

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, SS

SUPERIOR COURT DEPARTMENT
C.A. NO: 1780CV00033

PATRICK BUCHANAN AND)
TODD DODGE,)
Plaintiffs,)
)
v.)
)
TOWN OF GREENFIELD)
and)
ROBERT HAIGH,)
Defendants)

DEFENDANTS' MOTION FOR A MISTRIAL

As of the fourth day of this trial, April 14, 2022, the Court's rulings regarding the Confederate Flag have placed the Defendants in an impossible position with respect to defending this case. The court has ruled that non defendant, Daniel McCarthy, exercised his First Amendment right when a confederate flag was displayed inside his garage¹. This ruling necessarily means that the Defendants could not discipline him. It must also mean that the Department could not consider (i.e. punish) McCarthy for that lawful exercise of speech when it considered McCarthy for either future discipline or future promotions. The court had previously held that the flag could be used to show that "McCarthy and others" harbored racial animus towards Buchanan, and subsequently struck "and others" from that ruling. As a result, it appears that the plaintiff can argue that the jury can find that the flag can show that McCarthy harbored racial animus towards Buchanan. Based

¹ "Upon consideration of counsels['] argument, I have reconsidered my order below. My decision and order of April 8, 2022 (#74) is amended to provide that comparator evidence as to McCarthy is inadmissible for the reasons substantially set forth in Defendants motion to reconsider. In all other respects, defendants motion remains denied." (Court's Amended Order, dated April 11, 2022).

HAMPSHIRE SUPERIOR COURT

APR 14 2022



on the testimony as it came in today, April 14, 2022, there is absolutely no evidence that McCarthy had initiated or participated in this investigation in *any* way.

There is no dispute that McCarthy received information from then Officer Clark indicating that Buchanan may have violated Greenfield Police Rules. The policies and procedures of the Greenfield Police Department require all police officers to report any behavior that might violate the rules to a supervisor. Joint Exhibit 18, Greenfield Police Department Rules and Regulations, Rule 13.5 Report Rule Violations, (“Officers shall, upon observing or otherwise becoming aware of a violation by another officer or employee of the department’s Rules and Regulations of Policies and Procedures, as set forth in this Manual or by other departmental directives or as governed by law, report said violations to their superior officer who will be responsible for appropriate action, report submission and follow-up). Buchanan admitted today that his conduct as alleged violated the rules. Clark an *officer* at the time, disclosed Buchanan’s behavior to his supervisor, McCarthy, who then reported the information to Lt. Burge. It is undisputed that McCarthy is *not* a party, *not* a decision-maker, nor did he have any supervisory authority over the Plaintiff. Buchanan testified that the only evidence he possessed to support McCarthy’s role in this is that he is listed as the “complainant” in the ultimate IA conducted by Burge. There is no evidence to suggest that the information McCarthy passed or exaggerated was false or exaggerated; indeed, the investigation by Burge confirmed everything that McCarthy passed on.

The Plaintiffs have called Sgt. McCarthy “patient zero” who turned a “compliment into a complaint.” But this is not true, and not what Buchanan testified to. The letter itself states that McCarthy felt, “in of itself, I did not find a problem.” (Exhibit 1 to Motion for Reconsideration). In fact, McCarthy indicated that he was “not sure if this is an issue.” *Id.* McCarthy did not advocate

for any action to be taken as to Plaintiff Buchanan. *Id.* McCarthy had no further involvement in the investigation, did not participate in the decision to discipline, nor is it disputed that the investigation uncovered independent facts to support Plaintiff Buchanan acted inappropriately in the performance of his duties, and an *independent arbitrator* decided that a written warning and a demotion were the appropriate ways to discipline Buchanan, rather than a suspension and a demotion. Buchanan testified that Burge, who made factual findings in the IA, was not motivated by racial animus, and that Mayor Martin, who upheld the Chief's decision and felt that Buchanan deserved *worse* discipline, was also not motivated by racial animus.

The court's decision to admit the evidence of the flag to show the racial bias of McCarthy constitutes reversible error and has incurably prejudiced the jury. The confederate flag is an extremely divisive issue in today's society; however, the Constitution allows citizens to display it. Allowing the plaintiffs to suggest that McCarthy has racial animus towards the plaintiff because the flag was in his garage is entirely improper. It is also highly confusing and misleading.² The central issue in this case is the state of mind of the Chief Haigh when making decisions regarding discipline and promotions. The court has ruled, rightly, that the City could not punish McCarthy for engaging in protected speech. The Plaintiffs now wish to use the flag to show that McCarthy harbored racial animus when he passed a report from an officer up the chain of command. This is reversible error.

As has already been briefed extensively, McCarthy is, at best, a peripheral participant in one event in this case. He expressly took no position on the matter; in fact, he said he did *not* think it was an issue.

² Particularly where the Plaintiff also testified that someone else in the Department drove around with a confederate flag on his car and that the Plaintiff did not consider them to be racist.\=]

Finally, the only legal support that the court has provided to sustain its decisions is *Bulwer v. Mount Auburn Hospital*, 473 Mass. 672, 684-88 (2016). As the Defendants have pointed out on a number of occasions now, *Bulwer* is wildly inapposite; in *Bulwer*, individuals *in the workplace* were leaving white supremacist literature *in the workplace* and the plaintiff complained about the literature to the employer, *who refused to investigate*. This case is entirely distinguishable; 1) the speech at issue was displayed nowhere near the workplace; and 2) the Plaintiff never complained about the flag or requested an investigation. Notably, while the *Bulwer* court considered the evidence for purposes of summary judgment, it took no position on the admissibility of the evidence, highlighting that its admissibility was a question for the trial judge. *Id.* at n.16. Applying the holding in *Bulwar* to the facts of this case is not appropriate.

For these reasons, the court should grant the Defendants' Motion for a Mistrial and this matter should be reset for trial with any inflammatory evidence of McCarthy's private display of the Confederate flag inside of his residence properly *excluded*. It is certain that the Defendants can no longer receive a fair trial because the Court allowed into evidence an irrelevant and inflammatory issue, and the prejudice caused cannot be cured. The Defendants expressly incorporate by reference their previously filed Motion for Reconsideration and Motion in Limine preemptively addressing in painstaking detail the harm that would result from the admission of such evidence, and the numerous legal justifications for why it should have been excluded.

CONCLUSION

For these reasons, the Defendants' Motion for a Mistrial should be allowed.

Respectfully submitted,

The Defendants,
Town of Greenfield and Robert Haigh,
By their attorneys,

/s/ Leonard H. Kesten

Leonard H. Kesten, BBO No. 542042
Erica Brody, BBO No. 681572
Brody, Hardoon, Perkins & Kesten, LLP
699 Boylston Street, 12th Floor
Boston, MA 02116
617- 880-7100
lkestn@bhpklaw.com
ebrody@bhpklaw.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served this day via email to the Court via email to [Patricia.shepherd@jud.state.ma.us and hampshire.clerksoffice@jud.state.ma.us and to counsel of record Timothy J. Ryan [tjr@efclaw.com] and Michael G. McDonough [mgm@efclaw.com]. The original of which will be hand delivered to the Court for docketing and filing on Tuesday April 19, 2022.

/s/ Leonard H. Kesten

Leonard H. Kesten, BBO No. 542042

Dated: April 14, 2022