

78.

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, ss.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT  
CIVIL ACTION NO.: 1780CV00033

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

HAMPSHIRE SUPERIOR COURT

APR 12 2022

HARRY JEKAÑOWSKI, JR.  
CLERK MAGISTRATE

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION  
OF THE COURT'S RULING ON THE ADMISSIBILITY OF EVIDENCE RELATING  
TO THE CONFEDERATE FLAG**

**Introduction**

Now come the above-captioned Plaintiffs and hereby oppose Defendants' Motion for Reconsideration on the grounds that this Court was correct in its initial findings and ruling that the evidence pertaining to the Confederate flag is relevant and admissible in this race-based discrimination and retaliation case.

**Law**

The standard for addressing a motion for reconsideration is fairly discretionary, and it has been stated that “[t]hough there is no duty to reconsider a case, an issue, or a question of fact or law, once decided, the power to do so remains in the court until final judgment. ...” King v. Globe Newspaper Co., 400 Mass. 705, 707 (1987) (citing Peterson v. Hopson, 306 Mass. 597, 601 (1940)). Furthermore, a motion for reconsideration is not “the appropriate place to raise new arguments inspired by a loss before the motion judge in the first instance.” Commonwealth v. Gilday, 409 Mass. 45, 46 n. 3 (1991). Massachusetts Courts disfavor re-filed motions of this

nature merely seeking “to get another ‘bite at the apple’ by [reframing] certain legal issues following receipt of the court’s ruling.” Morgan v. General Soc'y of Mayflower Descendants, No. 18-1272, 2019 Mass. Super. LEXIS 2188, at \*3 (Nov. 14, 2019).

### Argument

Defendants’ Motion for Reconsideration is misplaced. The factual record shows deposition testimony from Chief Haigh to the effect that Sgt. McCarthy told him the Confederate flag was his and that he had it there because he liked the Dukes of Hazard. McCarthy testified that he did not know who put the Confederate flag there, how long the Confederate flag was there, that he was not offended by the Confederate flag, and that even though the Confederate flag became an issue in 2015, it was still there in December 2018. Further, the Greenfield Mayor, the Police Chief and the Deputy Chief all learned of and knew of this issue in December 2015, as all three of them visited a complaining neighbor’s home attempting to defuse the situation. Chief Haigh issued a written order to Sgt. McCarthy directing him not to comment on the social media regarding the flag. The controversy identified Sgt. McCarthy as a Greenfield police officer and the owner of the garage with the flag. All of the social media posts, the public vigils, and gatherings in reaction to and opposition to the confederate flag all placed the Greenfield Police Department in a negative light. In other words, it was “Conduct Unbecoming” that the Greenfield Police Department in an extremely negative light.

In Pereira v. Commission of Social Services, 432 Mass. 251 (2000), the SJC reversed a summary judgment entered in favor of Ms. Pereira in her claim against DSS that her race-based remarks at a political dinner were protected by the First Amendment. Pereira was a Protective Investigator for DSS and a former Fall River City Councilor who made a race-based comment at a testimonial for retiring councilors. The remark was quickly reported in the press, generated

much negative reaction, and the DSS terminated Pereira because of her remarks. Ms. Pereira brought suit contending that her remarks constituted protected political speech under the First Amendment. At the trial court, Ms. Pereira and the DSS brought cross motions for summary judgment with the trial court finding in favor of the employee and against the DSS. The SJC reversed the trial court finding that Ms. Pereira could be subject to discipline and that the DSS was entitled to retain its qualified immunity defense.

A key factor in the decision is that Pereira's remark, much like McCarthy's Confederate flag, was not directly related to protected political speech. First, there is no contemporaneous factual predicate for Defendants' contention that Sgt. McCarthy raised the flag in furtherance of political speech. At his own deposition, Sgt. McCarthy claimed he did not even know about the flag. However, Chief Haigh testified that Sgt. McCarthy did take ownership of raising the Confederate flag and, according to Chief Haigh, Sgt. McCarthy did so because he was a fan of the long-discontinued television program, "The Dukes of Hazzard." The record does not contain any factual predicate or evidence to support a core First Amendment concern. Many other jurisdictions have weighed in on the inapplicability of Defendants' after-the-fact First Amendment argument, as raised here. See D.C. v. R.R., 182 Cal. App. 4th 1190, 1229 (2010) (actionable posted messages, initially claimed by defendant to be a "joke," cannot later be recast as political speech on a matter of public concern); Polish American Congress v. F.C.C., 520 F.2d 1248, 1250, 1253–56 (7th Cir. 1975) (television broadcast of derogatory Polish jokes did not involve a public issue or an issue of public importance); Shub v. Westchester Community College 556 F.Supp.2d 227, 244–46 (S.D.N.Y. 2008) (college president's inappropriate use of sexual jokes did not relate to an issue of public concern).

Even where there was a contemporaneous claim of political speech, as in Pereira, the SJC found that Ms. Pereira's remark "ha[d] little in common with speech the Supreme Court has examined and determined to be of 'public concern'; there is little to link it to the central purpose of the First Amendment, 'protecting the public marketplace [of] ideas and opinions[.],'" and that there was no basis to relate Pereira's remark to speech on a matter of public concern. Pereira, 432 Mass. at 258 (citing Eberhardt v. O'Malley, 17 F.3d 1023, 1026 (7th Cir. 1994)).

In this case the flag is relevant both as to Sgt. McCarthy's state of mind and discriminatory animus. Sgt. McCarthy is an actor in this drama, as well as with respect to the respect to the Town. The facts show the Greenfield Police Department and the Town failed and refused to take ANY action with respect to Sgt. McCarthy's offensive display of the Confederate flag, even when complaints originating from a same-sex neighbor with an African American child spread not only through the Town but also across social media in a manner that was discrediting to the Greenfield Police Department and the Town at large. The Defendants knew about the Confederate flag, its racist symbolism, and the strong negative reaction it was creating in the community, but they failed and refused to investigate the matter, let alone take any action with respect to it. Further, the evidence is clear that the Confederate flag remained in place at least through the date of McCarthy's December 2018 deposition, a time-period in excess of three years.

Clearly, the noted and ongoing display of a Confederate flag by a police department supervisor, which has been identified by many in the community as racially hostile and polarizing is an incident that warrants some action, or the failure to take any action, just even a formal investigation is directly relevant to this case's central issue of disparate treatment and race hostility.

Sgt. McCarthy was the precipitant actor in the January 2015 Buchanan investigation that resulted in Buchanan's suspension, demotion, and the sabotaging of his becoming the first black Sergeant in the history of the Greenfield Police Department. The Defendants denied Buchanan that deserved and historic promotion because Buchanan allegedly brought discredit on the Police Department by exercising discretion in the case of a young motorist. The motorist's mother, so moved by this act of discretion and positive community policing, appeared in person to thank Buchanan and lauded his conduct in speaking with Officer Clark. It was when this information reached Sgt. McCarthy that Buchanan's conduct was contorted and flipped from a positive to a negative. Sgt. McCarthy filed became the complainant against Buchanan both in writing to Chief Haigh and in private conversations with Chief Haigh, who agreed with and adopted Sgt. McCarthy's spin on the facts. As a supervisor and the "complainant" in Buchanan's disciplinary case, Sgt. McCarthy's motives and views can be questioned and his steadfast three-year display of the Confederate flag is relevant evidence with respect to his motives and discriminatory animus.

Also relevant is the Greenfield Police Department's support of Sgt. McCarthy and refusal to order Sgt. McCarthy to remove the flag or investigate the matter. While Plaintiff's counsel now claims that such actions by the Town would not have been legally permissible, it is important to note that the Defendants have produced no evidence that (1) Sgt. Murphy was then claiming his display of the flag was based upon political speech or (2) that the Town ever requested or received a legal opinion from its counsel or anyone on the matter. Rather, the record shows that the Defendants have simply made up this argument after the fact. Moreover, it is completely undercut by the fact that the Defendants concede that they ordered Sgt. McCarthy not to make any public comments – even in his private capacity – on the topic of the Confederate

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