 81-85 and accompanying text.

[188] Shahar v. Bowers, 114 F.3d 1097, 1106 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998).

[189] *See* Williams v. Roberts, 904 F.2d 634, 638 (11th Cir. 1990); McCabe v. Sharrett, 12 F.3d 1558, 1570-74 (11th Cir. 1994).

[190] *Shahar*, 114 F.3d at 1126-27. In Judge Birch's dissenting opinion, he emphasized the fact that Bowers' predictions were based on assumptions and unsupported inferences. *Id.* at 1126.

been established by the courts to be First Amendment protected intimate associations. This would have allowed the court to determine the position Shahar's relationship occupied on the *Roberts* spectrum.

The en banc Eleventh Circuit's failure to analyze the relationship led to the second error committed by the court in the *Shahar* decision: the failure to assign a weight to Shahar's assumed intimate association right for the purposes of the *Pickering* balancing test. Judge Tjoflat summed up the majority's failure to assign a weight to Shahar's right by stating that balancing cannot occur in such a manner "any more than the local butcher can weigh five pounds of hamburger without placing a five pound weight on the other side of the scale."[191]

Because Shahar's relationship so closely resembled a typical heterosexual marital relationship in almost every relevant way, her right should have been given the highest possible weight for balancing purposes. There are many types of intimate association relationships and some, such as family relationships, may weigh heavier than others for constitutional purposes. Therefore, it was necessary for the court to determine the constitutional weight of Shahar's relationship before attempting to balance her intimate association right against the interests of Bowers.

As this Note argues, the Eleventh Circuit, had it analyzed Shahar's relationship, should have concluded that Shahar does indeed have a right of intimate association in her relationship with her partner, equal to that of any heterosexual marriage. Because the marital relationship is at the core of the First Amendment, Shahar's right should have been given the absolute highest weight possible for balancing purposes. Finally, Shahar's fully protected intimate association right should have outweighed Bowers' unsupported predictions of harm to his office.

---

[191] *Id.* at 1113.