NOT FOR PUBLICATION

In the United States Court of Appeals
For the Eleventh Circuit

No. 23-13029

RAMONA THURMAN BIVINS,

Plaintiff-Counter Defendant-Appellee,

versus

FELICIA FRANKLIN,
in her individual and official capacities, et al.,

Defendants,

GAIL HAMBRICK,

Defendant-Appellant,

CLAYTON COUNTY, GEORGIA
in her individual and official capacities,

Defendant-Counter Claimant.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:22-cv-04149-WMR

Before JORDAN, NEWSOM, Circuit Judges, and HONEYWELL,* District Judge.

PER CURIAM:

Ramona Bivins, the former chief financial officer of Clayton County, Georgia, alleges that she was fired for exercising her First Amendment right to intimate association. Specifically, she alleges that three commissioners—including the appellee, Gail Hambrick—retaliated against her because of her intimate association with—*i.e.*, her marriage to—her husband, on the basis of his political activities. Hambrick moved to dismiss Bivins's complaint, asserting that she was entitled to qualified immunity. The district court rejected this argument and denied the motion. Hambrick filed this interlocutory appeal to challenge the district court's denial of qualified immunity.

After careful consideration of the parties' arguments, and with the benefit of oral argument, we conclude that Bivins's intimate-association right was not clearly established at the time of the challenged conduct, so we reverse the district court's judgment.

I

Bivins served as CFO of Clayton County from 2013 to 2022. In this role, she oversaw the county's internal-audit and finance departments. She also provided guidance to the Clayton County Board of Commissioners, which included five elected

* The Honorable Charlene Edwards Honeywell, United States District Judge for the Middle District of Florida, sitting by designation.

commissioners. During the relevant period, the commissioners were Hambrick, Jeffrey Turner, DeMont Davis, Felisha Franklin, and Alieka Anderson.

In 2022, Bivins's contract came up for renewal. And Davis came up for reelection. Bivins's husband openly campaigned for Davis, while Franklin and Anderson openly campaigned for Davis's opponent. Mr. Bivins's allegiance to Davis was well publicized in the local news just before the board voted on Bivins's contract renewal. During the board's meeting, Hambrick, Franklin, and Anderson voted for three things: (1) not to renew Bivins's contract, (2) to immediately terminate the contract, and (3) to declare the contract *ultra vires*. Later, the same commissioners voted to claw back tuition payments that the county paid for Bivins to attend management courses.

In the district court, Bivins sued the county, Franklin, Anderson, and Hambrick. Against each of the commissioners, she brought a First Amendment retaliation claim under 42 U.S.C. § 1983. Specifically, she alleged that, by voting to take adverse employment actions against her based on her husband's political activities, the commissioners had retaliated against her in violation of her First Amendment right to intimate association.

Hambrick moved to dismiss, and Anderson and Franklin moved for judgment on the pleadings. In their respective motions, the commissioners argued that the district court should dismiss Bivins's First Amendment claim both because she had failed to

plead a plausible claim and because the commissioners were entitled to qualified immunity.

The district court denied the motions. First, the district court ruled, Bivins had pleaded a plausible First Amendment violation because, in her complaint, she alleged facts showing that each commissioner had voted to take adverse employment actions against her based on her husband's political activities. In so doing, the district court declined to apply a test to balance Bivins's interests with those of the government, but it acknowledged that Bivins's claims would be subject to balancing before she could prevail on the merits. Next, citing our decisions in *McCabe v. Sharrett*, 12 F.3d 1558 (11th Cir. 1994) and *Shahar v. Bowers*, 114 F.3d 1097, 1107 (11th Cir. 1997), the district court explained that the commissioners had violated clearly established law and were therefore not entitled to qualified immunity.

Hambrick filed an interlocutory appeal of the district court's decision; the other commissioners did not. We vacate and remand the district court's judgment, on the ground that Hambrick is entitled to qualified immunity.[1]

[1] We review de novo a district court's decision to deny "qualified immunity on a motion to dismiss, accepting the factual allegations in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." *Davis v. Carter*, 555 F.3d 979, 981 (11th Cir. 2009) (citation modified).

II

Hambrick argues that the district court erred in denying her qualified immunity because she didn't violate Bivins's clearly established First Amendment rights. We agree.

In the public-employment context, when a plaintiff asserts that her employer retaliated against her in violation of her First Amendment intimate-association right, she must allege (1) that "the asserted right is protected by the Constitution," (2) that "she suffered 'adverse employment action' for exercising the right," and (3) that "the adverse employment action was taken in such a way as to infringe the constitutionally protected right." *McCabe*, 12 F.3d at 1562. A plaintiff may bring constitutional claims against a government official—and seek damages from the official personally—under § 1983. *See* 42 U.S.C. § 1983; *Hafer v. Melo*, 502 U.S. 21, 22–23 (1991). But qualified immunity insulates government officials from personal liability so long as they were performing a discretionary function that did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, qualified immunity "allow[s] government officials to carry out their discretionary duties without fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent" who knowingly violate the law. *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (citation modified).

We analyze qualified immunity using a burden shifting framework. *See Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252,

1264 (11th Cir. 2004). Here, the initial burden is on Hambrick to show that she was performing a discretionary function. *Id*. Because all agree that she was, the burden shifts to Bivins to show (1) that Hambrick "violated a federal statutory or constitutional right," and (2) that "the unlawfulness of [Hambrick's] conduct was clearly established at the time" of the violation. *Dist. of Columbia v. Wesby*, 583 U.S. 48, 62–63 (2018) (citation modified). We have discretion to address the second prong first, especially if "it is plain that the right [wa]s not clearly established." *Wilson v. Sec'y, Dep't of Corr.*, 54 F.4th 652, 660 (11th Cir. 2022).

We think it prudent here to proceed directly to the second prong—whether the unlawfulness of Hambrick's conduct was clearly established in June 2022. To be "clearly established," the law must be "sufficiently clear that every reasonable official would understand that" the conduct is unlawful. *Wesby*, 583 U.S. at 63 (citation modified). A plaintiff can show that the law was clearly established in any of three ways: by pointing to (1) case law with materially similar facts; (2) "a broad statement of principle within the Constitution, statute, or case law;" or (3) "conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." *Jarrard v. Sheriff of Polk Cnty.*, 115 F.4th 1306, 1323–24 (11th Cir. 2024) (citation modified). As we will explain, Bivins hasn't shown—under any of these three methods—that the unlawfulness of Hambrick's conduct was clearly established at the time of the alleged violation.

We begin with the first method, in which we look for a materially similar case decided by the United States Supreme Court, this Court, or the Georgia Supreme Court. *Corbitt v. Vickers*, 929 F.3d 1304, 1312 (11th Cir. 2019). While it needn't be "directly on point," existing precedent must place the present constitutional question "beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). "This requires a high degree of specificity." *Wesby*, 583 U.S. at 63 (citation modified). Thus, "if case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Corbitt*, 929 F.3d at 1312 (citation modified). And, we have said, because First Amendment retaliation claims like the one at issue here "do not lend themselves to clear, bright-line[s]," the government official will usually be entitled to qualified immunity in this context. *Maggio v. Sipple*, 211 F.3d 1346, 1354 (11th Cir. 2000) (citation modified); *see also Gaines v. Wardynski*, 871 F.3d 1203, 1210 (11th Cir. 2017) (collecting cases).

This case is no exception. For intimate-association-based retaliation claims, the Supreme Court hasn't provided bright lines. Indeed, it hasn't decided an intimate-association-based retaliation case. Instead, it has provided general principles about the right to intimate association and fact-specific tests in other First Amendment retaliation cases. For instance, in *Roberts v. United States Jaycees*, a case involving expressive-association rights, the Supreme Court broadly explained that an individual has the right to intimate association with close family members, including the right to enter and maintain a marriage. *See* 468 U.S. 609, 617–20 (1984). Relatedly, in political-association-based retaliation cases, the Supreme Court

has held that a government employer may not retaliate against an employee based on his political affiliation unless the government can show that its actions were narrowly tailored to a compelling interest, such as firing certain employees in "policymaking" positions. *See Elrod v. Burns*, 427 U.S. 347, 362–63, 367 (1976); *see also Branti v. Finkel*, 445 U.S. 507, 517–18 (1980). And in speech-based retaliation cases, the Supreme Court has held that a government employer may not retaliate against an employee for his speech when the interests of the employee, as a citizen commenting on matters of public concern, outweigh the interests of the employer. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 573–74 (1968).

Supreme Court precedent therefore instructs that, when a government employee accuses her employer of First Amendment retaliation, we must apply fact-specific tests that weigh the individual's First Amendment rights against the government's interests. *See Elrod*, 427 U.S. at 367; *Pickering*, 391 U.S. at 568. And because the Supreme Court hasn't applied these fact-specific tests to an intimate-association case—much less a case analogous to this one—its precedent fails to clearly establish that Hambrick's conduct violated the law. *See Jones v. City of Dothan*, 121 F.3d 1456, 1460 (11th Cir. 1997) ("[P]ublic officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases." (citation modified)).

Similarly, this Court's caselaw has elucidated few bright lines in the intimate-association-retaliation context. For instance, in *McCabe v. Sharrett*, we explained that an intimate-association-

retaliation plaintiff must show (1) that the intimate association "right is protected by the Constitution," (2) that the government took "an adverse employment action for exercising the right," and (3) that the government's action "was taken in such a way as to infringe the constitutionally protected right." 12 F.3d at 1562 (citation modified). In order to determine whether a violation occurred for purposes of the third prong, we explained, we should apply either the *Pickering*, *Elrod*, or general strict-scrutiny tests. *Id*. at 1564. But we didn't clarify which test definitively applied. *See id*. at 1567–69. Instead, we concluded that the government employer's conduct there—demoting a secretary for marrying another employee—didn't violate the right to intimate association under any of them. *See id*. at 1569–74. Likewise, in *Shahar v. Bowers*, we assumed without deciding that the plaintiff had a right to same-sex intimate association. *See* 114 F.3d at 1102. But ultimately, we concluded that the government's conduct—revoking a job offer due to the plaintiff's same-sex marriage—didn't violate that right under a *Pickering* balancing analysis, which favored the government. *See id*. at 1102–03, 1106–11.

These cases demonstrate that the right to intimate association isn't absolute, given that we ruled in the government's favor both times. *See id*. at 1110; *McCabe*, at 1574. But they don't clearly convey what particular facts would violate this right, much less that this right is violated in the circumstances alleged by Bivins—*i.e.*, when a government employer takes adverse employment actions against an employee based on her husband's political activities. Because the Supreme Court, this Court, and the Georgia Supreme

Court haven't decided any case materially similar to this one,[2] we conclude that Bivins has failed to show that the law was clearly established under the first method. *See Gaines*, 871 F.3d at 1214 (ruling that a superintendent was entitled to qualified immunity because there wasn't controlling precedent involving retaliation based on a parent-child relationship).

The law in this context isn't clearly established under the second method, either. That method requires a plaintiff to "point to a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right." *Jarrard*, 115 F.4th at 1323 (citation modified). Here, our precedent makes clear that the First Amendment protects a right to intimate association, but it also counsels that, in order to determine whether an adverse employment action violates that right, we must conduct a fact-specific inquiry. *See McCabe*, 12 F.3d at 1564; *Shahar*, 114 F.3d at 1106–11. Because retaliation claims under the First Amendment turn on such fact-bound analysis, a plaintiff will rarely be able to show that the right was clearly established. *See Maggio*, 211 F.3d at 1354 ("Because the analysis of First Amendment retaliation claims under the *Pickering–Connick* test involves legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules a defendant in a First Amendment suit will only rarely be on notice that his actions are unlawful." (citation modified)).

[2] The parties don't cite—and we haven't found—a Georgia Supreme Court case that defines the contours of the First Amendment right to intimate association.

Unsurprisingly, then, neither *McCabe*, *Shahar*, nor any other case cited by Bivins has generated a broad statement of principle capable of alerting Hambrick that her conduct was unlawful "despite the fact that we hadn't yet applied the principle to the specific facts of [her] case." *Jarrard*, 115 F.4th at 1324.

Nor can Bivins clearly establish the law under the third method, which requires a plaintiff to show that the conduct "was so clearly prohibited [at the time] that a reasonable [official] would have known of its unconstitutionality." *Gilmore v. Ga. Dept. of Corrections*, 144 F.4th 1246, 1258 (11th Cir. 2025) (en banc). Under this method, the unconstitutionality of the official's conduct must have been truly apparent—as, for instance, in *Lee v. Ferraro*, 284 F.3d 1188. "There, an officer arrested a woman for committing a traffic violation and then—after handcuffing and securing her—walked her around to the back of her car and slammed her head against the trunk." *Jarrard*, 115 F.4th at 1324 (discussing *Lee* as "exemplif[ying] the level of outrageousness that we have required" under the third method). The conduct that Bivins has alleged here—adverse employment actions based on her husband's political activities—does not rise to this level.

Bivins counters that, because she has alleged retaliation on the basis of marriage, *McCabe*, *Roberts*, and *Shahar*—all of which stand for the general principle that the First Amendment protects a right to intimate association, including a right to marriage—clearly established that Hambrick violated her First Amendment rights. We disagree.

We must dismiss a complaint if it "fails to allege the *violation* of a clearly established constitutional right." *Chesser v. Sparks*, 248 F.3d 1117, 1121 (11th Cir. 2001) (emphasis added) (citation modified). Despite Bivins's contentions otherwise, our precedents instruct that not every retaliation based on marriage results in the violation of the right to intimate association. *See Shahar*, 113 F.3d at 1110–11; *McCabe*, 12 F.3d at 1574. So, to survive a motion to dismiss on qualified immunity, a complaint cannot simply allege retaliation based on marriage. Instead, it must allege such retaliation that the law has clearly established as a violation of the right to intimate association. Because Bivins's complaint failed to do so here, Hambrick is entitled to qualified immunity.

III

The district court's denial of Hambrick's motion to dismiss is **VACATED**, and the case is **REMANDED** for the district court to dismiss the First Amendment claim against Hambrick based on qualified immunity.

JORDAN, Circuit Judge, Concurring:

Taking its factual allegations as true, I believe that the complaint states a plausible claim that Commissioner Hambrick's retaliatory actions violated Ms. Bivins' right to intimate association. *See, e.g.*, *Adler v. Pataki*, 185 F.3d 35, 43-45 (2d Cir. 1999); *Adkins v. Bd. of Ed.*, 982 F.2d 92, 955-56 (6th Cir. 1993). But the caselaw in this area is not uniform, *compare Singleton v. Cecil*, 133 F.d 631, 635 (8th Cir. 1998), *aff'd on this issue*, 176 F.3d 419, 423 (8th Cir. 1999) (en banc), and I therefore agree with the majority that Commissioner Hambrick is entitled to qualified immunity on that claim.