

Filed: July 2, 2004

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1266
(CA-01-53-2-12)

MATTHEW DIXON,

Plaintiff - Appellant,

versus

COBURG DAIRY, INCORPORATED,

Defendant - Appellee.

EQUAL EMPLOYMENT ADVISORY COUNCIL,

Amicus Curiae.

O R D E R

The court amends its opinion on rehearing en banc, filed May 25, 2004, as follows:

On page 14, final line of text -- the word "employees" is corrected to read "employers."

On page 15, second paragraph, line 20 -- the cross-reference "supra note 8" is corrected to read "supra note 2."

For the Court - By Direction

/s/ Patricia S. Connor
Clerk

ON REHEARING EN BANC

PUBLISHED

UNITED STATES COURT OF APPEALS

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MATTHEW DIXON,
Plaintiff-Appellant,

v.

COBURG DAIRY, INCORPORATED,
Defendant-Appellee.

No. 02-1266

EQUAL EMPLOYMENT ADVISORY
COUNCIL,
Amicus Curiae.

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
C. Weston Houck, District Judge.
(CA-01-53-2-12)

Argued: December 2, 2003

Decided: May 25, 2004

Before WILKINS, Chief Judge, and WIDENER, WILKINSON,
NIEMEYER, LUTTIG, WILLIAMS, MICHAEL, MOTZ,
TRAXLER, KING, GREGORY, SHEDD, and DUNCAN,
Circuit Judges.

Reversed and remanded with instructions by published opinion. Judge Williams wrote the opinion, in which Chief Judge Wilkins and Judges Widener, Wilkinson, Niemeyer, Luttig, Traxler, Shedd, and Duncan concur. Judge Michael wrote a separate opinion concurring in the

judgment. Judge Motz concurred in the judgment. Judge King wrote a separate concurring opinion in which Judge Motz joined. Judge Gregory wrote a separate opinion concurring in the judgment.

COUNSEL

ARGUED: Samuel Wilson Howell, IV, HOWELL & LINKOUS, L.L.C., Charleston, South Carolina, for Appellant. J. Thomas Kilpatrick, ALSTON & BIRD, L.L.P., Atlanta, Georgia, for Appellee. **ON BRIEF:** Alan B. Linkous, HOWELL & LINKOUS, L.L.C., Charleston, South Carolina; Mikell R. Scarborough, Charleston, South Carolina, for Appellant. Christopher S. Enloe, ALSTON & BIRD, L.L.P., Atlanta, Georgia, for Appellee. Ann Elizabeth Reesman, Rae T. Vann, MCGUINNESS, NORRIS & WILLIAMS, L.L.P., Washington, D.C., for Amicus Curiae.

OPINION

WILLIAMS, Circuit Judge:

Matthew Dixon initiated this action in South Carolina state court, alleging that Coburg Dairy, Inc. unlawfully terminated his employment in violation of South Carolina law. Coburg removed the case to the United States District Court for the District of South Carolina, asserting that the court had subject matter jurisdiction over the case because it involved a substantial question of federal law. The district court denied Dixon's motion to remand the case to state court and granted summary judgment to Coburg on all of Dixon's claims. Sitting en banc, we hold that the district court lacked subject matter jurisdiction to hear this case. Accordingly, we reverse and remand with instructions that the case be remanded to the South Carolina Court of Common Pleas.

I.

Dixon began working for Coburg in 1997 as a mechanic. Dixon is a member of the Sons of Confederate Veterans, a Tennessee non-

profit corporation, "who[se members] can prove genealogically that one of their ancestors served honorably in the armed forces of the Confederate States of America." See *Sons of Confederate Veterans, Inc. v. Comm'n of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 613 n.1 (4th Cir. 2002). Dixon brought with him to work a personal tool box, to which he had affixed two decals depicting the Confederate battle flag. The decals offended one of Dixon's coworkers, who complained to Coburg management, citing the company's anti-harassment policy.¹ Coburg asked Dixon to remove the decals from his toolbox and, when he refused, offered to buy him a new, unadorned toolbox. Dixon declined, explaining that "his heritage was 'not for sale,'" and asserting that he had a First Amendment right to display the Confederate battle flag.² (J.A. at 10-11.) Unable to reach a compromise, Coburg terminated Dixon on September 5, 2000.

Dixon then filed suit in the South Carolina Court of Common Pleas. The complaint included nine causes of action. Critical to this appeal are the first, third and fourth causes of action, which allege that Dixon was terminated in violation of Section 16-17-560 of the South Carolina Code and that the discharge was in retaliation for his exercise of constitutional rights.³ Section 16-17-560 makes it "unlawful

(Text continued on page 5)

¹The policy prohibits "any form of . . . harassment because of race, color, religion, sex, age, disability, national origin, or status as a Vietnam era or disabled veteran." (J.A. at 42.) It specifies that harassment may take the form of "visual conduct such as derogatory posters, cartoons, drawings or gestures." (J.A. at 42.)

²In early 2000, South Carolinians were involved in a heated debate about whether to remove the Confederate battle flag from atop their state capitol building. Dixon points out that this was "a burning issue in the State of South Carolina," during a "period of intense national scrutiny and public debate." (Appellant's Br. at 4.)

³The relevant portions of the complaint read as follows:

FOR A FIRST CAUSE OF ACTION

(Violation of Constitutional Rights)

All of the pleadings previously alleged are hereby realleged and repeated and made a part of the pleadings contained herein.

11. SC Code § 16-17-560 states it is unlawful to discharge a citizen from employment because of the exercise of political

rights and privileges guaranteed under the Constitution of the United States and this state. The First Amendment to the U.S. Constitution and S.C. Constitution Article I, Section 2, provide for freedom of speech, assembly and the right to redress of grievances.

12. Plaintiff's termination arose from the exercise of his right of free speech to display the Confederate flag. Coburg violated the constitutional rights of its employee by its termination of Plaintiff.

13. Coburg's termination of Plaintiff for display of the flag constitutes a violation of his constitutional rights entitling Plaintiff to an award for damages.

. . .

FOR A THIRD CAUSE OF ACTION

(Violation of Public Policy)

All of the pleadings previously alleged are hereby realleged and repeated and made a part of the pleadings contained herein.

16. SC Code § 16-17-560 provides for a private civil cause of action where the wrongful discharge is a "crime against public policy."

17. The Defendant's termination of the Plaintiff for display of the Confederate flag. Defendant's actions constitute a violation of South Carolina criminal law and therefore a violation of the public policy of this State.

18. Coburg's termination of Plaintiff for display of the flag constitutes a violation of this statute entitling Plaintiff to an award for damages.

FOR A FOURTH CAUSE OF ACTION

(Retaliatory Discharge)

All of the pleadings previously alleged are hereby realleged and repeated and made a part of the pleadings contained herein.

19. Coburg's actions, through its agents attempts to control the content of Plaintiff's right of free speech through constant and repeated efforts to get him to abandon his constitutionally pro-



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