

## CASE NOTES

### *Shahar v. Bowers*: The Balance between Constitutional Rights and Governmental Efficiency

While in law school, Robin Joy Shahar was employed as a law clerk by the Georgia Department of Law during the summer of 1990.<sup>1</sup> In September of 1990, Attorney General Michael J. Bowers offered her the position of Staff Attorney following her graduation from law school.<sup>2</sup> Shahar accepted the offer of employment and intended to start work in September of 1991.<sup>3</sup> Also during the summer of 1990, Shahar and her partner, Francine M. Greenfield, began making arrangements to be married.<sup>4</sup> Shahar and Greenfield, both members of the Reconstructionist Movement of Judaism, planned to be married by their rabbi in June of 1991.<sup>5</sup> The upcoming wedding was announced to the congregation at Shahar's synagogue in Atlanta.<sup>6</sup> Approximately 250 people were invited to the wedding, including two employees from the Department of Law, and the wedding was to take place in a public park in South Carolina.<sup>7</sup> The wedding invitations described the ceremony as a "Jewish lesbian-feminist, outdoor wedding."<sup>8</sup>

In November of 1990, Shahar filled out an application which asked for her marital status, spouse's name, and whether any of her relatives worked for the state.<sup>9</sup> Shahar answered these questions respectively, as "engaged;" "future spouse, Francine M. Greenfield;" and "Francine M. Greenfield."<sup>10</sup> In the spring of 1991, Shahar and her partner were working on wedding invitations when they ran into two Department employees, with whom Shahar had a brief discussion about the wedding preparations.<sup>11</sup> In June of 1991, the plaintiff spoke to Deputy Attorney General Robert Coleman and told him that she was getting married and changing her last name.<sup>12</sup> At the time of this

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1. See *Shahar v. Bowers*, 114 F.3d 1097, 1100 (11th Cir. 1997).
  2. See *id.*
  3. See *id.*
  4. See *id.*
  5. See *id.*
  6. See *id.*
  7. See *id.*
  8. See *id.*
  9. See *id.*
  10. See *id.* at 1100-01.
  11. See *id.* at 1100.
  12. See *id.*

conversation, Senior Assistant Attorney General Jeffrey Milsteen overheard Coleman congratulate Shahar about her wedding.<sup>13</sup> Later, Milsteen mentioned the wedding to another Department employee who told him that Shahar was marrying another woman.<sup>14</sup> Upon hearing this, the Attorney General's Senior Aides held meetings to discuss the implications of the wedding on the Department.<sup>15</sup> When Attorney General Bowers returned to the office he was informed of the wedding and subsequently withdrew Shahar's job offer.<sup>16</sup> The reason given to Shahar by Bowers in his letter was that "inaction on [his] part would constitute tacit approval of th[e] purported marriage and jeopardize the proper functioning of this office."<sup>17</sup>

Robin Joy Shahar filed suit against the Attorney General of the State of Georgia claiming that the Attorney General violated her rights of intimate and expressive association, freedom of religion, equal protection and substantive due process when he withdrew his offer of employment upon learning of Shahar's upcoming lesbian marriage.<sup>18</sup> The district court granted Attorney General Bowers' motion for summary judgment.<sup>19</sup> It held that while a homosexual relationship is an intimate association protected by the First Amendment, the constitutionality of burdening the attorney's constitutional rights was governed by a balancing test and that withdrawing the offer of employment did not violate the right to freedom of association, the right to free exercise of religion or the equal protection clause.<sup>20</sup> Shahar appealed the decision to the United States Court of Appeals for the Eleventh Circuit.<sup>21</sup> The appellate court affirmed the holding that the intimate association between Shahar and the woman whom she planned to marry was protected by the First Amendment.<sup>22</sup> The court found that strict scrutiny was applicable to the intimate association claim and that the compelling interest test was applicable to the intimate expression claim.<sup>23</sup> The court vacated the decision of the lower court.<sup>24</sup> On rehearing *en banc*, the Eleventh Circuit Court of

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13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.*

17. *Id.*

18. *See id.*

19. *See Shahar v. Bowers*, 836 F. Supp. 859 (N.D. Ga. 1993).

20. *See id.*

21. *See Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995).

22. *See id.* at 1224.

23. *See id.*

24. *See id.*

Appeals *held* that the *Pickering* balancing test<sup>25</sup> was the appropriate standard, and that under this test, Shahar's First Amendment right of association was not violated because the Attorney General's interest in promoting efficiency outweighed Shahar's association interests. *Shahar v. Bowers*, 114 F.3d 1097, 1097 (11th Cir. 1997).

Modern case law regarding the First Amendment and its application to governmental employees centers around the balancing test set forth in *Pickering v. Board of Education*.<sup>26</sup> In *Pickering*, the Supreme Court held that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."<sup>27</sup>

The main controversy in *Pickering* concerned the state's interests as employer and an employee's protection under the First Amendment in conjunction with their employment.<sup>28</sup> The Court observed that the great weight of case law has held that in no way are public employees forced to give up the protection they are afforded under the First Amendment.<sup>29</sup> On the other hand, the Court stated that this protection did not mean that State employees would never be subject to the regulation they might encounter as general members of the population.<sup>30</sup>

In *Pickering*, the Court established a balancing test to weigh the interests of the State as employer versus the rights of the employee.<sup>31</sup> The test requires that a court "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."<sup>32</sup> Before applying the test to the particular facts of the case, the Court emphasized that it did not "deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."<sup>33</sup> Instead, the Court offered general guidelines for analyzing the competing interests.<sup>34</sup>

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25. See *infra* text accompanying notes 26-41.

26. 391 U.S. 563 (1968).

27. *Id.* at 573.

28. See *id.* at 568. In *Pickering*, a teacher was fired for writing a letter to a local newspaper criticizing the manner in which the school board allocated financial resources to different activities. See *id.* at 564, 566-67.

29. See *id.* at 568.

30. See *id.*

31. See *id.*

32. *Id.*

33. *Id.* at 569.

34. See *id.*

The Court first looked at the content of the speech to determine whether the criticism was directed at any person with whom the appellant would be in contact with during a normal school day as a teacher.<sup>35</sup> The Court concluded that the employment relationship between the teacher, the board, and the superintendent was neither a close working relationship, nor was it the type of relationship that required personal loyalty and confidence in order for the employment to function properly.<sup>36</sup> The Court next examined false statements made by the teacher and found that there was no evidence that the statements damaged personal reputations or created an atmosphere of controversy and conflict among teachers and board members.<sup>37</sup> Furthermore, the Court noted that the speech by the teacher was a matter of legitimate public concern and that it was essential that teachers be able to speak freely about these matters.<sup>38</sup> More generally, the Court stressed the public interest in “free and unhindered” debate on issues of public concern.<sup>39</sup> This interest “is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity.”<sup>40</sup> In weighing these considerations, the Court concluded that absent evidence of reckless disregard for the truth or falsity of the statements, the teacher could not be fired for criticizing public officials on matters of public concern even though the criticism was directed at his superiors.<sup>41</sup>

Subsequent case law has examined the boundaries of First Amendment protection afforded to government employees against the employers’ right to regulate these protections in the interest of efficiency. One case that demonstrated the application of the *Pickering* balancing test was *Connick v. Meyers*.<sup>42</sup> Again, the Supreme Court had before it a case concerning an employee’s speech in conflict with the employer’s need for an efficient work environment.<sup>43</sup> In *Connick*, the Supreme Court held that the discharge

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35. *See id.* at 569-70.

36. *See id.* at 570.

37. *See id.*

38. *See id.* at 572.

39. *See id.* at 573.

40. *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

41. *See id.* at 574.

42. 461 U.S. 138 (1983).

43. *See id.* at 141. In *Connick*, an Assistant District Attorney circulated a questionnaire to all of her coworkers concerning the office transfer policy, office morale, the need for a grievance

of a district attorney did not violate the attorney's constitutionally protected right of free speech.<sup>44</sup> The Court explained that when a public employee speaks, not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, a federal court is almost always not the forum to review personnel decisions made by a public agency allegedly in response to the employee's behavior.<sup>45</sup>

Reiterating the *Pickering* standard, the court in *Connick* noted that a public employee does not give up his or her First Amendment rights in relation to matters of public interest.<sup>46</sup> However, the State's interest in regulating speech as an employer differs significantly from its interest in regulating the general public's speech.<sup>47</sup> Focusing on the specific language of the test, the Court concluded that the government could not operate if every employment decision became a constitutional matter.<sup>48</sup> The Court emphasized the necessity of determining whether the speech was of public concern or individual concern.<sup>49</sup> If the speech was a matter of public concern, then it was to be afforded special protection.<sup>50</sup> In *Connick*, the employee's speech was not characterized as speech relating to an issue of public concern, and, therefore the Court refused to scrutinize the reasons for her employment termination.<sup>51</sup>

The Court explained that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."<sup>52</sup> The Court was careful to point out that speech that was political in nature would be protected.<sup>53</sup> In determining the nature of the employee's speech, the Court found that the questions raised by the employee were not of public concern, that there was no attempt to bring forth issues of breach of public trust, and that there was no information that was of

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committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. *See id.*

44. *See id.* at 154.

45. *See id.* at 147.

46. *See id.* at 140.

47. *See id.*

48. *See id.* at 143.

49. *See id.* at 145-46.

50. *See id.* at 146.

51. *See id.* at 146-49.

52. *Id.* at 146.

53. *See id.* at 147.

any value other than to those who worked at the office.<sup>54</sup> However, the Court did find that the question of “whether assistant district attorneys are pressured to work in political campaigns” was a matter of public concern.<sup>55</sup> Therefore, the Court went on to determine whether or not the employer was justified in terminating the employment.<sup>56</sup>

The Court looked both at the content of the speech and the nature of the employment and recognized that “it is important to the efficient and successful operation of the District Attorney’s office for Assistants to maintain close working relationships with their superiors.”<sup>57</sup> The Court explained further that where this close relationship was “essential to fulfilling public responsibilities, a wide degree of deference” should be given to the employer’s decision.<sup>58</sup>

The Court did not, however, deem it necessary for the “employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.”<sup>59</sup> The Court reiterated that cases involving speech and governmental employers should be decided based on the facts of that case and not on a general standard.<sup>60</sup>

The dissent in *Connick* criticized the majority for giving too much weight to one factor of the balancing test, the context in which the speech was made, when determining if the speech addressed a matter of public concern.<sup>61</sup> Justice Brennan, writing for the dissent, argued that “the freedom of speech guaranteed by the First Amendment is not ‘lost to the public employee who arranges to communicate privately with his employer rather than to spread his views to the public.’”<sup>62</sup> He reasoned that discussion about the way in which the government is functioning is a necessary element of public discourse.<sup>63</sup>

Justice Brennan also criticized the majority for narrowing the scope of speech that is considered public concern.<sup>64</sup> He suggested instead that First Amendment cases should not be limited to the idea

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54. *Id.* at 148.

55. *See id.* at 149.

56. *See id.*

57. *Id.* at 151 (quoting *Myers v. Connick*, 507 F. Supp. 752, 759 (E.D. La. 1982.)).

58. *Id.* at 151-52.

59. *Id.* at 152.

60. *See id.* at 154.

61. *See id.* at 157 (Brennan, J., dissenting).

62. *Id.* at 159 (Brennan, J., dissenting) (citing *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979)).

63. *See id.* at 161 (Brennan, J., dissenting).

64. *See id.* at 163 (Brennan, J., dissenting).

of public concern, but rather, adequate weight should be given to the public's interests in the efficient operation of government.<sup>65</sup>

Finally, Justice Brennan emphasized that an employer does not need to wait until the speech has a destructive effect on the work environment before the employer terminates the employment.<sup>66</sup> However, Justice Brennan found that this type of deference to the employer's judgment is inappropriate when public employees articulate views concerning the operations of their particular employment.<sup>67</sup> He agreed that the effect of the employee's speech on the efficiency of the office is one factor relevant to the *Pickering* balancing test, but cautioned that the threat of termination may inhibit employee speech.<sup>68</sup> Justice Brennan viewed *Tinker v. Des Moines Independent Community School District* as controlling, and noted that "'for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.'"<sup>69</sup> He concluded that the majority's decision would deter public employees from making critical comments about their superiors.<sup>70</sup>

The Court of Appeals for the Eleventh Circuit applied the *Pickering* balancing test in *McMullen v. Carson*.<sup>71</sup> In *McMullen*, the court held that a law enforcement agency did not violate the First Amendment by firing an employee whose active participation in an organization with a history of violent activity had become known to the public and created an adverse reaction which threatened the ability of the agency to perform its duties.<sup>72</sup>

In *McMullen*, the court focused on the responsibility of the government agency, law enforcement, and the effect that the employee's speech would have on those duties.<sup>73</sup> One of the factors

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65. *See id.* at 165 (Brennan, J., dissenting).

66. *See id.* at 168 (Brennan, J., dissenting).

67. *See id.* (Brennan, J., dissenting).

68. *See id.* (Brennan, J., dissenting).

69. *Id.* at 168-69 (Brennan, J., dissenting) (citing *Tinker v. Dees Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

70. *See id.* at 170 (Brennan, J., dissenting).

71. 754 F.2d 936 (11th Cir. 1985). McMullen was employed as a clerical employee in the sheriff's office in Jacksonville, Florida. *See id.* at 936. He was fired after he was interviewed on a local televised news broadcast as a recruiter for the Ku Klux Klan. *See id.* at 937. The interview was broadcast to an audience of 117,000 to 182,000 adult viewers. *See id.* The interview was also a topic in the television and news media the following day. *See id.* As a result of the interview, the sheriff's office received 200 telephone calls and live comments expressing individuals' concerns about a member of the Klan being employed at the sheriff's office. *See id.*

72. *See id.* at 938-39.

73. *See id.*

the court considered was the violent nature of the Ku Klux Klan (Klan), both actual and perceived, as an organization dedicated to the “sowing of fear and mistrust between white and black Americans.”<sup>74</sup> The response from the African-American community showed that it would hold a large sense of distrust towards the sheriff’s office if it employed a known member of the Klan.<sup>75</sup> This showing of distrust raised a very reasonable concern that the sheriff’s office would not be able to perform its duties efficiently.<sup>76</sup>

The court balanced this concern against the plaintiff’s constitutional rights to free speech and political expression.<sup>77</sup> The court observed that the plaintiff was not a passive member of the organization but an active recruiter for the Klan.<sup>78</sup> It then relied on the principle set forth in *Connick*, which stated that it was not necessary for an employer to allow events to unfold before they take action against an employee.<sup>79</sup> The court also concluded that there was no position in the sheriff’s office that the plaintiff could hold that would alleviate the public’s negative perception.<sup>80</sup> Because the government had no other alternative, the court upheld the constitutionality of the sheriff’s decision.<sup>81</sup>

In the noted case, the Eleventh Circuit followed the balancing test promulgated by the Supreme Court in *Pickering* to establish whether the employee’s constitutional rights outweighed the employer’s interests.<sup>82</sup> The Court focused on the facts surrounding Robin Joy Shahar’s dismissal and applied the *Pickering* test to alleged violations of Shahar’s rights to freedom of intimate and expressive association, freedom of religion, and equal protection.<sup>83</sup>

The court quickly discounted Shahar’s freedom of religion claim.<sup>84</sup> It stated that “given the culture and traditions of the Nation, considerable doubt exists that Plaintiff has a constitutionally protected federal right to be ‘married’ to another woman.”<sup>85</sup> The court also found it doubtful that Shahar “has a constitutionally protected federal right to be ‘married’ to another woman to engage in her religion,”

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74. *Id.* at 938.

75. *See id.* at 939.

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.* (citing *Connick v. Meyers*, 461 U.S. 138, 152 (1983)).

80. *See id.*

81. *See id.* at 940.

82. *See Shahar v. Bowers*, 114 F.3d 1097, 1103 (11th Cir. 1997).

83. *See id.* at 1102.

84. *See id.* at 1099.

85. *Id.*



because her religion neither requires her “to ‘marry’ another female—even in the case of lesbian couples—nor to marry at all.”<sup>86</sup> Instead the court characterized these claims as either intimate or expressive association claims, but not religious freedom claims.<sup>87</sup> The court also noted that judicial restraint required the court not to decide these constitutional issues because a favorable decision would still not entitle Shahar to relief.<sup>88</sup>

In establishing the appropriate standard of review, the court rejected Shahar’s argument that the proper standard was strict scrutiny.<sup>89</sup> Citing *Wabaunsee City v. Umbehr*,<sup>90</sup> the court held that the *Pickering* balancing test was the correct test to use in determining whether there was a First Amendment violation.<sup>91</sup>

The court went on to classify the special relationship between the Attorney General and his attorneys.<sup>92</sup> It relied on the accepted doctrine that employees who have access to their employer’s confidences are in a special class and “might seldom prevail under the First Amendment in keeping their jobs when they conflict with their employers.”<sup>93</sup> The court stated that it knew of no federal appellate case in which a subordinate attorney had succeeded in an action against the superior attorney.<sup>94</sup> Therefore, it concluded that the Attorney General might limit his staff to people whom he trusted.<sup>95</sup>

With this foundation laid, the court began to look at the specific circumstances from which the case arose.<sup>96</sup> It noted that there was an ongoing controversy in Georgia over issues pertaining to homosexuals, including gay marriage and homosexual sodomy.<sup>97</sup> It was in this environment that Attorney General Bowers reviewed the impending nuptials between Shahar and her partner.<sup>98</sup> He viewed Shahar’s participation in an “open” lesbian wedding, which included changing her name, as affecting both her credibility as well as the

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86. *Id.*

87. *See id.*

88. *See id.* at 1100.

89. *See id.* at 1102.

90. 518 U.S. 668 (1996).

91. *See Shahar*, 114 F.3d at 1102-03 (citing *Wabaunsee City v. Umbehr*, 518 U.S. 668 (1996)). In *Wabaunsee*, the Court held that the First Amendment protects independent contractors from termination or prevention of automatic renewal of at-will government contracts in retaliation for their exercise of freedom of speech. *See Wabaunsee City*, 518 U.S. at 668.

92. *See id.*

93. *Id.* at 1103.

94. *See id.* at 1104.

95. *See id.*

96. *See id.* at 1104, 1104 n.16.

97. *See id.*

98. *See id.* at 1104-05.

credibility of the office, and stated that it would create a difficult work environment.<sup>99</sup> These circumstances, especially Shahar's decision to participate in a lesbian wedding, made Attorney General Bowers lose faith in Shahar's ability to make good judgments.<sup>100</sup>

The court concluded that the Attorney General's concerns were not beyond "the broad range of reasonable assessments of the facts."<sup>101</sup> The court emphasized that "for *Pickering* balance, facts to be weighed on [the] government's side merely need to be reasonable view of facts or reasonable predictions."<sup>102</sup>

After finding that the government had a reasonable interest, the court turned to the issue of whether Shahar's constitutional interests outweighed the Attorney General's concern that Shahar's employment might cause a disruption in the work place.<sup>103</sup> In explaining the balancing test, the court noted that "*Pickering* balancing is never a precise mathematical process: it is a method of analysis by which a court compares the relative values of the things before it. A person often knows that 'x' outweighs 'y' even without first determining exactly what either 'x' or 'y' weighs."<sup>104</sup> The court assumed that Shahar's associational rights existed and accorded them substantial weight.<sup>105</sup> The court quickly pointed out, however, that this weight could be overcome by a government employer's interest in maintaining the effective functioning of his office.<sup>106</sup>

Shahar asked the court to consider the fact that she took no steps to make her intimate association into a public or political statement.<sup>107</sup> The court interpreted this suggestion as a claim that Shahar did not

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99. *See id.* at 1105.

100. *See id.* at 1105-06.

101. *Id.* at 1106.

102. *Id.* (citing *Waters v. Churchill*, 511 U.S. 661, 673-81 (1994) (plurality opinion)). In *Waters*, a nurse brought suit against the hospital in which she worked, alleging that the hospital was in violation of the First Amendment by terminating her employment for statements she made about her superiors. *See Waters*, 511 U.S. at 664-67. The Supreme Court held that "the government as employer . . . has far broader powers than it does as sovereign." *Id.* at 671. Second, the court held that government employee speech is treated differently than speech by a private member of society. *See id.* at 672-75. Third, the court held that prior to discharging an employee for unprotected speech, an employer must undertake a reasonable investigation into the content of the speech and the facts on which the government acts. *See id.* at 667. Fourth, the hospital did make an adequate investigation and that the nurse's speech as believed by hospital officials was not protected. *See id.* at 680. Lastly, the Supreme Court held that a genuine issue of fact existed as to the motivation of the hospital officials. *See id.* at 681.

103. *See Shahar*, 114 F.3d at 1106.

104. *Id.*

105. *See id.*

106. *See id.*

107. *See id.* at 1106.

hold herself out to be married, which they quickly discounted.<sup>108</sup> The court reasoned that Shahar invited employees from the department to the ceremony, that she and her partner legally changed their names, and that she listed her marital status as engaged on her employee form.<sup>109</sup> The court conceded that Shahar could have done more to make her intimate association a public statement but concluded that because her wedding ceremony aroused the suspicion of the Attorney General, it was enough to arouse confusion in the eyes of the public.<sup>110</sup>

The court also rejected Shahar's argument that the Attorney General's predictions as to potential harm are weak and therefore should be discounted.<sup>111</sup> In support of its position, the court relied on the language in *Connick* according great deference to an employer when it has been shown that a close working relationship exists.<sup>112</sup> The court emphasized that it was unnecessary for an employer to wait for events to unfold and disruption to occur before discharging the employee.<sup>113</sup> The court reiterated the Attorney General's concern that the office might become involved in litigation where Shahar's "homosexual" interest appeared to be in conflict with the State's position.<sup>114</sup> The court discounted Shahar's claim that she would not be in conflict with any cases concerning the enforcement of the Georgia's sodomy laws, because she handled primarily death penalty cases, and stated that it was not necessary to show a particularized interference.<sup>115</sup>

The last evidence that the court considered was the public reaction.<sup>116</sup> The court rejected Shahar's argument that Bowers could not justify his position by "reference to perceived public hostility to her 'marriage.'"<sup>117</sup> The court relied on the *McMullen* principle that public perception could be considered where law enforcement is concerned.<sup>118</sup> Although in *McMullen* the sheriff's employee was fired after he went on television and stated that he was a recruiter for the Klan, the court in *Shahar* relied on the fact that public perception

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108. *See id.* at 1107.

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.* at 1107 (citing *Connick v. Meyers*, 461 U.S. 138, 150-52 (1983)).

113. *See Shahar*, 114 F.3d at 1107.

114. *See id.* at 1108.

115. *See id.*

116. *See id.*

117. *Id.* at 1108.

118. *See id.* at 1108.

played a crucial part in tipping the scales in the State's favor.<sup>119</sup> In comparing *Shahar* with *McMullen* the court stated that the Attorney General had a reasonable fear that the public would perceive a staff member's open same sex marriage as inconsistent with the laws of Georgia.<sup>120</sup> The court pointed out that it was the Attorney General's job to determine what the citizens of Georgia might perceive as a conflict within his office.<sup>121</sup>

The court distinguished this case from the recent United States Supreme Court case of *Romer v. Evans*.<sup>122</sup> The court said that this case was about "people's conduct," whereas *Romer* was about "people's condition."<sup>123</sup> The court further distinguished the cases by stating that this case was about employment, whereas *Romer* was about an across-the-board denial of legal protection to a class of people.<sup>124</sup>

In conclusion, the majority stated that they could not find either the Attorney General's decision to dismiss Shahar or his loss of confidence in Shahar's ability to make good judgments unreasonable.<sup>125</sup> The court concluded that the Attorney General's interest in promoting the efficiency of the Law Department outweighed Shahar's personal associational interests.<sup>126</sup> The court stated that this decision, however, should not be interpreted to condone the Attorney General's decision, but only that his actions did not violate the asserted constitutional provisions.<sup>127</sup>

Judge Tjoflat wrote a highly critical concurring opinion.<sup>128</sup> He affirmed the majority's opinion only in so far as "the record [did] not permit the inference that the Attorney General's decision was based on her homosexual status."<sup>129</sup> Judge Tjoflat agreed with the majority that the Attorney General did not withdraw his offer of employment because Shahar participated in a religious ceremony with her

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119. *See id.* at 1109.

120. *See id.*

121. *See id.*

122. 517 U.S. 620 (1996). In *Romer*, the Supreme Court struck down an amendment to the Colorado Constitution because the amendment's sole purpose was to disadvantage a particular class of people, homosexuals, and to deny them protection in violation of the Equal Protection Clause. *See id.* at 633-35.

123. *See Shahar*, 114 F.3d at 1110.

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.* at 1110-11.

128. *See id.* at 1111-18 (Tjoflat, J., concurring).

129. *Id.* at 1111 (Tjoflat, J., concurring).

partner.<sup>130</sup> However, Judge Tjoflat disagreed with the majority's refusal to reach the constitutional questions, and argued that the constitutional questions were necessary to determine whether or not the Attorney General's action was lawful.<sup>131</sup> "[T]he court must describe qualitatively the constitutional right it is placing on the scale in order to determine whether, on balance, the government's interest is to prevail. [Without this], with respect to each of Shahar's remaining claims, [we do not know] where the assumed right ranks in the constitutional hierarchy."<sup>132</sup>

Judge Tjoflat argued that if Shahar had a protected right under the First Amendment to engage in a homosexual relationship, it was inappropriate to grant summary judgment on the intimate association claim.<sup>133</sup> However, Judge Tjoflat concluded that Shahar did not have a protected right because homosexual relationships were not protected relationships.<sup>134</sup> Further, the judge determined that Shahar's freedom of religion claim had to fail because there was no proof that the Attorney General was motivated by the religious nature of the ceremony.<sup>135</sup>

Judges Godbold, Barkett, Kravitch and Birch filed dissenting opinions.<sup>136</sup> Judge Godbold pointed out that this was more than a mere employment offer, it was an employment contract that Bowers unreasonably revoked.<sup>137</sup> Judge Godbold further criticized the majority's treatment of Shahar's marriage because it was recognized by her religion.<sup>138</sup> Although the marriage lacked legal status, Shahar had the right to both "the ceremonial event and the status created by it by using the term "marriage."<sup>139</sup> Judge Godbold noted that the Attorney General knew that he might be violating the plaintiff's religious right.<sup>140</sup> The Attorney general's failure to make a reasonable inquiry into the potential violation was, therefore, unreasonable.<sup>141</sup>

Judge Kravitch concluded that Shahar had a protected intimate association under the First Amendment, and that the Attorney

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130. *See id.* (Tjoflat, J., concurring).

131. *See id.* at 1111-12 (Tjoflat, J., concurring).

132. *Id.* at 1112 (Tjoflat, J., concurring).

133. *See id.* at 1113 (Tjoflat, J., concurring).

134. *See id.* (Tjoflat, J., concurring).

135. *See id.* (Tjoflat, J., concurring).

136. *See id.* at 1118-34 (dissenting opinions).

137. *See id.* at 1118 (Godbold, J., dissenting).

138. *See id.* at 1118-22 (Godbold, J., dissenting).

139. *Id.* (Godbold, J., dissenting) (quoting *Shahar v. Bowers*, 70 F.3d 1218, 1222 (11th Cir. 1995)).

140. *See id.* at 1120 (Godbold, J., dissenting).

141. *See id.* (Godbold, J., dissenting).

General's legitimate interests as a public employer did not outweigh Shahar's constitutionally recognized associational interests.<sup>142</sup> Kravitch argued that in order to qualify as an intimate association under the Constitution, the relationship has to be of the type "that presuppose[s] deep attachments and commitments to the necessarily few other individuals with whom one shares a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."<sup>143</sup>

Kravitch also criticized the majority's characterization of Shahar's relationship as public and noted that catering to private prejudice is not a legitimate government interest.<sup>144</sup> In Kravitch's opinion, the Attorney General did not act reasonably in ascertaining that Shahar's marriage could be viewed as a political statement that would disrupt the office.<sup>145</sup> Finally, Kravitch stated that "status-based inferences, unsupported by any facts in the record and explained only by animosity toward and stereotyping of homosexuals, do not constitute a legitimate interest that outweighs Shahar's First Amendment right of intimate association."<sup>146</sup>

Judge Barkett criticized the majority for failing to correctly apply the *Pickering* balancing test.<sup>147</sup> She explained that "the ultimate inquiry for balancing purposes is not the nature of the job Shahar was assigned to, but whether the Attorney General can demonstrate that Shahar's intimate association hinders her ability to perform effectively the job of a staff attorney."<sup>148</sup> Judge Barkett pointed out that the majority failed to show any balancing or weighing by Bowers and provided "after-the-fact reasons to support Bowers' side of the scale."<sup>149</sup> Judge Barkett stated that the Attorney General had "an evidentiary burden to offer credible predictions of harm or disruption based on more than mere speculation."<sup>150</sup>

The Eleventh Circuit reached an incorrect decision by failing to apply the *Pickering* balancing test correctly. In attempting to apply the *Pickering* balancing test, the majority ignored the constitutional rights they accorded Shahar for the very purpose of weighing her interests against those of the state. The majority asserted that they

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142. *See id.* at 1122 (Kravitch, J., dissenting).

143. *Id.* at 1123 (Kravitch, J., dissenting) (citing *Board of Dirs. v. Rotary Club*, 481 U.S. 537, 545 (1987)).

144. *See id.* at 1124 (Kravitch, J., dissenting).

145. *See id.* at 1124-25 (Kravitch, J., dissenting).

146. *Id.* at 1129 (Kravitch, J., dissenting).

147. *See id.* (Barkett, J., dissenting).

148. *Id.* at 1133 (Barkett, J., dissenting).

149. *Id.* (Barkett, J., dissenting).

150. *Id.* at 1133-34 (Barkett, J., dissenting).

“assume[d] (for the sake of argument only) that [the] Plaintiff has these rights,” that is, the right to intimate and expressive association with her lesbian partner.<sup>151</sup> Yet, as Judge Tjoflat pointed out in his concurrence, the majority merely “sidesteps or the issue” of indicating the type of weight that these First Amendment rights are to have in the application of the *Pickering* balancing test.<sup>152</sup> “[A] court cannot engage in *Pickering* balancing without identifying the constitutional source of the employee’s right and assigning the right a weight or a constitutional value.”<sup>153</sup>

With no discussion of how to weigh the constitutional rights on Shahar’s side of the balance, the majority explained that the Attorney General’s interests in “staffing [his] offices with persons [he] trusts is given great weight.”<sup>154</sup> To support the proposition that the Attorney General could not trust Shahar to make good decisions, the majority relied on the fact that she engaged in an “open” lesbian wedding, when she should have considered the implications that this act could have on the Department of Law.<sup>155</sup> The majority failed to discuss the fact that Shahar’s wedding took place in another state, that she made no public announcement of her wedding in the paper, and that it was a solemn religious ceremony.<sup>156</sup> Instead, the majority held that the Attorney General’s concerns that Shahar’s same-sex wedding would not only bring controversy to the office, but also undermine public confidence in the office’s ability, were reasonable.<sup>157</sup>

In discussing the Attorney General’s concerns the court relied on *Connick*, in which the Supreme Court upheld the termination of an employee who was exercising her right to free speech.<sup>158</sup> This case is distinguishable from *Connick*, however. In *Connick*, the employee was distributing a questionnaire to her colleagues at work, questioning their feelings about their superiors in relation to their work environment.<sup>159</sup> In *Connick*, there was ample reason for concern about the disruption of an office because an employee was soliciting comments from her colleagues about their superiors. In *Shahar*, there was no showing that the lesbian marriage would cause any disruption.

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151. *Id.* at 1100.

152. *See id.* at 1115 (Tjoflat, J., concurring).

153. *Id.* (Tjoflat, J., concurring).

154. *Id.* at 1103.

155. *See id.* at 1105-06.

156. *See id.* at 1100-01.

157. *See id.* at 1107-08.

158. *See id.* (citing *Connick v. Meyers*, 461 U.S. 138 (1983)).

159. *See Connick*, 461 U.S. at 141.

In fact, only one of the employees attended her wedding.<sup>160</sup> The court relied on the predictions of the Attorney General that there *could* be loss of morale in the office that *could* affect the efficient operation of his staff.<sup>161</sup> The court also discussed the Attorney General's worry that Shahar's "special interest" might appear to be in conflict with the State's enforcement of its sodomy laws as well as other litigation involving homosexuals.<sup>162</sup> Judge Birch, in dissent, stated that Bowers' reference to Shahar's ability to try cases involving sodomy was unreasonable because:

Bowers does not make the same assumption with respect to any of his other employees: He does not assume, for instance, that an unmarried employee who is openly dating an individual of the opposite sex has likely committed fornication, a criminal offense in Georgia, and thus may have a potential conflict in enforcing the fornication law. Nor, for that matter, does he apparently assume that married employees could well have committed sodomy . . . and could themselves have a potential conflict in enforcing Georgia's sodomy law.<sup>163</sup>

Lastly, the court cited fear of public perception to justify the Attorney General's concerns.<sup>164</sup> The authority relied on by the court was *McMullen*, which held that the governmental employer could rely on public perception and the effect an employee's speech could have on the office when making a decision about whether to terminate that employee.<sup>165</sup> Although the court focused only on this premise, it is impossible to ignore the particular facts surrounding the *McMullen* decision. *McMullen* was not a case about a woman engaging in a religious ceremony with her partner and the possible effects her employment would have on the Attorney General's office. In *McMullen*, an employee of the sheriff's office went on television before an estimated 117,000 to 182,000 viewers and stated that he was a recruiter for the Ku Klux Klan, "a violent, criminal and racist organization."<sup>166</sup> This was not a case of one employer's opinion regarding public perception. In *McMullen* there were over 200 phone calls and live comments made concerning the sheriff's employment of a Klansman.<sup>167</sup> The court in *McMullen* had not only the long history of the Klan and the fear of the Klan to rely on, it also had an actual

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160. See *Shahar*, 114 F.3d at 1101.

161. See *id.* at 1108.

162. See *id.*

163. *Id.* at 1128-29 (Birch, J., dissenting).

164. See *id.* at 1109.

165. See *id.* at 1109 (citing *McMullen v. Carson*, 754 F.2d 936, 938 (11th Cir. 1985)).

166. *McMullen*, 754 F.2d at 938.

167. See *id.* at 937.



showing of public perception.<sup>168</sup> The court in the noted case relied on *Bowers v. Hardwick*,<sup>169</sup> in which the Supreme Court held that a Georgia statute criminalizing sodomy was constitutional.<sup>170</sup> Unlike *McMullen*, there was no actual evidence that Shahar's employment would create a negative public perception of the Attorney General's office.

This case generates considerable confusion about how the *Pickering* test should be applied in cases about freedom of association and freedom of religion. In its opinion, the court ignored the word "balance," and chose to focus on how to avoid making a determination about the constitutional protection of homosexual relationships under the First Amendment. This case implies that little more than an employer's fear, founded or unfounded, will defeat a governmental employee's claim of constitutionally protected rights.

Noël K. Wolfe

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168. *See id.* at 937-39.

169. 478 U.S. 186 (1986).

170. *See Shahar v. Bowers*, 114 F.3d 1097, 1104 (11th Cir. 1997).