COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Docket No.: SJC-13073

SAUNDRA EDWARDS,

Plaintiff-Appellee,

v.

Commonwealth of Massachusetts

Defendant-Appellant.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT'S ORDER DENYING SUMMARY JUDGMENT

BRIEF OF DEFENDANT-APPELLANT COMMONWEALTH OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS
MAURA HEALEY
ATTORNEY GENERAL

Terence P. McCourt, BBO #555784
Special Assistant Attorney General
Kelly M. Pesce, BBO #689887
GREENBERG TRAURIG LLP
One International Place
Boston, MA 02110
Tel: (617) 310-6000
Fax: (617) 310-6001
mccourtt@gtlaw.com
pescek@gtlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State Cases

Statutes

Regulations

STATEMENT OF THE ISSUES

1. Whether the Superior Court erred in finding that the Governor, in exercising appointment and removal powers with respect to a public official who, by statute, is appointed to serve at the Governor's pleasure and who does not function as an employee of the Governor, could be considered an "employer" as that term is defined in the Massachusetts Whistleblower Act, G.L. c. 149, §185?

2. Whether the Superior Court erred in finding that the Plaintiff, who failed to object to an "activity, policy or practice" and resigned from her position, established the elements necessary to her claim pursuant to subsection (b)(3) of the Massachusetts Whistleblower Act?

3. Whether the Superior Court erred in holding that the specific power granted to the Governor under the terms of the Sex Offender Registry Board Statute, G.L. c. 6, §178D, to appoint and replace its chairperson at the Governor's pleasure, may be abrogated by the more general terms of the Massachusetts Whistleblower Act?

4. Whether the Superior Court violated separation of powers principles by encroaching on executive power expressly granted to the Governor by the Legislature?

STATEMENT OF THE CASE

Plaintiff Saundra Edwards ("Plaintiff") filed the underlying action in the Superior Court on December 31, 2014 asserting one count against the Commonwealth for a violation of the Massachusetts Whistleblower Act, G.L. c. 149, §185 (the "Whistleblower Act" or the "MWA"), and one count against Governor Deval Patrick for defamation in connection with her resignation as the Chair of the Sex Offender Registry Board in 2014. On February 27, 2015, the Plaintiff filed an Amended Complaint, adding a second count of defamation against Governor Patrick. On June 30, 2015, the Commonwealth and Governor Patrick each filed motions to dismiss, both of which were denied by the Superior Court on March 14, 2016.

On May 16, 2016, the Superior Court stayed the trial court proceedings pending resolution of an appeal brought by Governor Patrick seeking interlocutory review. After granting Governor Patrick's request for direct appellate review, on June 8, 2017, this Court reversed the Superior Court's denial of Governor Patrick's motion to dismiss the two defamation claims. *See Edwards v. Commonwealth of Massachusetts & another,* 477 Mass. 254 (2017). The case alleging a violation of the Whistleblower Act against the Commonwealth alone

then resumed in the Superior Court.

On September 18, 2019, following the close of discovery, the Commonwealth filed a motion for summary judgment as to the MWA claim, the only claim remaining in this case. On January 13, 2020, the Superior Court denied the Commonwealth's motion for summary judgment.

On February 12, 2020, the Commonwealth filed with the Appeals Court (Dkt. No. 2020-J-0073) a petition for interlocutory relief, pursuant to G.L. c. 231, §118 (first paragraph). On September 4, 2020, following delays relating to a change in counsel, Plaintiff filed an opposition to the Commonwealth's petition for interlocutory relief.

On September 10, 2020, a Single Justice of the Appeals Court (Ditkoff, J.) granted the Commonwealth leave to file an interlocutory appeal of the Superior Court's January 13, 2020 Order denying the Commonwealth's motion for summary judgment, and on December 28, 2020, the Appeals Court issued a Notice of Entry of Appeal (Dkt. No. 2020-P-1413). A certified copy of the docket entries is attached hereto in the Record Appendix ("RA _"), at RA1-RA20.

On January 19, 2021, the Commonwealth filed an application for Direct Appellate Review to this Court,

which was granted on February 17, 2021. On February 18, 2021, this Court docketed the appeal (Docket No. SJC-13073).

STATEMENT OF FACTS

This case involves the Governor's replacement of the Chairperson of the Sex Offender Registry Board ("SORB") pursuant to the appointment powers expressly granted to the Governor by the Legislature.

A. The Sex Offender Registry Board.

The SORB is an administrative agency charged with maintaining a "central computerized registry of all sex offenders required to register." G.L. c. 6, §178D. The SORB consists of seven members. Each is appointed by the Governor to serve a term of six years except for the Chairperson, who "shall be appointed by and serve at the pleasure of the governor." G.L. c. 6, §178K(1).

SORB is required to "promulgate guidelines for determining the level of risk of reoffense [for convicted sex offenders] and the degree of dangerousness posed to the public or for relief from the obligation to register." *Id.* Regulations promulgated by SORB create a registration and classification process. 803 CMR §1.04(2).

During the classification process, if the offender rejects the SORB's recommendation regarding registration or classification, a *de novo* hearing is held before a SORB hearing examiner. 803 CMR §1.04(d). The hearing examiner is authorized to "reach a final decision regarding the sex offender's duty to register and final classification level." *Id*. Notification of the hearing examiner's decision is sent to the petitioner and his or her authorized representative but is not available to the public. 803 CMR §1.23(1).[1] Like the hearing itself, the "administrative record [in connection with a SORB hearing] is not available to the public." 803 CMR §1.22(4).

B. The Bernard Sigh Matter.

Starting in or around 2006, and prior to Plaintiff taking office as Chairperson, SORB was handling a matter involving Bernard Sigh ("Sigh"). Sigh had been convicted in California in 1993 of spousal rape. (RA89, at ¶17). The victim was Governor Patrick's sister, and she remained Sigh's spouse at the time of the SORB proceedings. (RA90, at ¶18). Based on the California conviction, SORB had preliminarily classified Sigh as a

[1] Currently codified at 803 CMR §1.14(2) ("Hearings by the Board are not open to the public.").

Level 1 offender. In response, Sigh petitioned for a hearing regarding his classification and duty to register as a sex offender. (RA280, at 17-19; RA696, at 9-16).

Sigh's petition for a hearing required a SORB hearing officer to decide whether the crime of spousal rape in California was a "like offense" to one of the Massachusetts offenses listed in G.L. c.6, §178C because section 178C did not list the criminal offense of "spousal rape". (RA77,[2] at ¶5; RA167, at 66:17-67:7). SORB Hearing Officer A.J. Paglia conducted Sigh's hearing in August 2007, three months prior to Plaintiff's commencement of employment at SORB. (RA759, at 16-18). On August 31, 2007, at the end of the third and final hearing session, Paglia announced his decision on the Sigh matter verbally, concluding that spousal rape was a "like offense" to the crime of indecent assault and battery, but not a "like offense" to the crime of rape. (RA77, at ¶7). Based on Paglia's decision, Sigh was relieved from the duty to register as a sex offender. (RA77, at ¶8). Sometime after May 9, 2008,

[2] The Superior Court Rule 9A(b)(5) Statement of Material Facts is in the Record Appendix at RA76-83.

Paglia memorialized his determination in a written decision. (RA78, at ¶10).

C. Plaintiff is Appointed Chairperson of the SORB in November 2007.

Governor Patrick appointed the Plaintiff as Chairperson of the SORB effective November 5, 2007, more than two months after the conclusion of Mr. Sigh's hearing. (RA78, at ¶11). The SORB statute provides that the "chairman shall be appointed by and serve at the pleasure of the governor and shall be the executive and administrative head of the sex offender registry board." G.L. c. 6, §178K(1). SORB is "in the executive office of public safety and security." *Id.*; *see also* G.L. c. 6A, §18. The EOPSS undersecretary for criminal justice "oversee[s] the functions and administration" of SORB. G.L. c. 6A, §18 ½.

On May 9, 2008, prior to Paglia's issuance of a written decision in the Sigh matter, Plaintiff and SORB's Executive Director Jeanne Holmes met with Paglia. (RA79, at ¶17). According to Plaintiff, during that meeting, Plaintiff "discussed the elements of the crime of rape with Paglia and reiterated to him that a man can be guilty of raping his wife." (RA93, at ¶40). The Plaintiff told Paglia that "rape is rape" and that the

California "spousal rape" statute is a like statute to the Massachusetts rape statute. (*Id.*; RA184-185, at 83:22-84:9).

Plaintiff testified that after Paglia left the meeting, she discussed the situation with Holmes, and Plaintiff indicated a need to conduct training for the SORB hearing officers because she was unsure about whether Paglia understood the elements of the crime when he issued his decision in the Sigh matter. (RA185-186, at 84:10-85:3). Staff-wide training was then conducted. (RA79, ¶20). In May of 2008 at the direction of Plaintiff, SORB also promulgated emergency regulations to institute a review process to allow SORB's general counsel to petition the SORB Board to review a hearing officer's decision before the decision was finalized and released to the petitioner. (RA79, at ¶21; RA138, at 37:16-23). By these actions taken shortly after the May 2008 meeting with Paglia, Plaintiff instituted a process that would prevent a hearing officer from issuing any decision without review by the SORB Board. (RA188, at 87:11-22).

Paglia's employment with SORB separated in December 2008. (RA80, at ¶23). Thereafter, Paglia filed suit under the Whistleblower Act against SORB, the Plaintiff,

and others at SORB, alleging that he was retaliated against in light of his decision in the Sigh matter (the "Paglia Litigation"). (RA80, at ¶24). Among other allegations, Paglia claimed that the Plaintiff created a hostile work environment. (RA919-934). The Paglia Litigation settled in or around July 2014, almost six years later. (RA80, at ¶25).

D. Plaintiff Resigns as SORB Chair in September 2014.

On September 16, 2014, Plaintiff met with Kendra Foley, the Governor's Director of Boards and Commissions, and Patrick Moore, a Deputy Legal Counsel from the Governor's Legal Office. (RA80, at ¶26). During this meeting, Foley reminded Plaintiff that she served at the Governor's pleasure, and informed her that the Governor had decided to replace her as the chairperson of the Sex Offender Registry Board and to appoint a new chairperson. (RA81, at ¶27). In response, Plaintiff requested that she be permitted to resign. (RA212, at 111:15-24). By letter to Governor Patrick, dated September 16, 2014, Plaintiff resigned as Chairperson of SORB: "In anticipation of the appointment of a new Chairperson to the Sex Offender Registry Board (SORB),

I hereby tender my resignation, effective September 16, 2014." (RA 81, at ¶28).

Subsequently, Governor Patrick made comments to the media in which he discussed his reasons for making a change in leadership at SORB. *See, e.g.*, RA82, at ¶31. Governor Patrick testified consistent with his comments to the media that, by 2014, he had become concerned with (i) this Court's decisions repeatedly reversing SORB; (ii) SORB's failure to update its regulations in a timely manner; and (iii) a negative and "bullying" working environment at SORB. (RA422-428, at 59:9-65:13). This Court has issued decisions discussing the updating of SORB regulations, one of which highlights a 2015 act of the Legislature compelling SORB to respond to this Court's rulings.[3]

---

[3] *See Doe v. Sex Offender Registry Bd., No. 380316*, 473 Mass. 297 (2015) (even the "Legislature has recently required SORB to update its regulations…." (citing St. 2015, c.10, §63)) *L.L. v. Com.*, 470 Mass. 169, n. 23 (2014) ("We have recognized the problem of the [SORB's] failure to update its regulations and its continued reliance on increasingly outdated studies and research."); *Doe v. Sex Offender Registry Bd., No. 68549*, 470 Mass. 102 (2014) ("We emphasize, however, as we have done previously, that it is incumbent upon SORB to update its guidelines at reasonable intervals in order to take proper account of current scientific knowledge."); *Doe v. Sex Offender Registry Bd. No. 2015614*, 466 Mass. 594, 489 (2013) (noting that "eleven years have passed since SORB last updated those guidelines, during which time knowledge and

On January 8, 2015, Governor Charles D. Baker was sworn in as Governor, succeeding Governor Patrick.

SUMMARY OF THE ARGUMENT

Governor Patrick exercised his appointment powers to appoint the Plaintiff to the position of Chairperson of the SORB and later to remove her because she served at the Governor's pleasure. He did not employ her. The Massachusetts Whistleblower Act only applies to employment relationships. In any case, the facts do not support a Whistleblower Act claim against the Commonwealth even if that statute did apply to the Governor's act in replacing the SORB Chairperson.

The Superior Court's ruling impermissibly constrains the Governor's power to appoint and remove the SORB Chairperson, a position that the Legislature has determined is within the small class of senior policy-making positions where the Governor should be empowered to appoint or replace officials with maximum freedom in order to ensure the steady advancement of the Governor's policy objectives and a clear measure of political accountability. The general remedies available

---

understanding … has expanded considerably, compliance with this statutory charge requires incorporation of current information.").

to an employee who alleges retaliatory action against the Commonwealth as employer under the Whistleblower Act do not override the specific and unconstrained grant of discretion the Legislature has placed in the Governor to appoint and remove the SORB Chair. By purporting to restrict the Governor's purely executive power of appointment, the Superior Court's ruling violates the provisions of Article 30.

ARGUMENT

I. STANDARD OF REVIEW.

The disposition below was on summary judgment, and review is therefore *de novo* "to determine whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." *Chambers v. RDI Logistics, Inc.*, 476 Mass. 95, 99 (2016). In *de novo* review, "no deference is accorded the decision of the judge in the trial court." *Id.* at 99.

II. THE SUPERIOR COURT ERRED IN APPLYING THE WHISTLEBLOWER ACT, WHICH IS LIMITED TO THE EMPLOYMENT RELATIONSHIP, TO THE GOVERNOR ACTING IN HIS CAPACITY AS AN APPOINTING AUTHORITY.

The Whistleblower Act concerns the relationship between a public employer and its employees. In

replacing Plaintiff with a new SORB Chair, the Governor did not act as Plaintiff's "employer," as defined in the Whistleblower Act. Nor did he act on behalf of the Commonwealth as the Plaintiff's employer or otherwise in a manner for which the Commonwealth should be held accountable under the MWA. The Governor's exercise of his appointment power did not constitute a "discharge, suspension or demotion of an employee," which is the "retaliatory action" required for asserting a claim under the Act. G.L. c. 149, §185(a)(5). Rather, the Governor exercised his appointing authority to replace the SORB Chair who, by statute, serves "at his pleasure." G.L. c. 6, §178K(1). The Superior Court erred in disregarding the plain text of the Whistleblower Act in order to extend its application to the Governor.

The Whistleblower Act prohibits the Commonwealth as an employer from taking retaliatory action against an employee where the employee "objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes is in violation of a law … or which the employee reasonably believes poses a risk to public health, safety or the environment." G.L. c. 149, §185(b)(3). The sole cause of action in this case is the Plaintiff's allegation that "Plaintiff

objected to, and refused to participate in a policy, practice, and *precedent*[4] that spousal rape is not rape (emphasis added)." (RA96, at ¶55). The Plaintiff specifically alleges that "[Governor] Patrick terminated the Plaintiff…in violation of G.L.c.149, 185." (*Id*. at ¶58).

A. The Governor is not an "employer" under the MWA and did not, in any case, "employ" the Plaintiff.

The Whistleblower Act defines the term "employer" as "the commonwealth, and its agencies or political subdivisions, including, but not limited to, cities, towns, counties and regional school districts, or any authority, commission, board or instrumentality thereof." G.L. c. 149, §185(a)(2). The term "governor" does not appear in the definition of "employer" or anywhere else in the text of the MWA. For that simple reason the Plaintiff's MWA claim must fail.

In considering this question, the Superior Court correctly acknowledged that "no Massachusetts appellate court has specifically addressed whether the Governor is

[4] The word "precedent" does not appear in the MWA. *See* discussion at Section II(A).

subject to the [Whistleblower] Act's provisions." (Opinion, at 9).[5]

Contrary to the Superior Court's holding, however, and under a plain reading of the statute, the Governor does not fall within the definition of an "employer" under the MWA. The Governor is not himself "the commonwealth," nor is he or she an "agency or political subdivision" of the Commonwealth. Massachusetts courts have strictly construed the definition of "employer" under the MWA to exclude entities and persons not referenced in the statute. *See, e.g., Cabi v. Boston Children's Hospital*, 161 F.Supp. 3d 136, 158 (D. Mass. 2016)(even if hospital has "a quasi-public status, that status still falls short of the strictly construed definition of an employer for the purposes of Mass. Gen. L. c. 149 §185") (citing *Ahanotu v. Mass. Turnpike Authority*, 466 F.Supp. 2d 378, 395–396 (dismissing MWA claim where defendant was not an "instrumentality of the state based on a plain reading of the statute"); and *Boisvert v. Genzyme Corp.*, No. 2011–cv–00131–RJC, 2011 WL 5841680, at *2 (Mass.Super. Oct. 5, 2011) (dismissing

[5] The Superior Court's Memorandum of Decision and Order on the Commonwealth of Massachusetts' Motion for Summary Judgment, dated January 10, 2020, is appended hereto as Exhibit 1 and is cited as "Opinion".

MWA claim because defendant "d[id] not fit the statutory definition of an 'employer,' as it [was] neither an agency nor a political subdivision of the Commonwealth.")).[6] The Superior Court erred in not doing the same.

While it is clear that the Governor does not fall within the definition of an "employer" in the MWA, his relationship to the Plaintiff in this case was, at any rate, not an employment relationship as defined by the MWA. An "employee" is defined under the statute as an "individual who performs services for and under the control and direction of an employer" (as the latter term is defined above). G.L. c. 149, §185(a)(1). There is nothing in the record in this case to support a finding that Plaintiff performed services "under the control and direction" of the Governor. Plaintiff herself testified that she had no reporting relationship

[6]Construing a different statute, in *Lambert v. Executive Director of the Judicial Nominating Council*, 425 Mass. 406, 409 (1997), the Court found that because the Governor "is not explicitly included" in the definition of public record custodians contained in G.L. c. 4, §7, Twenty-sixth ("officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose"), the Governor is not covered by that statute.

to the Governor. (RA116, at 15:10-17; RA127, at 26:16-20). The Governor testified, similarly, that during Plaintiff's entire tenure as Chair, he could not recall ever even meeting Plaintiff, much less "controlling and directing" her. (RA401-402, at 38:23 – 39:2).[7]

In order for there to be any liability against the Commonwealth under the MWA, the alleged retaliatory action against Plaintiff must have been taken by her employer. SORB is "in the executive office of public safety and security." *Id.*; *see also* G.L. c. 6A, §18. The EOPSS undersecretary for criminal justice, and not the Governor, is by statute charged with responsibility to "oversee the functions and administration" of SORB. G.L. c. 6A, §18 ½. This oversight function by EOPSS does not translate to an employment relationship between the Governor and the SORB Chairperson. In fact, neither of the two EOPSS undersecretaries who oversaw SORB during Plaintiff's tenure as Chairperson recall ever speaking to the Governor about Plaintiff. (RA79, at ¶16). And, there is no evidence that anyone at EOPSS made the decision to replace Plaintiff as the Chairperson. To the

[7] For these factual reasons, the Governor was also not the Plaintiff's "supervisor" under the MWA. G.L.c. 149, §185(a)(4).

contrary, Ms. McCroom, who was the undersecretary at the time of Plaintiff's replacement, testified that she was "very surprised" when she learned that the Governor was appointing a new Chairperson. (RA621, at 51:16).

Plaintiff was not fired by the Secretary or Undersecretary of EOPSS, the officials who by statute were charged with "control and direction," *see* G.L. c. 149, §185(a)(1), of the Plaintiff in her administration of SORB. Rather, on September 16, 2014, Plaintiff was reminded by senior staff members of the Governor's Office that she served at the Governor's pleasure and informed that the Governor had decided to replace her as chairperson in order to appoint a new chairperson. (RA208-209, at 107:23-108:4). On that same day, and per her request, Plaintiff tendered her resignation. (RA 81, at ¶28).

B. The Governor was not acting as an agent of the Commonwealth in replacing the Plaintiff.

The Superior Court attempted to obscure the legal problem created by the omission of the Governor from the reach of the MWA by holding that the Governor was acting in the capacity of an "officer and/or agent" of the Commonwealth when making the decision to replace the Plaintiff as SORB Chair, thus presumably making the

Commonwealth vicariously liable under the MWA for the Governor's independent actions. (Opinion, at 14). These agency gymnastics do not bear up under even passing scrutiny.

The sole remaining defendant in this case is the Commonwealth, not the Governor. But the Commonwealth and the Governor do not operate under a principal-agent relationship as the Superior Court erroneously concluded. The Governor is the constitutional leader of the executive branch of the Commonwealth, the "supreme executive magistrate." Massachusetts Constitution, Part II, c. 2, §1, art. 1. The Commonwealth does not serve as a principal in control of the Governor as its agent.

Instead, the Governor, as the appointing authority, acts as an independent principal (not as any party's agent) in exercising his appointment and removal power. *Cf., McCarthy v. Governor*, 471 Mass. 1008, 1010 (2015) (the Governor is charged under the Massachusetts Constitution to appoint judges, and "when the Governor has the power to act, '[t]he act, first of all, and afterwards for all time, is the act of the Governor.'" (citing *Opinion of the Justices*, 190 Mass. 616, 619-620 (1906)).

The Plaintiff's attempt to transform the Governor's exercise of his appointment power into liability for the Commonwealth as an employer under the MWA does not withstand inspection. The Governor's exercise of his appointment power did not make him the Plaintiff's "employer," as defined in the MWA, and the Governor's later decision to appoint a successor was not a "discharge, suspension or demotion of an employee" which is the "retaliatory action" required to sustain a claim under the MWA. G.L. c.149, §185(a)(5). In appointing and then in removing the Plaintiff, the Governor acted independently to exercise his appointing authority consistent with the terms of the statute that created the SORB Chair position.

III. EVEN IF THE GOVERNOR HAD BEEN INCLUDED AS AN EMPLOYER UNDER THE WHISTLEBLOWER ACT, THE SUPERIOR COURT ERRED IN FINDING THAT PLAINTIFF ESTABLISHED A *PRIMA FACIE* WHISTLEBLOWER ACT CLAIM.

To establish a *prima facie* Whistleblower Act claim, the Plaintiff must demonstrate that (i) she engaged in protected activity by objecting to an "activity, policy or practice;" (ii) her employer knew of the protected activity; (iii) she suffered an adverse employment action; and (iv) her participation in the protected activity played a substantial or motivating part in the

retaliatory action. *Amirault v. City of Malden*, 335 F.Supp.3d 111, 120 (D.Mass. 2018) (and cases cited therein). In this case, because Plaintiff is unable to establish any of the four essential elements of the *prima facie* case, her claim must be dismissed.

A. Plaintiff Did Not Object to an "Activity, Policy or Practice."

Plaintiff makes her claim in reliance on G.L. c. 149, §185(b)(3), which requires both an "objection," and an "activity, policy or practice." The provision of the MWA pled in this case protects a plaintiff who has engaged in a narrow range of conduct: "object[ing] to, or refus[ing] to participate" in a specific activity, practice, or policy. The essence of the protected conduct is speech — blowing the whistle. It requires that an employee object to or refuse to do something. Those elements are absent here. On the record, it is clear that Plaintiff neither objected to nor refused to participate in any conduct in the sense required by the MWA.

Plaintiff describes her "objection" as follows: "if that [Paglia] decision went through, and if I didn't object to it and retrain the staff, we would have had a - spousal rape would not be considered rape in

Massachusetts...and then I had to do an emergency regulation so that it never happened again….” (RA222-224, 121:1-4; 123:3-7). Plaintiff voiced what she characterizes as her “objection” on May 9, 2008 to Paglia, a colleague employed by SORB as a hearing officer. (RA93, at ¶40). She did not object “up” to a supervisor (much less to the Governor); she saw a hearing officer do something she thought improper and used the considerable authority she had as the head of the agency to correct the matter and to ensure it would not happen again. That is running an agency, not whistleblowing, and it is not protected activity under the statute.

There was also no “activity, policy or practice” to which the missing objection could have been raised, as required by the statute. Referring to the hearing officer’s decision in the Sigh case, the Plaintiff testified that “I objected to what I saw as a policy of trying to change the law so that a person who was required to register as a sex offender didn’t have to.” (RA221, 120:13-17). The Complaint alleges (and the Superior Court appears to have agreed) that a whistleblower claim may be triggered by an objection raised to a “policy, practice, and *precedent*,” even though the term “precedent” appears nowhere in the MWA.

The Superior Court swallowed the Plaintiff's erroneous premise in finding that Plaintiff engaged in protected activity even as the Court admitted that the hearing officer's "decision" that resulted in the Plaintiff's corrective action "cannot be deemed an actual policy or practice." (Opinion, at 14).

This stretches the language of the statute beyond its limits. Courts are "not permitted to add words to a statute that 'the Legislature did not see fit to put there.'" *Commonwealth v. Russ R*, 433 Mass. 515, 520 (2001) (quoting *General Elec. Co. v. Department of Envtl. Protection*, 429 Mass. 798, 803 (1999)). The Superior Court breezily accepted that a hearing officer's decision fits within the MWA because it was "conduct that Edwards believed to be contrary to the law and to be dangerous to the public." (Opinion, at 14).This is plain error. The statute requires that "an activity, policy or practice" be at issue, and it does not define protected activity to include a hearing officer's decision in a single case.[8]

[8] Even if an objection to "precedent" were somehow the standard under the MWA, the decision at issue is not "precedent." Plaintiff herself testified that precedent was not created by the decision: "Q: Was Paglia's decision on not converting spousal rape in California to rape in Massachusetts binding on other hearing officers?

B. Governor Patrick Did Not Have Knowledge of the Alleged Protected Activity.

Plaintiff's attempt to impose liability on the Commonwealth must also fail because Governor Patrick, the only actor responsible for her removal from appointed office, had no knowledge of the activity she claims entitles her to protection under the MWA. Plaintiff alleges that her "protected activity" under the MWA was her May 9, 2008 meeting with Paglia discussing the crime of spousal rape. (RA93, at ¶40; RA183-185, 82:7-84:9). It is undisputed, however, that Plaintiff did not discuss the May 9, 2008 Paglia meeting with Governor Patrick or anyone on his staff (RA79, at ¶19), and there is no evidence that the Governor was aware of this meeting when, more than six years later, he exercised his authority to remove the Plaintiff as SORB Chair and appoint a successor to the office.

A [Plaintiff]: It was not." (RA227-228, 126:21-127:2). In addition, SORB hearing officer decisions are confidential and not subject to the public records law. *See* 803 CMR §1.14(2)("[h]earings held by the Board are not open to the public."); 803 CMR §1.22(4) (SORB "administrative record is not available to the public."); 803 CMR §1.26(1) (where a sex offender has not been finally classified or is classified as a Level 1 offender, the "general public shall not have access to this sex offender information, pursuant to M.G.L. c. 6, §§178D, 178I, 178J and 178(K)2)(a).").

As discussed above, Plaintiff did not lodge an objection with the Governor related to this subject. When asked whether he was aware that Paglia "determined that the California crime of spousal rape was not a like offense to the crime of rape in Massachusetts," Governor Patrick testified: "I do not know or did not know until I read the complaint [in this case] the basis for his decision that Mr. Sigh didn't have to register. All I knew is that he concluded he did not have to register." (RA398, at 35:8-18). Without knowledge by the responsible actor, the necessary causal nexus between protected activity and an adverse employment action cannot be established. *See Gauthier v. Town of Dracut*, 2005 WL 1669121 at *3 (Mass. Super. Ct. June 27, 2005) ("To succeed on his claim under the Whistleblower Act, Gauthier must show that he engaged in protected activity **of which the employer was aware**, that he suffered an adverse employment action, and that there was a causal connection between the protected activity and the adverse action.") (emphasis added) (citing *Lipchitz v. Raytheon Co.*, 434 Mass. 493, 502 (2001)).

The Superior Court's decision attempts to overcome this gap in knowledge by suggesting that even if the Governor did not have knowledge of the alleged protected

activity, "the Commonwealth and its agents were aware of Edwards' objections to how the Sigh matter was handled." (Opinion, at 14). General knowledge within SORB or EOPSS about the "Sigh matter," however, does not provide a basis to attribute knowledge to the Governor of the specific "protected activity" in question in the Plaintiff's MWA claim. *See, e.g., Francois v. JRM Hauling & Recycling Services, Inc.*, C.A.No. 08-02125-C, 2009 WL 2449860, *3 (Mass. Super. Ct. July 29, 2009)(summary judgment for defendant granted where general knowledge found insufficient, "no evidence that the employees that [plaintiff] spoke to played any role in the decision to fire him … bare assertion or speculation that [employer] terminated [plaintiff] because they knew he spoke with other employees about employment conditions is not sufficient to create a dispute of material fact concerning the reason for his discharge."). Plaintiff testified that she never informed the Governor of the protected activity, and the Governor testified that he was not aware of the protected activity. (RA79, at ¶¶18 and 19; RA398, at 35:8-18).

The Plaintiff simply has not shown that the Governor had the knowledge of the allegedly protected activity that is necessary to maintain a MWA claim.

C. There is No Adverse Employment Action Where Plaintiff Resigned.

The MWA defines a retaliatory action as a "discharge, suspension or demotion." G.L. c. 149, §185(a)(5). Here, the Plaintiff resigned. When informed that Governor Patrick intended to replace her, the Plaintiff submitted a letter to the Governor, tendering her resignation: "I hereby tender my resignation, effective September 16, 2014." (RA 81, at ¶28). Plaintiff's resignation was not a "discharge, suspension or demotion" under any rational application of the terms of the statute.

A voluntary resignation, it should be clear, cannot be characterized as an adverse employment action under the Whistleblower Act. G.L. c. 149, §185(a)(5). While not arising under the MWA, in *Spencer v. Civil Service Commission*, 479 Mass. 210, 221 (2018), the Court distinguished voluntary and involuntary resignations in simple terms: "[A]n employee's resignation is voluntary absent a showing of fraud, coercion, or duress" (citing *Jones v. Wayland*, 374 Mass. 249, 259–260 (1978)). There is no evidence of fraud, coercion or duress in this case. Referring to the Civil Service Commission, the Court in *Spencer* also noted that "[t]he commission has

consistently ruled that mere evidence that a resignation was made under threat of discharge or discipline is not enough." *Id.* (*citing Forrest v. Weymouth Fire Dep't*, 28 Mass. Civ. Serv. Rep. 480, 482 (2015)). *See also Lewis v. Boston Redevelopment Authority*, No. Civ. A. 94-12103-GAO, 1996 WL 208473, at *4 (D. Mass. Apr. 4, 1996) ("As a general matter, resignations are presumed voluntary." (citing *Hargray v. Hallandale*, 57 F.3d 1560, 1568 (11th Cir. 1995) ("The fact that an employee is faced with an inherently unpleasant situation or that his choice is limited to two unpleasant alternatives does not make an employee's decision any less voluntary.")).

In *Monahan v. Romney*, 625 F.3d 42 (1st Cir. 2010), the court dismissed the plaintiff's claim that he had been unconstitutionally removed as Chair of the Civil Service Commission on a finding that plaintiff had voluntarily resigned. The First Circuit affirmed that dismissal, noting that:

> The district court found that Monahan's resignation was not involuntary. In making this finding, the court cited the fact that Monahan had a choice between resignation and termination; that Monahan had a law degree and understood that he was under no obligation to resign … and that although Monahan likely felt pressure to make a quick decision, he could have demanded more time or demanded to speak to the Governor … Under these circumstances,

> the court found Monahan's resignation was not involuntary. *Id.* at 47.

Similarly, in this case, the Plaintiff, an experienced attorney, understood that she was under no pressure to resign, but chose that path, in her words, to "avoid the stigma of being terminated from my highly-visible position" — a decision that was entirely voluntary on her part. (RA668, at 5).

The Superior Court's alternative finding that the Plaintiff was constructively discharged is clearly erroneous. (Opinion at 16). Citing *GTE Prod. Corp. v. Stewart*, 421 Mass. 22, 33-34 (1995), the Superior Court stated that "[c]onstructive discharge occurs when the employer's conduct effectively forces an employee to resign." *Stewart* explains, however, that a finding of a constructive discharge requires that:

> 'the trier of fact must be satisfied that the new working conditions would have been so difficult that a reasonable person in employee's shoes would have felt compelled to resign.'… The test is met if, based on an *objective* assessment of the conditions under which the employee has asserted he was expected to work, it could be found they were so difficult as to be intolerable." (internal citations omitted) (emphasis in original). *Id.* at 34.

Thus, a constructive discharge requires the prospect of "new working conditions," for example a new

supervisor or a new hostile working environment, that forces the employee to resign. The facts in this case do not meet this test. There is no evidence anywhere in the record that Plaintiff was experiencing new and intolerable working conditions that forced her to resign. In the Plaintiff's own words, she resigned in order to "avoid the stigma of being terminated from my highly-visible position" (RA668, at 5), and not because she was faced with intolerable working conditions. Instead, Plaintiff was simply informed that she was being removed as SORB Chair, and she then requested the opportunity to submit a letter of resignation. (RA212, 111:15-18). The sequence is therefore the opposite of a constructive discharge where an employee resigns before being terminated. Plaintiff's resignation was not constructive discharge.

D. There is No Causal Nexus Between Plaintiff's Alleged Protected Activity in 2008 and her Resignation in 2014.

Finally, even if it could be assumed, contrary to the facts established above (i) that the Governor could somehow be deemed Plaintiff's employer, (ii) that Plaintiff did in fact engage in protected activity, (iii) that the Governor had knowledge of the Plaintiff's protected activity, and (iv) that Plaintiff's

resignation somehow constituted an adverse employment action, the MWA claim nonetheless fails because there is no evidence that Plaintiff's participation in a protected activity "played a substantial or motivating part" in any alleged adverse employment action. *Pierce v. Cotuit Fire Dist.*, 741 F.3d 295, 303 (1st Cir. 2014).

The absence of the required causal connection between Plaintiff's "objection" and her replacement as Chairperson is most evident in the fact that Plaintiff did not tender her resignation until September 2014 – more than six years after she participated in the May 2008 discussion with her subordinate that she characterizes as protected activity. This is simply too great a temporal gap to permit an inference that Plaintiff's protected activity was a "substantial or motivating" factor in any adverse employment activity. *See, e.g., Taylor v. Town of Freetown*, 479 F. Supp. 2d 227, 238 (D. Mass. 2007) ("The problem is that Plaintiff's protected speech was five years earlier.").

Moreover, even if Plaintiff could somehow overcome the six-year gap between the alleged protected activity and the alleged adverse employment action by somehow demonstrating that the Governor was reminded of the specific activity sometime in 2014, the record does not

support that Plaintiff's alleged protected activity was a "substantial or motivating" factor in Plaintiff's removal. Indeed, in his statement soon after Plaintiff's resignation, Governor Patrick listed four other independent reasons for his decision to replace Plaintiff as Chairperson (loss of confidence, reversal of cases by SJC, failure to update regulations, negative work environment), and then identified the fifth reason as the settlement of Mr. Paglia's MWA claim in the Paglia Litigation. (RA82, at ¶31). Plaintiff cannot show the requisite causal nexus between "protected activity" and an adverse employment action.

IV. THE SUPERIOR COURT'S EXTENSION OF THE WHISTLEBLOWER ACT IMPROPERLY CONSTRAINS THE GOVERNOR'S POLICY-MAKING AND IMPERMISSIBLY INTERFERES WITH THE GOVERNOR'S POWER OF APPOINTMENT UNDER THE SPECIFIC TERMS OF THE SORB STATUTE.

The Superior Court's ruling impermissibly constrains the Governor's power to appoint and remove the SORB chair at his pleasure. The clear language adopted by the Legislature at G.L. c. 6, §178K(1) identifies that position as one of the few critical, senior policy-making positions where the Governor is empowered to act with maximum freedom in selecting—and if necessary, replacing—a chief policy officer in order

to ensure the steady advancement of the Governor's policy objectives and the proper measure of political accountability for the executive.

A. The Superior Court Disregarded the Policy Reasons Underlying the Legislature's Designation of Serve "At Pleasure" Positions.

The Legislature established the position of SORB Chair as one of the few public offices where the public official is appointed by and serves at the pleasure of the Governor. These positions include the 9 cabinet secretaries (G.L. c. 6A, §§2 and 3); as well as other senior policy-making positions, including the SORB Chair (G.L. c. 6, §178K); the Secretary of Elder Affairs (G.L.c. 19A, ¶1); the Director of the Office of Consumer Affairs and Business Regulation (G.L. c. 24A, §1); the Commissioner of Insurance (G.L. c. 26, §6); and the State Police Colonel (G.L. c. 22C, §3).[9] The rarity of such positions suggests their importance. They are policy-making positions, and a Governor's ability to ensure advancement of the policy goals that he or she has pledged to pursue would be substantially compromised if

[9] *See also* G.L. c. 6, §185 (Director of the Office on Disability); G.L. c. 23A, §13E (Executive Director of the Office of Travel and Tourism); G.L. c. 23A, §13K (Executive Director of International Trade Office); G.L. c. 25C, §2 (Commissioner of the Department of Telecommunications).

the appointment or removal of officers "who serve at his [or her] pleasure" could be a subject of litigation or restricted by judicial order. It would, by the same measure, unacceptably interfere with the effective administration of government to leave the Governor (or a succeeding Governor, as in this case) vulnerable to a lawsuit every time the Governor determines that a disagreement with a Cabinet Secretary or appointed officer in a senior policy-making position compels the replacement of that officer to advance the Governor's policy goals.

The Superior Court failed to appreciate that the Legislature has intentionally drawn a statutory distinction between officers who serve at the Governor's pleasure and other officers who serve for a fixed term or executive department employees generally. This type of distinction, however, has long been recognized, most pointedly in decisions of the United States Supreme Court relating to the Presidential appointment power. As those decisions explain, the greater allowance for control given to the executive in appointing and removing the senior officers is intended to ensure fidelity and consistent execution from those in "policymaking positions" to ensure that "representative

government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." E*lrod v. Burns*, 427 U.S. 347, 367 (1976). Non-policymaking employees, by contrast, have broader rights with respect to retaining public office or employment because they "usually only have limited responsibility and are therefore not in a position to thwart the goals of the in-party." *Id.*

A Chief Executive necessarily relies on a class of key subordinate officers to fulfil certain responsibilities, and accordingly the United States Constitution gives the President removal power over that class of officers. As the Supreme Court has recently reiterated in a case upholding the President's removal power, "[w]ithout such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Seila Law LLC* v. *Consumer Financial Protection Bureau*, __U.S.__, 140 S.Ct. 2183, 2191, 207 L. Ed. 2d 494 (2020) (citing *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 513-414 (2010)).

This Court recognized similar policy considerations in affirming the discretionary authority exercised in an

"at pleasure" appointment by the Commissioner of Insurance in *Cieri v. Commissioner of Insurance*, 343 Mass. 181 (1961). In *Cieri*, the plaintiff sought reinstatement to a position in the division of insurance where, by statute, he served at the pleasure of the insurance commissioner. In holding that the Commissioner had full authority to appoint and replace any holder of the office, the Court noted that "[i]t seems obvious that the Legislature not only intended that the designation of a representative be a strictly personal prerogative of the Commissioner, but also that it intended and expected that the designee serving at the pleasure of the Commissioner reflect, at the risk of replacement, the policies of the incumbent Commissioner in the actual workings of the board whose decisions sensitively affect large numbers of people in the Commonwealth." *Id.* at 186.

In *Regan v. Commissioner of Insurance*, 343 Mass. 202, 206 (1961), the Court also upheld the removal by the Commissioner of Insurance of the assistant chief examiner in the division of insurance on similar grounds and on the basis of similar statutory language. In drawing lines between executive authority and judicial review, the Court explained that "in a removal at

pleasure no cause need be given, and none can be judicially known" (quoting *O'Dowd v. Boston*, 149 Mass. 443, 446 (1889)).

In creating the SORB Board positions, the Legislature carefully distinguished between the position of the SORB Chair, who functions as the agency's chief policy-making official and who therefore serves solely at the pleasure of the Governor, and the remaining Board members who are appointed for fixed terms of six years and thus may only be removed for "cause" prior to the expiration of the term. G.L. c. 6, §178K(1).

The Legislature's clear intention that the Governor be free to replace the chief policy making officer of the SORB at his or her discretion cannot be reconciled with the remedy provisions of the Whistleblower Act. Most particularly, G.L. c. 149, §185(d) provides that on a finding that an employee has been terminated in violation of the MWA, a court is empowered to "reinstate the employee to the same position held before the retaliatory action." This would unacceptably interfere with the Governor's execution of his or her duties when the Governor has determined that the Chair will no longer effectively advance the Governor's policy goals. The problem would be especially acute if (as here) the

previous appointee could be imposed on a successor Governor. If the Superior Court's decision is upheld, then after a change in administrations, a new Governor could be required to accept the prior Governor's SORB Chair based on the *prior* Governor's purported violation of the Whistleblower Act. This would be an absurd result.

While it appears that there is no reported Massachusetts case where the tension between the Whistleblower Act's reinstatement remedy and an "at pleasure" appointed position has been addressed, the issue was presented in *Grimaldi v. New Castle Cty.*, Civ. A. No. 15C-12-096, 2016 WL 4411329 (Del. Super. Ct. Aug. 18, 2016) where the plaintiff was a chief administrative officer who served by statute at the pleasure of the county executive. In dismissing the plaintiff's whistleblower claims, the Delaware Superior Court rejected the possibility that the Delaware Legislature could have intended that appointees serving "at the pleasure" of the County Chief Executive Officer would be entitled to seek reinstatement under the Delaware whistleblower act following a replacement. *Id.* at *4. The court concluded that the "alternative would create havoc at the highest levels of County and State government." *Id.*

It would indeed create havoc if the MWA may be invoked by senior Massachusetts officials who serve at the Governor's pleasure any time they are replaced in the course of a disagreement with the Governor over a matter that may be characterized as implicating "a risk to public health, safety or the environment." *See* G.L. c. 149, §185(b)(3). The scope of the potential problem created by such a rule could be considerable. An official who, like the SORB Chairperson, serves at the pleasure of the Governor, only presents a special case of the appointment power. Conceivably, policy disagreements raised by the many state officials who serve for a fixed term, and who the Governor in his or her discretion chooses not to re-appoint to a successor term, would also provide grounds for claims by displaced officials alleging retaliation under the MWA. Any ruling permitting an appointee to litigate the Governor's decision not to extend or continue that appointment as a "retaliatory action" under the MWA would present a serious constraint on a Governor's ability to carry out his or her executive duties and policy initiatives.

The Superior Court excused its unwillingness to harmonize the two statutes at the heart of this case by invoking a policy concern that is simply not present in

this case and that in any event is susceptible to other remedies. The Superior Court stated that "to accept the Commonwealth's argument would require the court to conclude that the Governor, pursuant to his or her appointing authority, could act in any manner—lawful or unlawful—when appointing or removing a gubernatorial appointment. Meaning the Governor could potentially remove an appointee for being of a particular race or color, for practicing a particular religion, or for being of a particular sexual orientation." (Opinion, at 12).

A recognition that the remedies of the MWA do not apply to the Governor's exercise of his appointment authority does not open up the dark potential for unlawful and unaccountable behavior that the Superior Court envisions. This case contains a single count under the MWA and raises no other statutory or common law claims. The Commonwealth's position regarding the independence of the Governor's appointment authority from the statutory provisions of the MWA does not address any other potential claims an appointed official might raise in connection with a removal or employment termination. In particular, the possible discrimination claims that the Superior Court anticipates could be

raised in other cases are not implicated in this case. Even if they were, relief would be available for a claim against the Commonwealth pursuant to Chapter 151B. *See Bain v. City of Springfield*, 424 Mass. 758, 763 (1997) ("[t]here is no doubt that the antidiscrimination statute, G.L. c. 151B … waives the sovereign immunity of the 'Commonwealth and all political subdivisions.'").

In addition, in contrast to the MWA, an employee seeking relief from a discriminatory employment action or other wrongful termination may bring claims against individuals (as distinct from the employing entity) under, for example, Chapter 151B's retaliation (§4(4)), interference §4(4A)), and aiding and abetting (§4(5)) subsections, all of which provide for claims against "any person." Accordingly, contrary to the Superior Court's assertion, a ruling that the MWA is inapplicable to the Governor would not contravene an individual's rights to pursue a separate claim such as discrimination, if appropriate to do so.

Finally, unlike most other state government officials, any Governor is always politically accountable for his or her appointments, good or bad, and this extends to a Governor's decision to remove and replace an appointed official. *See Seila Law,* 140 S.Ct.

at 2203 (discussing President's political accountability in context of appointment power as "enhanced by the solitary nature of the Executive Branch, which provides a single object for the jealousy and watchfulness of the people") (internal quotation omitted). Voters are entitled to re-elect a Governor, or not, based in part on the success of the Governor's appointments. This political accountability acts as a formidable check on a Governor's improper or unwise exercise of his or her appointment or removal powers.

B. Under Canons of Statutory Construction, the Governor's Specific Power of Appointment in the SORB Statute Cannot Be Overridden by the MWA.

Beyond the requirement of fulfilling the Legislature's intent that the Governor should be able to appoint and replace the SORB Chair in order to ensure the advancement of important policy goals, basic canons of statutory construction compel the conclusion that the Governor's specific power of appointment in this case may not be overridden by a statute that places limitations on the termination of public employees generally. As a statute of general applicability dealing with a broad swath of employees of the Commonwealth's agencies and municipalities, the MWA should yield to the SORB statute, which makes a specific provision for the

appointment and removal of a single SORB officer. *See Russ R.*, 433 Mass. at 521 ("where a general statute and a specific statute cannot be reconciled, the general statute must yield to the specific statute." (quoting *Pereira v. New England LNG Co.*, 364 Mass. 109, 118 (1973)); *see also Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (where there is no clear intention otherwise, a specific statute will not be controlled by a general one). In addition, the Whistleblower Act was enacted in 1994[10] while the SORB statute was enacted two years later in 1996.[11] The SORB statute reflects the more recent expression of legislative intent. *Russ R.*, 433 Mass. at 521 ("where two statutes conflict, the later statute governs.").

V. The Superior Court's Restriction on the Governor's Appointment and Removal Power Impermissibly Violates Separation of Powers Principles.

The arguments set forth in Sections II through IV are fully sufficient to find in favor of the Commonwealth, and the Court should refrain from unnecessarily deciding this case on a constitutional basis. *Beeler v. Downey*, 387 Mass. 609, 613 (1982) ("it

[10] St. 1993, c. 471.
[11] St. 1996, c. 239, §1.

is our duty, if reasonably possible, to interpret statutes in a manner that avoids unnecessary decision of a serious constitutional question."). However, if the Court were inclined to reach the constitutional issue, the Court should reverse the Superior Court's decision because it violates separation of powers under Article 30. "The creation of a public office is a legislative function, but the appointment of a particular person to an office is the function of the executive department." *Opinion of the Justices*, 365 Mass. 639, 643 (1974). "The Legislature may confer this power of appointment on the Governor or on another public officer or board within the executive branch." *Id*.

"[T]he power of removal is incident to the power of appointment." *Martin v. Reagan*, 525 F. Supp. 110, 112 (D. Mass. 1981) (internal citation omitted); *Adie v. Mayor of Holyoke*, 303 Mass. 295, 300 (1939) ("universal rule that, where no definite term of office is fixed by law, the power to remove an incumbent is an incident to the power to appoint, in the absence of some constitutional or statutory provision to the contrary.") (internal citation omitted). And, "[t]he general question of executive policy involved in a removal cannot be turned over to the courts." *Opinion of the*

Justices, 300 Mass. 596, 599 (1938). The Superior Court's decision violates this rule by interfering with an appointment decision that the Legislature has determined should rest within the most protected category of "executive policy" determinations and should accordingly be unconstrained.

By erroneously reading the MWA to limit the Governor's authority to appoint and remove the SORB Chair in his discretion, the Superior Court impermissibly constrained a power that the Legislature lodged squarely with the Governor. When faced with a separation of powers issue, courts have a duty "to construe a statute in a way to avoid constitutional problems." *Waltham Tele-Communications v. O'Brien*, 403 Mass. 747, 751 (1989). To that end, the "court is ever solicitous to maintain the sharp division between the three departments of government as declared by art. 30 of the Declaration of Rights." *Opinion of the Justices*, 365 Mass. 639, 641 (1974). Rather than recognizing and resolving the separation of powers concerns presented in this case, the Superior Court simply dismissed this concern and, with only the barest of explanation or analysis, declared that "the [MWA] does not infringe upon the Governor's executive authority or blur the

lines between the three branches of government." (Opinion, at 13).

The Superior Court appeared to justify its unwillingness to examine the separation of powers issue by advancing an unusually constrained and unsupported view of the reach of Article 30: "[I]nterference with authority granted to the Governor under the constitution has separation of power implications," the court wrote, "while interference with authority granted by the Legislature does not." (Opinion, at 10). The court cites no support for the proposition that the limits on inter-branch interference mandated by Article 30 apply exclusively to grants of power under the Constitution, and not to statutory grants of power. In fact, the authority is all to the contrary.

This Court has repeatedly made clear that judicial interference with a power granted by the Legislature to the executive by way of statute constitutes just the kind of inter-branch interference that Article 30 prohibits. When the Legislature grants unconditional discretion to the executive to make a specific policy determination, it creates a category of "executive decision not reviewable by a court of justice." *Ames v. Attorney General*, 332 Mass. 246, 250 (1955). The

Superior Court's decision disregards this Court's repeated adherence to this rule.

In *Ames*, the Court held that a decision of the Attorney General not to seek enforcement of a charitable trust under powers granted by the Legislature was an executive decision not reviewable by the court. The Court refused to direct the exercise of executive authority assigned to the Attorney General under the common law and more specifically by G.L. c. 12, §8. The Court concluded that any judicial inquiry into or potential overruling of the Attorney General's "purely executive decision" whether or not to use that authority in a particular case "would constitute an intolerable interference by the judiciary in the executive department of the government and would be in violation of art. 30 of the Declaration of Rights." *Id.* at 250, 253.

In *Town of Burlington v. Dist. Attorney for N. Dist.*, 381 Mass. 717, 721 (1980), the Court held that a town bylaw purporting to grant town counsel authority to prosecute criminal cases unconstitutionally infringed on the authority granted to District Attorneys in G.L. c. 12, §27, and G.L. c. 218, §27A to control the prosecution of criminal cases, a power that the Court held was

"comparable to that in [the District Attorney's] choosing to nol-pros a criminal case. The virtual exclusion of judicial intervention to check or correct the district attorney in [such instances] . . . follows from Part I, art. 30, of the Massachusetts Constitution declaring a separation of powers." I*d.*, at 721-722 and cases cited. Similarly, in *Commonwealth v. Webber*, No. SJ-2019-0366 (2019), the Single Justice held that the unqualified grant of discretion conveyed to the District Attorney in Mass. R. Crim. P. 16 meant that a Boston Municipal Court Judge had "no authority to 'deny' the Commonwealth's entry of a nolle prosequi," and that the judge's order purporting to deny the entry violated Article 30. *Id.* at 5-7.

The Superior Court therefore erred in finding that "interference with [executive] authority granted by the Legislature" does not implicate the separation of powers. (Opinion, at 10). The Supreme Court of Arizona resolved a similar conflict by preserving the appointing authority's unconstrained discretion. In *McDonald v. Campbell*, 169 Ariz. 478, 483 (1991), the court ruled that a whistleblower law, applicable on its face to state employees (including court employees) is unconstitutional as applied to the chief judge's

administrative director and staff who served at the Arizona Supreme Court's pleasure: "[E]mployees do not 'serve at the pleasure' of the Supreme Court if some other agency[12] has the authority to tell the Court to fire or to rehire such employees."

In sum, the Legislature has vested the Governor with the authority to appoint and remove officials that serve at his pleasure. Where, as here, a Governor loses confidence in an appointee that serves at his pleasure, the Governor must be free to exercise the authority granted by the Legislature to remove or replace that official in his or her discretion. The Superior Court's decision impermissibly encroaches on the Governor's executive power in contravention of Article 30.

CONCLUSION

For these reasons, the Commonwealth respectfully requests that this Court reverse the Superior Court's Order and enter Summary Judgment in favor of the Commonwealth.

[12] The court noted that "executive and judicial branches of Arizona state government are referred to in the Arizona Constitution as 'departments.'" *McDonald,* 169 Ariz. at 141.

Respectfully submitted,

COMMONWEALTH OF
MASSACHUSETTS

MAURA HEALEY
ATTORNEY GENERAL,

Defendant/Appellant,

By: 

Terence P. McCourt
Special Assistant Attorney General
BBO #555784
mccourtt@gtlaw.com
Kelly M. Pesce
pesceK@gtlaw.com
BBO #689887
Greenberg Traurig LLP
One International Place
Suite 2000
Boston, MA 02110
Phone: (617) 310-6000
Fax: (617) 310-6001

Dated: March 11, 2021

ADDENDUM

A copy of the Superior Court's Order denying the Commonwealth's Motion for Summary Judgment, along with the statutes, constitutional authority, and unpublished cases cited herein are addended hereto.

CERTIFICATE OF COMPLIANCE WITH MASS. R.A.P. 16(k)

I certify that this Memorandum of Law complies with the type-volume limitation set forth in Massachusetts Rule of Appellate Procedure 20(a)(4)(A)-(C), as this brief uses Courier New 12-point typeface and contains one-inch margins on the top and bottom, and one-and-one-half inch margins on the left and right. I further certify that this Memorandum of Law complies with the

page limitations set forth in Massachusetts Rule of Appellate Procedure 20(a)(2), as it is no more than 50 pages in length.

Terence P. McCourt
Special Assistant Attorney General
GREENBERG TRAURIG LLP
One International Place
Suite 2000
Boston, MA 02110
Tel: (617) 310-6000
Fax: (617) 310-6001

CERTIFICATE OF SERVICE

I, Terence P. McCourt, counsel for Appellant Commonwealth of Massachusetts hereby certify that on March 11, 2021, I caused a copy of Appellant's Brief together with the Record Appendix filed with the Massachusetts Supreme Judicial Court at SJC-13073, to be served, via email and first class mail, upon counsel for the Plaintiff at

Gail McKenna, Esq.
Mount Hope Street, Suite 206Y
North Attleboro, MA 02760
mckennaappeals@gmail.com

Signed under the pains and penalties of perjury on this 11th day of March, 2021.

Terence P. McCourt
Special Assistant Attorney General
GREENBERG TRAURIG LLP
One International Place
Suite 2000
Boston, MA 02110
Tel: (617) 310-6000
Fax: (617) 310-6001

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SJC Docket No.: 13073

SAUNDRA EDWARDS,

Plaintiff-Appellee,

v.

Commonwealth of Massachusetts

Defendant-Appellant.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT'S ORDER DENYING SUMMARY JUDGMENT

ADDENDUM OF DEFENDANT-APPELLANT THE COMMONWEALTH OF MASSACHUSETTS

Terence P. McCourt, BBO #555784
Kelly M. Pesce, BBO #689887
GREENBERG TRAURIG LLP
One International Place, 20th Fl.
Boston, MA 02110
Tel: (617) 310-6000
Fax: (617) 310-6001
mccourtt@gtlaw.com
pescek@gtlaw.com

March 11, 2021

TABLE OF CONTENTS

EXHIBIT 1

45

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1477CV01994

SAUNDRA R. EDWARDS

vs.

COMMONWEALTH OF MASSACHUSETTS

MEMORANDUM OF DECISION AND ORDER ON THE COMMONWEALTH OF MASSACHUSETTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In November 2007, the plaintiff, Saundra R. Edwards ("Edwards"), was appointed Chairperson of the Sex Offender Registry Board ("SORB"). In September 2014, former Massachusetts Governor Deval Patrick ("Governor Patrick") relieved Edwards of her position. In response, Edwards filed the current action in December 2014, contending her termination was retaliatory. Thereafter, in February 2015, she filed the First Amended Complaint and Jury Claim (the "Amended Complaint"), asserting one claim for violation of G. L. c. 149, § 185 (the "Whistleblower Act") against the Commonwealth of Massachusetts (the "Commonwealth") (Count I), and two claims for defamation against Governor Patrick (Counts II and III). This matter is currently before the court on the Commonwealth's Motion for Summary Judgment. For the reasons stated below, the Motion for Summary Judgment is **DENIED**.

BACKGROUND

The following undisputed facts are taken from the Superior Court Rule 9A(b)(5) Statement of Material Facts in Support of the Commonwealth's Motion for Summary Judgment, and the exhibits referenced therein. Some facts not specifically mentioned here are reserved for reference during the court's discussion of the relevant legal issues.

SORB is an administrative agency within the Commonwealth's Executive Office of Public Safety and Security ("EOPSS"). SORB maintains a centralized registry of sex offenders required to register pursuant to the Commonwealth's sex offender registry law, G. L. c. 6, § 178D. The governor appoints SORB's Chairperson, and he or she serves at the pleasure of the governor. G. L. c. 6, § 178K(1).

In 2006, SORB began reviewing a matter involving Governor Patrick's brother-in-law, Bernard Sigh ("Sigh"), who had previously been convicted of spousal rape in California. At the time, although he was living in the Commonwealth, Sigh had never registered as a sex offender in Massachusetts. When Sigh's failure to register became a campaign issue for Governor Patrick, SORB began an investigation into the matter. Ultimately, SORB's review led to its recommendation that Sigh be classified as a Level 1 sex offender—a classification that required registration. As was Sigh's right, he requested a hearing to challenge his classification and filed a motion seeking relief from the requirement that he register as a sex offender.

Before Sigh's classification hearing took place, SORB's General Counsel, Daniel Less ("Less"), wanted briefing regarding whether a conviction of spousal rape in California was a "like offense" to rape in Massachusetts. Less also requested a legal opinion on the issue from the Massachusetts Attorney General, because, under Massachusetts law, a convicted rapist could not be relieved of the obligation to register as a sex offender. And, SORB's acting director, Robert Baker ("Baker"), wanted to continue any hearing on Sigh's classification until the Attorney General's office issued its opinion.

In August 2007, despite Less and Baker's concerns and despite instructions from the Director of Hearings, Martin Whitkin ("Whitkin"), telling him not to hold a hearing, SORB hearing examiner, A.J. Paglia ("Paglia"), held a hearing as Sigh requested. At the conclusion of

the hearing, Paglia ruled orally that spousal rape in California equated to indecent assault and battery in Massachusetts and relieved Sigh of his obligation to register as a sex offender in Massachusetts. Paglia did not issue a written decision at that time.

Approximately three months after Paglia issued his ruling, in November 2007, Governor Patrick appointed Edwards Chairperson of SORB. The EOPPS Undersecretary for Criminal Justice oversees the functions and administration of SORB. Thus, while Governor Patrick appointed Edwards to her position, she never reported directly to him; instead, the Undersecretary for Criminal Justice monitored her job performance.

Soon after her appointment, Edwards hired Jeanne Holmes ("Holmes") as the Executive Director of SORB and began an evaluation of SORB. This process included a review of Paglia's decision regarding Sigh. At that point, while Paglia had made an oral ruling and drafted a decision on the Sigh matter, no formal written decision had yet been issued. Over the course of the next several months, discussions ensued among members of SORB, the EOPSS, and the Attorney General's office about how to proceed with the Sigh matter. These discussions frequently included references to *Commonwealth* v. *Becker*, 71 Mass. App. Ct. 81, 87 (2008), wherein the Massachusetts Appeals Court defined the term "like offense" to mean "the same or nearly the same." Edwards and others believed that, based on this definition, Paglia's decision holding that spousal rape in California was not a "like offense" to rape in Massachusetts was legally unsupportable. Edwards, in particular, felt it was her responsibility to do something about this legally untenable conclusion.

In May 2018, Paglia met with Edwards to discuss the Sigh matter. During this meeting, Edwards explained her view that the California spousal rape statute was like the Massachusetts rape statute. Paglia was upset about the prospect of having to change his decision. After their

initial meeting, Paglia and Edwards met again. This time, counsel for EOPSS was present, as were others. A decision was made to publish Paglia's unedited decision and, thereafter, to immediately issue emergency regulations to provide future guidance to SORB's hearing examiners.

Subsequently, SORB published Paglia's decision and issued emergency regulations. Edwards also conducted staff training on the elements of offenses within SORB's jurisdiction and promulgated emergency regulations to allow SORB's general counsel to petition the SORB Board to review a hearing officer's decision before the decision was finalized and disseminated to the petitioner. Prior to the promulgation of the emergency regulations, hearing examiners had discretion to issue decisions without any additional review by SORB's Board.

Paglia separated from SORB in December 2008. Around that same time, he filed suit against Edwards and others at SORB, alleging he was retaliated against, under the Whistleblower Act, for refusing to engage in illegal conduct. The Palia litigation settled in July 2014.

On September 16, 2014, Edwards met with Kendra Foley ("Foley"), the Governor's Director of Boards and Commissions, and Pat Moore from the Governor's Legal Office. Foley told Edwards that she (Edwards) served at Governor Patrick's pleasure and that he had decided to replace her as Chairperson of SORB. By letter to Governor Patrick, dated that same day, Edwards tendered her resignation as Chairperson. By letter dated September 18, 2014, the EOPSS acknowledged Edwards resignation.

Following Edwards' resignation, on September 22, 2014, Governor Patrick made the following statement regarding her departure and the appointment of a new Chairperson:

> I think we put out the statement saying that I lost confidence and that's what it is about. They've had several cases where the SJC has reversed them and most recently I think at the end of last year they were criticized for not updating their regulations which is and I know it's a tough job but it is something they need to

> do. We have gotten a number of reports about the work environment not being very positive, not being very conducive to the kinds of productivity we need out of them and then I'd say the straw, the final straw was the settlement of a lawsuit which happened about not quite a year ago now that involved some inappropriate at least, maybe unlawful pressuring by the Chair and Executive Director of a hearing officer to change the outcome of a case. The hearing officer didn't ultimately do that. It turns out that that case is the case that arose out of my brother-in-law's experience way back at the beginning of the first campaign when the Republican party sorry to say, aided by the Herald nearly destroyed their lives. So it was time. Rather than be precipitous we looked at the whole Board. We had a month's long process of interviewing candidates, vetting candidates, some of the candidates who were appointed have been reappointed so they are people we think can get the job done. But the folks who were setting the tone over there, well the chair in particular has been changed out and we thank her for her service. But again, Connors will be great. The only thing I will say about it is that tradition or custom is not the rules over there that the Chair chooses the Executive Director so that the Executive Director will be stepping aside as well.

Thereafter, on January 2, 2015, after Edwards filed the current suit, Governor Patrick made additional comments to the media concerning his reasons for removing her, stating:

> You know, people do things like this when they've been, sometimes when they've been called out, and, you know, it's part of the business. The fact is that she influenced inappropriately, or attempted to influence inappropriately, a hearing officer, and that's a matter of record. That hearing did involve my brother-in-law, that is true. We've never made a secret of that, but it's still inappropriate, and that's the reason why I asked for her resignation.
>
> We can't have officials inappropriately interfering with the independence of hearing officers. It undermines the whole process whether it involves someone I know or not.

DISCUSSION

In support of the Motion for Summary Judgment, the Commonwealth advances three arguments. First, it contends that a claim under the Whistleblower Act fails because Edwards was not subjected to a retaliatory discharge by her employer; instead, she was replaced by Governor Patrick, during the exercise of his legitimate appointing authority power. Second, it argues that the statutory power granted to Governor Patrick under the SORB statute, to appoint and/or replace its Chairperson, cannot be abrogated by the Whistleblower Act. Lastly, the

Commonwealth contends that, even if Governor Patrick is subject to the Whistleblower Act, Edwards cannot establish a *prima facie* violation of the Act. Below, the court addresses these arguments.

I. Standard of Review

A motion for summary judgment may be granted if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56(c); see also *Barrows* v. *Wareham Fire Dist.*, 82 Mass. App. Ct. 623, 625 (2012), citing *Cassesso* v. *Commissioner of Corr.*, 390 Mass. 419, 422 (1983). The party opposing a request for summary judgment must respond and allege specific facts establishing the existence of a genuine issue of material fact for trial. *Polaroid Corp.* v. *Rollins Envtl. Servs. (N.J.), Inc.*, 416 Mass. 684, 696 (1993). The court views the evidence in the light most favorable to the non-moving party, but does not weigh evidence, assess credibility, or find facts. *Drakopoulos* v. *United States Bank Nat'l Ass'n*, 465 Mass. 775, 788 (2013), quoting *O'Connor* v. *Redstone*, 452 Mass. 537, 550 (2008).

II. Analysis

A. The Whistleblower Act

The claim Edwards asserts for violation of G. L. c. 149, § 185, i.e., the Whistleblower Act, is premised upon a theory of retaliation. She contends that the Commonwealth, acting through Governor Patrick, retaliated against her for objecting to the policy, practice, and precedent Paglia established within SORB (in his oral decision on the Sigh matter) that spousal rape in California was not a "like offense" to rape in Massachusetts. In addition, Edwards claims that she was retaliated against for generally objecting to Paglia's conduct.

Generally speaking, the Whistleblower Act "protects public employees from retaliation

by their employers for disclosing to a supervisor or public body workplace activities, policies, or practices that the employee reasonably believes violate the law, or pose a risk to public health, safety, or the environment." *Trychon* v. *Massachusetts Bay Transp. Auth.*, 90 Mass. App. Ct. 250, 254-255 (2016). There are three elements to a claim brought under the Whistleblower Act. "The plaintiff-employee must prove that (1) the employee engaged in protected activity; (2) participation in that activity played a substantial or motivating part in the retaliatory action; and (3) damages resulted." *Id.* at 255, citing *Welch* v. *Ciampa*, 542 F.3d 927, 943 (1st Cir. 2008) and *Taylor* v. *Freetown*, 479 F. Supp. 2d 227, 241 (D. Mass. 2007).[1]

The protection afforded by the Whistleblower Act is not, however, without limits. In fact, the Whistleblower Act delineates only three unique circumstances under which an employee's whistleblowing conduct is protected. See G. L. c. 149, §§ 185(b)(1)-(3).[2] In the Amended Complaint, Edwards refers to the Whistleblower Act generally without identifying the particular provision under which her claim falls. Nonetheless, the Amended Complaint makes clear

---

[1] Because there is little authority from our appellate courts interpreting the provisions of the Act, at times throughout this decision, the court relies on federal cases discussing and interpreting the Act. See *Trychon*, 90 Mass. App. Ct. at 255 (describing federal cases discussing the Act as "persuasive" and "instructive").

[2] First, pursuant to section 185(b)(1), an employee is protected from employer retaliation if she:

> *Disclose[d] or threaten[ed] to disclose* . . . an activity, policy, or practice of the employer . . . that the employee reasonably believe[d] . . . [was] in violation of a law, or a rule or regulation promulgated pursuant to law, or which the employee reasonably believe[d] pose[d] a risk to public health, safety or the environment.

G. L. c. 149, § 185(b)(1) (emphasis added). Next, under section 185(b)(2), an employee is protected from retaliation if she:

> *Provide[d] information to, or testifie[d] before*, any public body *conducting an investigation, hearing or inquiry* into any violation of law, or a rule or regulation promulgated pursuant to law, or activity, policy or practice which the employee reasonably believe[d] posed a risk to public health, safety or the environment by the employer[.]

G. L. c. 149, § 185(b)(2) (emphasis added). Lastly, pursuant to section 185(b)(3), an employee is protected from employer retaliation if she:

> *Objecte[d] to, or refuse[d] to participate in* any activity, policy or practice which the employee reasonably believe[d] was in violation of law or a rule or regulation promulgated pursuant to law, or which the employee reasonably believe[d] pose[d] a risk to public health, safety or the environment.

G. L. c. 149, § 185(b)(3) (emphasis added).

(through assertions, if not by identifying a specific statutory provision) that she believes she was terminated for engaging in conduct entitled to protection under the third subsection of the Whistleblower Act. More specifically, that she was removed from her position as Chairperson of SORB because she objected to, and refused to participate in, a policy, practice, and precedent establishing that spousal rape in California was not a "like offense" to rape in Massachusetts, because she reasonably believed that such a policy or practice posed a risk to public safety. G. L. c. 149, § 185(b)(3).

B. The Commonwealth's Arguments in Support of Summary Judgment

1. Applicability of the Act to Gubernatorial Appointments

In the first instance, the Commonwealth argues Governor Patrick's decision to replace Edwards falls outside the scope of the Whistleblower Act, even if retaliatory, because there was no employee-employer relationship between the two. The Commonwealth raises two points in support of this contention.

First, referencing the fact that the Whistleblower Act defines the term "employer" as "the commonwealth, and its agencies or political subdivisions, including . . . towns, counties and regional school districts, or any authority, commission, board or instrumentality therof[,]" G. L. c. 149, § 185(a)(2), and the term "employee" as an "individual who performs services for and under the control and direction" of one of these referenced entities, G. L. c. 149, § 185(a)(1), the Commonwealth contends Governor Patrick cannot be deemed Edwards' employer for purposes of the Act because she never performed services under his "control and direction." Instead, according to the Commonwealth, Edwards was employed by SORB performing her duties under the direction and control of the EOPSS.

Second, the Commonwealth argues that, in accord with a plain reading, Governor Patrick

is not subject to the provisions of the Whistleblower Act because the Act's definition of the term "employer" makes no mention of the Governor as a possible employer. See G. L. c. 149, § 185(a)(2).

Not surprising considering the general dearth of case law discussing the Whistleblower Act, no Massachusetts appellate court has specifically addressed whether the Governor is subject to the Act's provisions. Notwithstanding this absence, the Commonwealth urges the court to adopt the reasoning the Supreme Judicial Court applied in *Lambert* v. *Executive Dir. Of the Judicial Nominating Council*, 425 Mass. 406 (1997), to determine Governor Patrick is not an employer subject to the provisions of the Whistleblower Act.

In *Lambert*, the Court was tasked with determining "whether a questionnaire completed by an applicant for judicial appointment and submitted to the Governor through the Judicial Nominating Council (JNC)" was a public record under the definition set forth in G. L. c. 4, § 7, cl. 26.[3] *Id.* In concluding that the questionnaire was not a public record, the Supreme Judicial Court upheld the trial court's determination that neither the JNC nor the Governor were entities subject to the public records law. *Id.* at 408. In doing so, the Court mentioned the fact that the Governor was not explicitly identified within the public records law as an entity whose records were subject to public disclosure. *Id.* at 409.

Lambert is not, however, the smoking gun the Commonwealth would have the court

---

[3] Unless contained within a list of specified exemptions, G. L. c. 4, § 7, cl. 26, defines "[p]ublic records" to mean:

> [A]ll books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32[.]

believe because, in this court's view, the Supreme Judicial Court's reasoning in that case was grounded less on the specific language of G. L. c. 4, § 7, cl. 26, and more on the fact that the appointment of judges stems from the governor's constitutional authority, which may be exercised in his or her sole discretion. *Id.* And here, Governor Patrick was exercising his statutory authority to appoint and remove the Chairperson of SORB—authority the General Court granted via legislation—not authority granted to him under the State constitution. This distinction is significant because interference with authority granted to the Governor under the constitution has separation of power implications, while interference with authority granted by the Legislature does not.

The Commonwealth's suggestion that Edwards cannot assert a claim for violation of the Whistleblower Act because based on Governor Patrick's action she was not under his direct supervision and control is unpersuasive. Edwards was employed by the Commonwealth and Governor Patrick was acting as an officer and/or agent of the Commonwealth when he removed Edwards from her position as Chairperson of SORB. The fact that Governor Patrick may not have had direct supervision over Edwards following her appointment is immaterial, if his actions in his capacity as an officer and/or agent of the Commonwealth were retaliatory. And, that is a determination best left to trial.

Ultimately, whether Governor Patrick's actions were retaliatory will be decided by the trier-of-fact; however, drawing all reasonable inferences in favor of Edwards, his comments to the media about the reasons for her removal as Chairperson of SORB are sufficient for her claim to survive summary judgment. There is sufficient support in the summary judgment record to support Edwards' claim. It is undisputed that she was employed by the Commonwealth, that Governor Patrick advised her she was being replaced, and that there is, at least some, evidence

indicating this removal was retaliatory. Nothing in the Whistleblower Act or the case law the Commonwealth cites suggests that an individual cannot bring a claim under the Act where the person perpetuating the alleged retaliation was not the claimant's direct supervisor. The court declines to interpret the Whistleblower Act as containing such a restriction.

The Commonwealth's argument that, because the Chairperson of SORB is appointed by the Governor and serves at his or pleasure under G. L. c. 6, § 178K, Governor Patrick could have removed Edwards for any reason is flawed. While there may be debate about whether the Governor can remove a gubernatorial appointment without cause, see *Levy* v. *Acting Governor*, 436 Mass. 736, 745-749 (2002), there is no legal authority to support the proposition that the Governor may remove a gubernatorial appointment for an unlawful reason. Here, if Edwards is believed, she was not removed from her position as Chairperson for "no reason"; rather, she was removed for an unlawful reason, i.e., in retaliation for objecting to Paglia establishing a policy, practice, or precedent within SORB that spousal rape in California was not a "like offense" to rape in Massachusetts. A Governor is not exempt from our laws merely because he or she holds the position of Governor.

2. Conflicts Between The SORB Statute And The Whistleblower Act

Next, the Commonwealth argues that the specific power granted to the Governor under the terms of the SORB statute to appoint the Chairperson for SORB cannot be abrogated by the more general terms of the Whistleblower Act. Put another way, according to the Commonwealth, Governor Patrick's appointment authority, under G. L. c. 6, § 178K, trumps any right Edwards may have to recover under the Whistleblower Act, because Edwards' right to bring an action under the Whistleblower Act conflicts with Governor Patrick's right under the SORB statute to appoint and remove the Chairperson of SORB at his pleasure, for cause, or for no cause. This

argument is premised on the idea that the SORB statute and the Whistleblower Act are somehow in conflict and are irreconcilable; however, this is not a position with which the court agrees.

Ordinarily, when interpreting more than one statute, the courts are directed to construe the statutes at issue "'in a manner which gives reasonable effect to both statutes and creates a consistent body of law[.]'" *St. Germaine* v. *Pendergast*, 411 Mass. 615, 626 (1992), quoting Boston v. Board of Educ., 392 Mass. 788, 792 (1984). The courts "assume that the Legislature was aware of existing statutes when enacting subsequent ones." *Green* v. *Wyman-Gordon Co.*, 422 Mass. 551, 554 (1996), citing *LaBranche* v. *A.J. Lane & Co.*, 404 Mass. 725, 728 (1989). Thus, the courts attempt to interpret statutes in harmony with each other whenever possible. *Id.*

First, the SORB statute and the Whistleblower Act address entirely different matters. General Laws c. 6, § 178K, authorizes the Governor to appoint the Chairperson of SORB. Meanwhile, the Whistleblower Act authorizes a state employee to sue the Commonwealth (or, any of its agencies or various subdivisions) for, among other things, retaliation. Even on a cursory review, it is clear that the two statutes address completely different subject matters. There is no reason to interpret them in such a way as to find a conflict where no conflict is readily apparent.

More significantly, to accept the Commonwealth's argument would require the court to conclude that the Governor, pursuant to his or her statutory appointing power, could act in any manner—lawful or unlawful—when appointing or removing a gubernatorial appointment. Meaning the Governor could potentially remove an appointee for being of a particular race or color, for practicing a particular religion, or for being of a particular sexual orientation. The court finds no legal basis for such an outcome. In fact, while the Commonwealth has cited a number of cases highlighting the Governor's exclusive prerogative to appoint and remove gubernatorial

appointments for whatever reason, not one of these cited cases supports the proposition that the Governor may remove a state employee—appointed or otherwise—for unlawful reasons.

Second, the Whistleblower Act does not infringe upon the Governor's executive authority or blur the lines between the three branches of government. As the Commonwealth rightly points out, "[t]he creation of a public office is a legislative function, but the appointment of a particular person to an office is the function of the executive department." *Opinions of the Justices*, 365 Mass 639, 641 (1974) (internal citations omitted). Nothing in the Whistleblower Act infringes on the Governor's ability to appoint or remove a gubernatorial appointment, it simply makes it unlawful for the Commonwealth to retaliate against a state employee for blowing the whistle on some policy or procedure that the employee believes to be unlawful or that would endanger the public. There is no legal basis to conclude the Governor is exempt from these provisions. If the Governor, in his or her capacity as an agent for the Commonwealth, retaliates against a state employee for engaging in conduct protected under the Whistleblower Act, there is no reason that employee cannot assert a claim under the Act.

3. Violation of the Whistleblower Act

Finally, the Commonwealth argues that, even if the court finds that Governor Patrick is subject to the Whistleblower Act, Edwards' claim fails because she has not made a *prima facie* showing that the Whistleblower Act was violated. First, the Commonwealth challenges Edwards' contention that she engaged in activity protected under the Whistleblower Act. According to the Commonwealth, Edwards' objection to Paglia's interpretation that spousal rape in California was not a "like offense" to rape in Massachusetts does not constitute the objection to an activity, policy, or practice entitled to protection under the Whistleblower Act.

The Commonwealth's argument is based primarily on the fact that SORB's General

Counsel testified that Paglia's legal interpretation was not binding on any future hearing examiner, and the fact that Edwards took steps to institute oversight procedures so that the deficiencies surrounding Paglia's decision in the Sign matter would not be repeated by future hearing examiners. In the court's view, however, the Commonwealth's interpretation of the Paglia incident is overly narrow. The EOPSS was allowing Paglia's legal interpretation to stand, relieving Sigh from his obligation to register. Even if this decision cannot be deemed an actual policy or practice, this decision was certainly conduct that Edwards believed to be contrary to the law and to be dangerous to the public. Drawing all reasonable inferences in favor of Edwards, the court concludes a trier-of-fact could find that Edwards engaged in protected activity.

Next, the Commonwealth argues that, for Edwards to prevail on her claim, she must show that her objection to the Commonwealth's activity, policy, or practice was communicated to, or known by, Governor Patrick. In support of this contention, the Commonwealth relies on *Gauthier* v. *Dracut*, 19 Mass. L. Rptr. 579, 2005 WL 1669121, at *3 (Mass. Super. Ct. Jun. 27, 2005) (Fishman, J.), which states that "[t]o succeed on . . . [a] claim under the Whistleblower Act," a plaintiff "must show that he engaged in protected activity of which the employer was aware[.]" In this regard, the Commonwealth conflates Governor Patrick with the Commonwealth.

There can be no real dispute that Edwards was employed by the Commonwealth and that, if Governor Patrick retaliated against her in his capacity as the Governor, he did so as an agent or officer of the Commonwealth. And, there is sufficient record evidence from which a trier-of-fact could conclude the Commonwealth and its agents were aware of Edwards' objections to how the Sigh matter was handled. She attended meetings with Paglia at which representatives of the EOPSS were present. And, she instituted changes allowing for more oversight of SORB's

hearing examiners following the Sigh matter.

Moreover, it defies logic that the Governor would remove an individual from an appointed position without full knowledge of the person's work history and contributions to the positon. Even if the court were to accept the Commonwealth's assertion that Edwards is required to show that Governor Patrick knew of her objections to the Sigh matter, it would not change the outcome on the pending motion. Whether Governor Patrick knew of Edwards' objections when she voiced them to Paglia, in May 2008, is irrelevant. Viewing the evidence in the light most favorable to Edwards, based on the statements Governor Patrick made regarding his reasons for removing Edwards from her position as Chairperson, one can reasonable infer that he knew of her objections before he made the decision to remove her as SORB's Chairperson.

Finally, the court concludes Edwards has presented sufficient evidence to support her assertion that she was terminated by the Commonwealth. The Commonwealth argues that Edwards suffered no adverse employment action because she resigned from her position, instead of waiting to be officially relieved of her duties by Governor Patrick. In support of this argument, the Commonwealth relies on *Monahan* v. *Romney*, 625 F. 3d 42, 47 (1st Cir. 2010). However, *Monahan* is readily distinguishable from the current case.

In *Monahan*, the First Circuit Court of Appeals upheld a trial judge's factual finding that the plaintiff had voluntarily resigned from his position as Chairperson of the Civil Service Commission for purposes of his Due Process claim against then-Governor Mitt Romney ("Governor Romney"). However, in that case, there was, at most, a strong "suggestion" by Governor Romney's office that he resign. *Id.* at 45-46. Here, not only was Edwards advised by aides to Governor Patrick that she was being removed as SORB's Chairperson, she was told who he planned to appoint to her position.

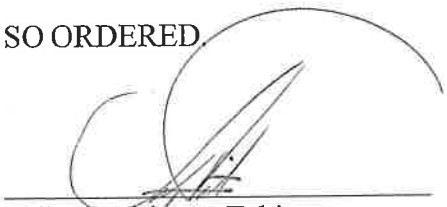
Massachusetts jurisprudence has a long history of acknowledging the legal construct of constructive discharge. See *GTE Products, Corp.* v. *Stewart*, 421 Mass. 22, 33-34 (1995). A "[c]onstructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." *Id.* (internal citations omitted).

Here, the evidence, taken in the light most favorable to Edwards, supports a claim of constructive discharge. Similarly, whether, as the Commonwealth suggests, too much time elapsed between the time Edwards allegedly objected to the activity, policy or practice and the time of her discharge, to show a causal nexus between the two is for the trier-of-fact.

CONCLUSION AND ORDER

For the reasons set forth above, it is hereby **ORDERED** that the Motion for Summary Judgment be **DENIED**.

SO ORDERED.



Dated: January 10, 2020

Salim Rodriguez Tabit
Justice of the Superior Court

EXHIBIT 2

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

LAUREN FORREST,
Appellant,

v.

D1-13-2

WEYMOUTH FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

Pro Se
Lauren Forrest

Appearance for Respondent:

George Lane Jr., Esq.
87 Broad St.
P.O. Box 29
Weymouth, MA 02180

Commissioner:

Cynthia Ittleman, Esq.[1]

DECISION ON APPOINTING AUTHORITY'S MOTIONS TO DISMISS

On December 26, 2012, the Appellant, Lauren Forrest ("Ms. Forrest" or "Appellant"), pursuant to G.L.c. 31, §2(b), filed this appeal with the Civil Service Commission ("Commission") contesting the decision of the Weymouth Fire Department ("Appointing Authority" or "Town") to terminate her employment as a Lieutenant in the Weymouth Fire Department. A Prehearing conference was held at the Commission on January 22, 2013. Also on January 22, 2013, the Appointing Authority filed two (2) Motions to Dismiss ("Motions"); one (1) motion asserts that the Commission has no jurisdiction to hear this appeal because it was

[1] The Commission acknowledges the assistance of Law Clerk Chris Windle in the drafting of this decision.

untimely, the second motion asserts that the Commission has no jurisdiction because the Appellant resigned and, thus, her employment was not terminated. On January 28, 2013, the Appellant filed an Opposition to the Motions. A hearing on the Motions was held at the Commission on March 25, 2013, at which time the Appointing Authority filed a Memorandum in Support of its Motions ("Town's Memorandum").[2] The witnesses were sequestered, except for the Appellant. The hearing was digitally recorded and the parties were provided with a CD of the hearing[3]. For reasons set forth herein, the Motions to Dismiss is allowed and the Appellant's appeal is dismissed.

FINDINGS OF FACT:

Four (4) exhibits were entered into evidence at the hearing. Based on these exhibits, the Motions and the Appellant's Opposition thereto, the testimonies of the following witnesses:

Called by the Appointing Authority:

- Joseph L Davis, Fire Chief, Weymouth Fire Department
- Michael Coughlin, Director, Weymouth Human Resources Department

Called by the Appellant:

- Lauren Forrest, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, caselaw, regulations, rules, policies, and reasonable inferences from the credible evidence; a preponderance of credible evidence establishes the following facts:

[2] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with G.L.c. 31 or any Commission rules taking precedence.

[3] If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

1. At all pertinent times prior to September 7, 2012, the Appellant was a fulltime, tenured civil service employee of the Appointing Authority. She had no prior discipline there. (Stipulated Facts)
2. On August 23, 2012, the Appointing Authority gave Ms. Forrest a Notice of Disciplinary Hearing pursuant to G.L. c. 31, § 41, indicating that the Appointing Authority was considering disciplinary action against Ms. Forrest, up to and including termination for alleged violations of the Weymouth Fire Department's Rules and Regulations. (Exh. 1)
3. The Town disciplinary hearing was scheduled for August 29, 2012. (Exh. 1)
4. The hearing date was postponed until September 7, 2012 by agreement. (Testimonies of Davis, Coughlin, and Forrest)
5. On September 7, 2012 the parties convened at Weymouth Town Hall for the Town disciplinary hearing. Prior to the hearing, the parties entered into settlement negotiations regarding various matters, including resolution of the disciplinary matter which was to be the subject of the Town disciplinary hearing that day.[4] (Testimonies of Davis, Coughlin, and Forrest)
6. The Town was represented by counsel at the settlement negotiations, which lasted at least a couple of hours. Ms. Forrest was represented by an attorney for the Weymouth Firefighters Local 1616, International Association of Fire Fighters (AFL-CIO)("Union") at the negotiations. Ms. Forrest's personal attorney, whom she had hired in connection with a Massachusetts Commission Against Discrimination ("MCAD") case against the Town and Fire Chief Leary, was not involved with the Town's disciplinary hearing or the related negotiations. (Testimony of Forrest). Ms. Forrest had attempted to contact her

[4] The settlement also included, *inter alia*, the Appellant's retirement, confidentiality and backpay to be paid to the Appellant pursuant to an arbitration award and subsequent litigation. Ex. 2.

personal attorney to be involved with the negotiations on September 7, 2012 but she was unable to contact him prior to, and during the negotiations. (Testimonies of Davis, Coughlin and Forrest; Appellant's Opposition)

7. The Union attorney and Appointing Authority's attorney discussed the terms of the settlement. During these discussions, the Union attorney would periodically discuss with Ms. Forrest the suggested terms of the settlement and receive her input before returning to negotiation with the Town's attorney. (Testimony of Forrest)
8. The parties agreed to the terms of a settlement on the afternoon of September 7, 2012. Because Ms. Forrest had been unable to contact her personal attorney prior to and during the negotiations, she was given seven (7) days to discuss the agreement with her personal attorney before being required to sign. However, Ms. Forrest spoke to her personal attorney about an hour after they left City Hall on September 7, 2012 and he advised Ms. Forrest to sign the settlement Agreement. Within a week or so thereafter, Ms. Forrest discontinued the legal services of her personal attorney. (Testimony of Forrest)
9. Sometime prior to September 7, 2012, Ms. Forrest applied for Accidental and/or Ordinary Disability Retirement with the Weymouth Retirement Board.[5] (Exh. 2)
10. After the settlement negotiations concluded on September 7, 2012, the Union's attorney reduced the Agreement to writing and the Town computed the amount of backpay to be paid to the Appellant. The Union attorney completed drafting the Agreement on September 11, 2012. (Testimony of Davis; Exh. 2)

[5] The Weymouth Retirement Board website states, *inter alia*,"[u]nder M.G.L. Chapter 32, Municipal retirement systems are governed by a five-member board, which is independent of the local government. Each board has two members representing the municipal government, two members elected by the system's membership, and a fifth member, who is appointed by the other four members, and who is not a member of the retirement system." (Administrative Notice)

11. On September 11, 2012, the Appellant received a call from her Union representatives indicating that they would bring the drafted Agreement and resignation letter to her to sign. Shortly thereafter that day, the President and Vice President of Ms. Forrest's Union brought the Agreement and a resignation letter to Ms. Forrest's residence to discuss them with her and to have her sign them. Ms. Forrest discussed other options with the Union President and Vice President. Ultimately, that day, they suggested that she sign the Agreement and resignation letter because, according to them, a Town discipline hearing would be held, she would likely be terminated if she did not resign and her termination would affect her ability to obtain other employment. (Testimony of Forrest).
12. On September 11, 2012, Ms. Forrest signed the Agreement and resignation letter dated September 7, 2012. (Testimony of Forrest; Exh. 3) The Union signed the Agreement on September 11, 2012 and the Town signed the Agreement on September 12, 2012. (Exh.2)
13. The Appellant's resignation letter is attached to the Agreement as Appendix A and it is referenced in the Agreement. The letter states, in full, "I hereby irrevocably resign from my employment as a Lieutenant in the Weymouth Fire Department, effective as of 11:59 p.m. on September 7, 2012." (Exhs. 2, 3) The Agreement states that the Town accepted Ms. Forrest's resignation. (Id.)
14. The Agreement acknowledges that Ms. Forrest had filed an application for Accidental and/or Ordinary Disability Retirement with the Weymouth Retirement Board and states that the Appointing Authority would cooperate in processing of her retirement application. (Exh. 2) At some point in December 2012, the Weymouth Retirement

Board denied Ms. Forrest's application for Accidental and/or Disability Retirement[6],[7]. (Testimony of Forrest)

15. On December 26, 2012, Ms. Forrest filed an appeal with the Civil Service Commission, more than three months after the Agreement and resignation letter were signed by Ms. Forrest, the Union and the Town. (Stipulated Facts)

Applicable Law

The Standard Adjudicatory Rules of Practice and Procedure (the "Rules"; 801 CMR 1.00, *et seq.*) apply to administrative adjudication at the Commission but Commission policy provides that when such rules conflict with G.L. c. 31, the latter shall prevail. There appears to be no conflict in the instant case. The Rules indicate that the Commission may dismiss an appeal in the event that the appeal fails to state a claim upon which relief can be granted. (801 CMR 1.01(7)(g)(3)) In addition, the United States Supreme Court has held that in order to survive a motion to dismiss, the non-moving party must plead only enough facts to state a claim to relief that is plausible on its face. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007). Thus, the non-moving party must plead enough facts to raise a reasonable expectation that discovery will reveal evidence in support of the allegations. (See id. at 545) Similarly, the Massachusetts Supreme Judicial Court has held that an adjudicator cannot grant a motion to dismiss if the non-moving party's factual allegations are enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the appeal are true, even if doubtful in fact. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 890 (2008).

[6] At pertinent times, Acting Chief Davis of the Town Fire Department was a member of the Weymouth Retirement Board. He abstained from the vote on Ms. Forrest's retirement and was present as the Fire Department head. He took no part in the discussion. (Testimony of Davis)

[7] I take Administrative Notice that the Appellant appealed the Weymouth Retirement Board's denial of her application for Accidental and/or Disability Retirement to the state Contributory Retirement Appeal Board ("CRAB") and that a Division of Administrative Law Appeals ("DALA") Magistrate denied her appeal on February 27, 2014 (Docket No. CR-12-690). I have no additional information indicating that Ms. Forrest has taken further legal action regard to her retirement application.

The Commission's jurisdiction to hear disciplinary appeals is limited by statute to cases involving an employee being "discharged, removed, suspended... laid off, transferred from his position without written consent... lowered in rank or compensation without his written consent [or] his position be abolished." G.L. c. 31, § 41. Section 44 of G.L. c. 31 provides that, " … a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission …." Id.

The Commission has held that a Civil Service employee who has voluntarily resigned is not entitled thereafter to the benefit of a hearing pursuant to G.L. c. 31, §§ 42-43. See e.g., Travers v. City of Fall River, 21 MCSR 182 (2008); Liswell v Registry of Motor vehicles, 20 MCSR 355 (2007); Maynard v Greenfield, 9 MCSR 165 (1996). Absent fraud, coercion or duress, a public employee may end his or her employment by voluntarily resigning. Jones v. Town of Wayland, 374 Mass. 249, 259 (1978); cf. Champion v. Weymouth Fire Department, 25 MCSR 223 (2012)(Appellant's resignation was invalid because she lacked the capacity to voluntarily resign). That a party chooses between facing disciplinary charges and resignation does not of itself create sufficient facts to establish that the resignation was induced by coercion or duress. Simmons v Department of Conservation and Recreation, 25 MCSR 249, 252 (2012)(citing Stone v. Univ. of MD. Med. Sys. Corp., 855 F.2d 167, 175 (4th Cir. 1988)(establishing the legal standard to determine resignation voluntariness)(cited by the First Circuit of the US Court of Appeals in Monahan v. Romney, 625 F.3d 42, 47 (1st Cir. 2010))

Analysis

The Appellant has failed to raise a right to relief beyond speculation, having not pleaded sufficient facts to raise a reasonable expectation that discovery will lead to evidence in support of

her allegations. Specifically, the Appellant in the instant case believed that she could be terminated following the Town's disciplinary hearing if she did not resign before it. However, the Commission cannot hold the Appointing Authority responsible for actions it did not take. See Travers, Liswell, and Maynard, supra. The existence of a future intent to possibly terminate someone's employment does not yield a right to action; rather, it is the actual termination that triggers such a right. Director of Civil Defense Agency & Office of Emergency Preparedness v. Civil Service Com., 373 Mass. 401, 411 (1977).

The Appellant argues that she signed the resignation letter and Agreement under duress, averring that a choice to resign or be terminated is not a choice. However, she was represented by her Union attorney during negotiations. In addition, when the Appellant was unable to reach her personal attorney, the Appointing Authority allowed the Appellant some time before signing the letter and Agreement in order to discuss them with her personal attorney. She spoke to her personal attorney on the evening of September 7, 2012 and he advised her to sign the agreement. In addition, Ms. Forrest was represented by a Union representative during the settlement negotiations. On September 11, 2012, when her Union President and Vice President visited her with the Agreement in hand, the Appellant discussed with them her other options before they ultimately suggested that she sign the Agreement. This does not constitute duress.

The Appellant also argues that she was induced to resign under false pretenses or fraud. As part of the Agreement, she avers that she was informed that she would be able to process an application for Accidental and/or Disability Retirement. The Town avers that the Agreement acknowledges her retirement application and indicates that it would cooperate with Ms. Forrest's retirement application. This was done, the Town further states, to inform the Appellant that her resignation would not preclude her retirement claim; it did not state that her claim would be

granted because the Weymouth Retirement Board makes such decisions, not the Town. The terms of the Agreement and its enforcement, with the exception of the resignation letter referenced in it and attached to it, is beyond the Commission's authority. Addressing only the resignation, I note that a Union representative at the settlement negotiations assured the Appellant that she would still be able to pursue her retirement claim even though she was resigning. The Appellant was also able to consult her personal attorney on this matter. As such, the Appellant did not sign the resignation letter under circumstances that undermine her resignation.

In addition to finding that the Commission has no jurisdiction over this appeal because the Appellant resigned from her employment, the Commission also has no jurisdiction over the instant appeal because it is untimely. The Appellant's resignation was effective September 7, 2012, although she did not sign the resignation letter until September 11, 2012. Whether the Appellant's resignation was effective on September 7 or September 11, 2012, well more than ten (10) days passed, pursuant to G.L. c. 31, s. 41, before the Appellant filed this appeal at the Commission on December 26, 2012. Also in December, 2012, the Weymouth Retirement Board denied her Accidental and/or Disability retirement application. The Commission has no jurisdiction regarding the Appellant's retirement application or to determine if the Appointing Authority breached its obligations pursuant to the parties' Agreement in that regard. The sole issue before the Commission is whether the Appellant voluntarily resigned and the evidence indicates that she did. It is well established that an employee who voluntarily resigns from employment is not aggrieved by the actions of the employer for purpose of civil service law. In addition, the appeal was untimely. Therefore, the Commission does not have jurisdiction to hear the present appeal.

Conclusion

Accordingly, for the reasons stated above, the Motions are hereby ***allowed*** and the appeal of the Appellant, Lauren Forrest, is hereby ***dismissed***.

Civil Service Commission

/s/Cynthia Ittleman

Cynthia Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman, Ittleman, McDowell, and Stein, Commissioners) on September 3, 2015.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice:
Lauren Forrest (Appellant)
George Lane Jr., Esq. (for Respondent)

EXHIBIT 3

2016 WL 4411329

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

GRIMALDI

v.

NEW CASTLE COUNTY, et al.

C.A. No: 15C-12-096 (ESB)

|

August 18, 2016

Attorneys and Law Firms

Michael P. Kelly, Esquire, Daniel J. Brown, Esquire, McCarter & English, LLP, 405 N. King Street, 8th Floor, Wilmington, DE 19801

David L. Finger, Esquire, Finger & Slanina, LLC, 1201 North Orange Street, 7th Floor, Wilmington, DE 19801

Darryl A. Parson, Esquire, Wilson B. Davis, Esquire, New Castle County Office of Law, 87 Reads Way, New Castle, DE 19720

Opinion

E. SCOTT BRADLEY, Judge

***1** Dear Counsel:

This is my decision on the Motion to Dismiss the Complaint for Failure to State a Claim filed by Defendants Thomas P. Gordon and New Castle County seeking dismissal of the complaint filed against them by Plaintiff David Grimaldi. Gordon is the County Executive. Grimaldi was Gordon's Chief Administrative Officer until Gordon terminated him on October 29, 2015. All was apparently well between Gordon and Grimaldi until September of 2015, when Grimaldi got involved in matters involving County Council President Christopher Bullock, County Chief of Staff James D. McDonald, and County Risk Manager Cheryl McDonaugh.

On September 29, 2015, County Council President Christopher Bullock told Grimaldi that he had heard a rumor that Grimaldi was helping the political campaign of Bullock's potential primary opponent. Bullock told Grimaldi that he had told Gordon to fire Grimaldi over the incident. The next day, Grimaldi and Gordon talked about the matter. Gordon allegedly told Grimaldi that if he was going to help Bullock's opponent, then "you can't work here."

Grimaldi was involved in matters involving the brother and son of County Chief of Staff James D. McDonald. The County had hired Robert McDonald, Esquire to represent the County in a lawsuit. Robert McDonald is the brother of Chief of Staff James D. McDonald. Robert McDonald had previously represented clients in litigation against the County. Grimaldi thought this might be a conflict of interest and potential violation of the County Code. Grimaldi sent a text message to Gordon about the matter and an e-mail to the County Attorney asking him to look into it. Grimaldi never got a response from either man and nothing was ever done.

County employees were complaining to Grimaldi that the County Merit System was being manipulated so that James McDonald, Jr., could get a County job as an equipment operator. James McDonald, Jr., is the son of Chief of Staff James D. McDonald. Grimaldi talked to Gordon about the matter on October 19, 2015. Gordon allegedly told Grimaldi to "back off" his investigation because he "always took care of people's family."

Grimaldi was involved in a matter involving County Risk Manager Cheryl McDonaugh. McDonaugh was Gordon's campaign treasurer. After returning to office, Gordon appointed McDonaugh as an Executive Assistant. Gordon then, according to Grimaldi, manipulated the County Merit System so that McDonaugh could be hired as County Risk Manager, a position that Grimaldi did not think McDonaugh was qualified to hold. Apparently, Gordon routinely told people that McDonaugh had graduated from the University of Delaware. Grimaldi was unable to verify that and asked the County Chief Human Resources Officer ("CHRO") to review McDonaugh's personnel file to see if she had graduated from the University of Delaware. Gordon apparently got wind of this and told the CHRO to block Grimaldi's access to McDonaugh's personnel file. Grimaldi made a formal request under Delaware's Freedom of Information Act for McDonaugh's resume on November 1, 2015. The County denied his request on November 17, 2015.

***2** Grimaldi believed that Gordon and McDonaugh shared a close personal relationship. Grimaldi did not think that McDonaugh did her job very well and that she used her close personal relationship with Gordon to engage in questionable

practices and abuse County employees. Grimaldi discussed his concerns about McDonaugh with Gordon.

On October 22, 2015, Grimaldi was driving through Elsmere, Delaware, when he was stopped by an Elsmere police officer. Apparently, Grimaldi's license had been suspended for his failure to pay a traffic fine in Maryland. During the 20-minute ticketing process, Grimaldi said to the police officer, "you know, your Mayor works for me." After getting the ticket, Grimaldi called County Executive Assistant and Elsmere Mayor Steve Burg for a ride home. Grimaldi was initially unable to reach Burg. Grimaldi's girlfriend came to the scene and gave him a ride home. Grimaldi and Burg spoke later that night. Burg offered to have Grimaldi's ticket "yanked." Grimaldi declined Burg's offer.

Grimaldi and Gordon discussed the ticket incident by phone on October 29, 2015. Their conversation then turned to the complaints against McDonaugh. Grimaldi told Gordon, "every day there's an incident with Cheryl [McDonaugh] but you defend her 100% because your [of] [your] personal relationship." Gordon responded, "hey, fuck you, Dave, you're fired. You're fired Dave." Gordon then told the press and public that he had fired Grimaldi for using his position to try to get out of the traffic ticket.

Grimaldi filed his six-count complaint against Gordon and the County on December 10, 2015.

1. In Count I Grimaldi claims that Gordon and the County violated the New Castle County Employee Protection Act when they fired him for reporting to Gordon violations of the County Code by other County employees.

2. In Count II Grimaldi claims that Gordon and the County violated the Delaware Employee Protection Act when they fired him for reporting to Gordon violations of the County Code by other County employees.

3. In Count III Grimaldi claims that Gordon violated his First Amendment Rights of freedom of political belief and association when Gordon threatened to terminate Grimaldi if he supported a member of the same political party who was planning to undertake a primary challenge to County Council President Christopher Bullock.

4. In Count IV Grimaldi claims that Gordon defamed him when Gordon told the press and public that he fired Grimaldi for using his position to try to get out of a traffic ticket when Gordon really fired him for complaining to Gordon about McDonaugh.

5. In Count V Grimaldi claims that he is entitled to a severance package including two months' salary and two months of extended health care benefits.

6. In Count VI Grimaldi claims that the County violated Delaware's Freedom of Information Act by refusing to give him a copy of McDonaugh's resume.

STANDARD OF REVIEW

The standards for a Rule 12(b)(6) motion to dismiss are clearly defined. The Court must accept all well-pled allegations as true.[1] The Court must then determine whether a plaintiff may recover under any reasonable set of circumstances that are susceptible of proof.[2] When deciding a motion to dismiss, the Court accepts as true all well-pleaded allegations in the complaint, and draws all reasonable inferences in favor of the plaintiff.[3] As a general rule, when deciding a Rule 12(b)(6) motion, the Court is limited to considering only the facts alleged in the complaint and normally may not consider documents extrinsic to it. There are two exceptions, however, to this general rule.[4] "The first exception is when the document is integral to a plaintiff's claim and incorporated into the complaint. The second exception is when the document is not being relied upon to prove the truth of its contents."[5] "Where allegations are merely conclusory, however, (*i.e.*, without specific allegations of fact to support them) they may be deemed insufficient to withstand a motion to dismiss."[6] Dismissal will not be granted if the complaint "gives general notice as to the nature of the claim asserted against the defendant."[7] A claim will not be dismissed unless it is clearly without merit, which may be either a matter of law or fact.[8] Vagueness or lack of detail in the pleaded claim are insufficient grounds upon which to dismiss a complaint under Rule 12(b)(6).[9] If there is a basis upon which the plaintiff may recover, the motion is denied.[10]

DISCUSSION

Counts I and II

***3** Grimaldi claims that the County violated the County Employee Protection Act ("NCCEPA")[11] and the Delaware Employee Protection Act ("DEPA")[12] when it fired him for reporting to Gordon violations of the County Code by other County employees.[13] The County argues that Grimaldi has failed to state a claim for which relief may be granted because he was an at-will employee who served at the pleasure of Gordon and, as such, could be terminated with or without cause pursuant to 9 *Del. C.* § 1120(a).

NCCEPA states, in part, the following:

> The County shall not discharge, threaten, reassign or otherwise adversely impact an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because:
>
> > A. The employee reports, in a written or oral communication to an elected official, or in a written communication to a non-elected public official, a suspected violation of a law, rule or regulation adopted by the County, the State or the United States, a violation of a court order, a misuse of public funds, or an action which is of substantial and specific danger to the public health, safety or welfare unless the employee knows that the report is without merit.

DEPA states, in part, the following:

> (b) No public employee shall be discharged, threatened or otherwise discriminated against with respect to the terms or conditions of employment because that public employee reported, in a written or oral communication to an elected official, a violation or suspected violation of a law or regulation promulgated under the law of the United States, this State, its school districts, or a county or municipality of this State unless the employee knows that the report is false.

NCCEPA and DEPA both provide that an employee claiming a violation of either law may bring a civil action for appropriate injunctive relief, actual damages, or both.

9 *Del. C.* § 1120 (a) provides as follows:

> The County Executive shall appoint a Chief Administrative Officer who shall serve at the pleasure of the County Executive. The Chief Administrative Officer shall be qualified by education, training and experience for the duties to be performed.

A person who serves "at the pleasure of another" is deemed to be an employee-at-will who may be terminated for any reason or no reason.[14]

Grimaldi argues that NCCEPA and DEPA are exceptions to § 1120(a), reasoning that actions brought pursuant to "whistleblower" laws like these are "public policy" exceptions to the "employee-at-will" doctrine and treating them as such advances the public's interest in a government free of corruption.

The County argues that NCCEPA and DEPA should not apply to Grimaldi because (1) Grimaldi's right to pursue reinstatement to his job under NCCEPA and DEPA would conflict with Gordon's right under § 1120(a) to terminate him without consequence; (2) the interpretation that best harmonizes all three laws is one that provides that NCCEPA and DEPA do not apply to a high-level employee like Grimaldi; (3) Grimaldi's interpretation would allow all of the high-level State employees who serve at the pleasure of the Governor to bring a claim for reinstatement against the Governor; (4) Grimaldi occupied such a high-level position in County government that Gordon must be able to terminate him at his pleasure in order to properly run the County government; (5) the Delaware Courts have only recognized two narrow exceptions to the employee-at-will doctrine[15]; and (6) the Delaware legislature has declined opportunities to expand those two exceptions.[16]

***4** Grimaldi and the County have both made persuasive arguments that advance their respective positions.[17] However, I believe the more persuasive argument is that the whistleblower laws were never intended to limit the County Executive's right to hire and fire his Chief Administrative Officer without consequence because the County Executive needs a Chief Administrative Officer of his own choosing in order to carry out his policies. Gordon is the County Executive. The County Executive is an elected position and is the highest position in County government. Grimaldi was the Chief Administrative Officer. The Chief Administrative Officer is a non-elected position and is the second highest position in County government. The County Executive appoints the Chief Administrative Officer who serves at the County Executive's pleasure.[18] Gordon is certainly entitled to work with a "second-in-command" that is loyal, cooperative, trustworthy, and willing to carry out his policies and directives without complaint. Once Gordon determined that he could

no longer work with Grimaldi, then it was not possible for Grimaldi to carry out his duties as Chief Administrative Officer. Similarly, Gordon's ability to carry out his duties as County Executive would be jeopardized without a Chief Administrative Officer that he could work with. It would create an untenable situation for Gordon if a Court forced him to accept Grimaldi as his "second-in-command" when he had lost confidence in Grimaldi. That is why Grimaldi and others like him in State government who serve at the pleasure of the Governor must sacrifice their rights under the whistleblower laws so that the County Executive and Governor can effectively and efficiently run their respective governments and it is why I have concluded that NCCEPA and DEPA with their job reinstatement provisions do not apply to Grimaldi. While I am confident that the Delaware Legislature is interested in good government, as evidenced by its passage of DEPA, I certainly do not believe that the legislature passed all of those statutes providing that the County Chief Administrative Officer and various high-level State appointees shall serve at the pleasure of the County Executive and Governor, respectively, only to have those persons file lawsuits for reinstatement under NCCEPA and DEPA where applicable. My decision, I believe, is one that gives full effect to 9 *Del. C.* § 1120(a) and the other "at pleasure statutes," and only infringes on NCCEPA and DEPA by excluding from them the County Chief Administrative Officer and those State appointees that serve at the pleasure of the Governor. That does not seem to me to be an unreasonable result. The alternative would create havoc at the highest levels of County and State government. Therefore, I will dismiss Counts I and II.

COUNT III

Grimaldi claims that Gordon violated his First Amendment rights of freedom of political belief and political association when Gordon threatened to terminate Grimaldi if he supported a member of the same political party who was planning to undertake a primary challenge to County Council President Christopher Bullock.

I am satisfied that Grimaldi has properly pled a regular retaliation claim. In order to do this, a plaintiff must allege: (1) constitutionally protected conduct; (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his rights; and (3) a crucial link between the constitutionally protected conduct and the retaliatory action.[19] Grimaldi alleged in his complaint that Gordon threatened to fire him if he supported a primary challenger to County President Christopher Bullock. Grimaldi's allegation meets all three of the pleading requirements. Political belief and association are protected by the First Amendment. The threat of termination of one's employment would certainly deter a person of ordinary firmness from exercising his constitutional rights. Lastly, there is no doubt that there is a direct link between Grimaldi's exercise of his rights and Gordon's threat to terminate Grimaldi for doing so.

The contested issue regarding this claim is whether Grimaldi had to allege that his position as Chief Administrative Officer did not require political affiliation. This matters because the political affiliations of lower level political players are constitutionally protected from government retaliation, whereas the political affiliations of "policymakers" are not similarly protected.[20] Policymaking staffers may be permissibly fired based on their views and associations.[21] The "policymaker's exception" to the First Amendment retaliation doctrine reflects the fact that the people's chosen representatives must be allowed to hire aides who share their political views and fire those aides who do not.[22] A "policymaker" has been defined as someone for whom political affiliation is an appropriate requirement where there is a rational connection between shared ideology and job performance.[23]

It is well recognized that the assertion that an employment position is a policymaking position is an affirmative defense.[24] An affirmative defense cannot be raised on a motion to dismiss because an affirmative defense does not have to be pled in the complaint.[25] However, when facts in the complaint support the affirmative defense, then it may be considered.[26] The Court may also take judicial notice of the law and consider it as part of the complaint.[27]

***5** The factors to consider when determining whether an employee is a policymaker are as follows:

> Whether the employee has duties that are non-discretionary or non-technical, participates in discussions or other meetings, prepares budgets, possesses the authority to hire and fire other employees, has a high salary, retains power over others, and can speak in the name of policy makers.[28]

The Third Circuit has suggested that the "key factor seems to be not whether the employee was a supervisor or had a

great deal of responsibility, but whether [the employee] has meaningful input into decision making concerning the nature and scope of a major program."[29]

I have considered Grimaldi's broad statutory authority, the allegations he made in his complaint about his extensive involvement in important County activities, and a case involving a lower-level County executive who was deemed to hold a policymaking position requiring political affiliation and concluded that Grimaldi was a policymaker whose job required political affiliation.

Grimaldi's Statutory Authority

Grimaldi's statutory authority as Chief Administrative Officer is set forth in 9 *Del. C.* § 1121(a). The Chief Administrative Officer assists the County Executive with his duties and responsibilities and, subject to the policies and directives of the County Executive, shall have general supervision over the executive, administrative and operational departments of New Castle County.[30] The Chief Administrative Officer, on behalf of the County Executive, prepares the annual operating budget, capital program and capital budget.[31] The Chief Administrative Officer also supervises the execution of the budget, the preparation of reports and information concerning the status of the financial and other affairs of New Castle County in order to keep the County Executive, County Council and the public informed as to all offices, departments, and agencies receiving appropriations from the County.[32] In sum, Grimaldi has broad statutory authority over the County's budget and executive, administrative and operational departments.

Grimaldi's Complaint

Grimaldi's complaint lists a number of accomplishments indicating the policymaking role he played in County government: (1) eliminating structural deficits and producing an operating surplus in each year in office, thereby allowing the County Executive to keep his "no tax increase" pledge; (2) restructuring the County's debt and realizing a $12 million saving, making it the most successful bond deal in County history, allowing the County to shrink the year-over-year budget for only the fourth time it its history; (3) leading the drastic fiscal year 2015 financial turnaround, which eliminated a mid-year $2.5 million projected deficit and replaced it with a surplus. The surplus was large enough to allow for a one-time bonus of $750 to each County employee while still ending the year in the black; (4) restructuring the County employee retirement plan to avoid $600,000 in surrender fees; (5) discovering that the County's financial statements were wrong and misrepresented the County's investment risk, with 16% of the reserve portfolio in junk bonds, and moving the portfolio to UBS and bringing investments in line with the financial statements, thereby reducing the risk of the County's investments and saving hundreds of thousands of dollars per year in investment fees; (6) initiating and leading the County's first-ever Comprehensive Economic Development Plan, the Anti-Heroin marketing campaign, the successful opposition to the Barley Mill Plaza rezoning, Comprehensive Ethics Reform, the Open Government platform, the new County Website, and the Route 9 Innovation Center and revitalization project; (7) serving as key policy advisor to the County Executive and causing his public positions on key progressive issues such as raising the County minimum wage, supporting marriage equality, and opposing the Trans Pacific Partnership Agreement, which initiatives furthered Gordon's popularity among Democratic voters; and (8) serving as the architect of the Delaware Board of Trade (DBOT) project, the Chemours incentive package, and leading the County effort in assisting the Governor's Office for the JP Morgan expansion project.

Freeberry v. Coons

***6** The Third Circuit in *Freeberry v. Coons*[33] found that position of General Manager of the Special Services Department for the County was a policymaking position that required political affiliation. The General Manager of this County department has responsibility over County infrastructure and facilities.[34] It is a lower-level position than Chief Administrative Officer.

There is no doubt that Grimaldi was a high-level policymaker for the County. Grimaldi held the second-highest position in the County government. Grimaldi had supervisory authority over the executive, administrative and operational departments of the County. Grimaldi was responsible for preparing the annual operating budget, capital program, and capital budget for the County. Grimaldi supervised the execution of the budgets and the preparation of reports concerning the status of the financial and other affairs for New Castle County. There is no doubt that there is a strong link between policy making and budgeting.

Grimaldi was, in his own words, deeply involved in spearheading programs regarding the fiscal health of New Castle County, including: (1) eliminating deficits; (2) restructuring the County's debt; (3) restructuring the County employee retirement plan; (4) investing County money in less-risky investments. Grimaldi was, again in his own words, responsible for *initiating and leading* various economic development and social programs including: (1) an anti-heroin marketing program; (2) opposing the Barley Mill rezoning; (3) ethics reform; (4) a new County website; (5) the Route 9 Innovation Center and revitalization program; (6) the Chemours incentive package; (7) serving as the architect of the Delaware Board of Trade project; and (8) the JP Morgan expansion project.

Most importantly, Grimaldi, in his own words, served as a key advisor to the County Executive and caused his public positions on key program issues to be known, such as raising the County minimum wage, supporting marriage equality, opposing the Trans Pacific Partnership Agreement, which initiatives furthered Gordon's popularity with Democratic votes. This implicates what the Third Circuit in *Galli* said what may be the key factor in determining whether an employee is a policymaker. Grimaldi certainly had meaningful input into Gordon's decision making regarding the nature and scope of a number of major County programs and he also spoke on behalf of Gordon in promoting those programs.

Lastly, the Third Circuit in *Freeberry* held that the Manager of the Special Services Department for the County was a policymaker position that required political affiliation. This is a lower-level job than the one Grimaldi held. If it required political affiliation, then there is no doubt that Grimaldi's job did as well.

In summary, Grimaldi was a high-level County employee that (1) had responsibility for all of the County's budgeting; (2) had supervising authority over the executive, administrative and operational departments of the County; (3) initiated and led many County financial programs; (4) initiated and led many County social programs; (5) initiated and led many County economic development programs; and (6) was a key advisor to, and spokesperson for, the County Executive on a number of progressive programs that made the County Executive more popular with his Democratic constituents. There is no doubt that Grimaldi held a high-level policymaking position that required political affiliation. To conclude that Grimaldi, the second-highest County officer who had responsibility over a broad range of County operations and programs, was not a policymaker whose position recognized political affiliation suggests that no County employee was. That is not a reasonable conclusion. Therefore I will dismiss Count III because Grimaldi was unable to allege that his job did not require political affiliation.

COUNT IV

***7** Grimaldi claims that Gordon told the public and press that he fired Grimaldi for using his position to try to get out of a traffic ticket when Gordon really fired him for complaining to Gordon about McDonough. This is what is known as "stigma-plus" defamation claim.

The United States Supreme Court has held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[35] When notice and an opportunity to be heard are not provided, a plaintiff may bring "a due process claim for deprivation of a liberty interest in reputation."[36] To prevail, the plaintiff must demonstrate "a stigma to his reputation plus deprivation of some additional right or interest."[37] This is referred to as the "stigma-plus" test, and in the context of public employment, it "has been applied to mean that when an employer 'creates and disseminates a false and defamatory impression about the employee in connection with his termination,' it deprives the employee of a protected liberty interest."[38]

"To satisfy the 'stigma' prong of the test, it must be alleged that the purportedly stigmatizing statement(s): (1) were made publicly; and (2) were false."[39] "To satisfy the 'plus' requirement, a plaintiff must demonstrate that the alleged defamation harming the plaintiff's reputation 'occurs in the course of or is accompanied by extinguishment of a right or status guaranteed by law or the Constitution.' "[40] "The creation and dissemination of a false and defamatory impression is the 'stigma,' and the termination is the 'plus.' When such a deprivation occurs, the employee is entitled to a name-clearing hearing."[41] The Third Circuit has held that "a public employee who is defamed in the course of being terminated or constructively discharged satisfies the 'stigma-plus' test even if, as a matter of state law, he lacks a property interest in the job he lost."[42]

Gordon makes four arguments in an attempt to gain dismissal of Grimaldi's defamation claim:

1. The Complaint fails to state a stigma-plus defamation claim because it does not plead the alleged defamatory statement with particularity.

I disagree. Grimaldi alleges that Gordon told the press and public that he fired Grimaldi for using his position to try to get out of a traffic ticket. To satisfy the requirements of pleading defamation, a complaint must only supply sufficient notice of the communications complained of to allow the defendant to defend himself.[43] Grimaldi readily acknowledges that he told the police officer who stopped him, "you know, your Mayor works for me." Grimaldi's allegation is certainly straight forward and leaves no doubt exactly what he is complaining about. I am satisfied that Grimaldi's allegation about his termination together with his admitted statement to the police officer who stopped him adequately puts Gordon on notice of the allegations against him.

***8** 2. The Complaint fails to state a stigma-plus defamation claim because it impermissibly bases a stigma-plus claim on a true statement.

Gordon argues that Grimaldi's claim fails because it is based on a true statement. The true statement made by Grimaldi is that he told the police officer who stopped him that, "you know, your Mayor works for me." Gordon's authority for his argument is the United States Supreme Court's decision in *Codd v. Velger*.[44] In *Codd*, the plaintiff's personnel file showed that he had been dismissed because while as a trainee police officer he had put a revolver to his head in an apparent suicide attempt. The Supreme Court ruled that the statement was not defamatory because the plaintiff never alleged that the report of his suicide attempt was false. Grimaldi's case is different. While Grimaldi acknowledges that he told the police officer, "you know, your Mayor works for me," Grimaldi clearly alleges that Gordon's statement about him trying to get out of a traffic ticket was false. Thus, Gordon's argument fails because the allegedly false statement is not the admittedly true statement.

3. The Complaint fails to state a defamation claim because it impermissibly bases a stigma-plus claim on "pure opinion," which cannot be defamatory as a matter of law.

Gordon notes that a "pure opinion" is one that is based on stated facts or facts that are known by the parties or assumed by them to exist.[45] Pure expressions of opinion are protected under the First Amendment and are not defamatory.[46] I certainly can not conclude, on a motion to dismiss for the failure to state a claim, that Gordon's statement is pure opinion. Whether Grimaldi tried to use his position to get out of a ticket by saying to the police officer that, "you know, your Mayor works for me," is to me more of a question of fact because it relates to Grimaldi's intent and, as such, one to be decided by the jury after it hears Grimaldi's explanation for why he made that statement.

4. The Complaint fails to state a stigma plus defamation claim because it does not allege any harm to Grimaldi's reputation caused by a false statement versus harm caused by his own conduct.

Gordon argues that his statement about Grimaldi is substantially true. Gordon also argues that the fact that he allegedly gave a false reason for terminating Grimaldi can not provide a basis for Grimaldi's stigma-plus defamation claim. Gordon uses this to argue that Grimaldi has not properly stated a stigma-plus defamation claim because Grimaldi has not alleged that Gordon's statement foreclosed Grimaldi from any other employment. Grimaldi alleges, in part, that Gordon's statement damaged Grimaldi's good name, reputation, honor or integrity.

"To satisfy the 'stigma' prong of the test, it must be alleged that the purportedly stigmatizing statement(s): (1) were made publicly; and (2) were false."[47] "To satisfy the 'plus' requirement, a plaintiff must demonstrate that the alleged defamation harming plaintiff's reputation 'occurs in the course of or is accompanied by extinguishment of a right or status guaranteed by law or the Constitution.' "[48] "The creation and dissemination of a false and defamatory impression is the 'stigma,' and the termination is the 'plus.' The Third Circuit has held that "a public employee who is defamed in the course of being terminated or constructively discharged satisfies the 'stigma-plus' test even if, as a matter of state law, he lacks a property interest in the job he lost."[49]

***9** Grimaldi has pled the required elements. Grimaldi alleges that Gordon told the press and public that he terminated Grimaldi because he used his position to try to get out of a traffic ticket. Quite simply, Grimaldi was a public employee who was allegedly defamed in the course of being terminated. As I have noted before, the Third Circuit has concluded that this is an adequately-pled stigma-plus defamation claim.[50] Therefore, I will not dismiss Count IV.

Count V

Grimaldi claimed that he was entitled to a severance package including two months' salary and two months of extended health care benefits. Grimaldi has withdrawn this claim.

Count VI

Grimaldi claims that the County violated the Delaware Freedom of Information Act by refusing to give him a copy of Cheryl McDonaugh's current resume.

The County argues that McDonaugh's resume is not a public record because it (1) is part of her personnel file, and (2) pertains to pending or potential litigation.

Personnel Files

29 *Del. C.* § 10002 (l)(1) provides that a public record does not include:

> Any personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy.

McDonaugh was the successful applicant for the Risk Manager's job. Under Delaware law, it is not an invasion of the personal privacy of a successful applicant for a job for the government to disclose to the public information the successful applicant disclosed during the application process.[51] The information submitted by unsuccessful applicants is treated differently because disclosure may embarrass or harm them.[52] Their present employers, should they seek new work, may learn that other people were better qualified for a competitive appointment. A successful applicant would not be subject to the kind of embarrassment that the unsuccessful applicant would face.[53] The successful applicant's identity is known and the fact that they have decided to leave their former employer or current position is also known. In such cases, the public's legitimate interest in knowing information about the candidate who got the job outweighs the privacy interest of the successful applicant.[54] Thus, I conclude that the County's disclosure of McDonaugh's resume would not constitute an invasion of her personal privacy.

Pending Litigation

29 *Del. C.* § 10002(l)(9) provides that a public record does not include:

> Any records pertaining to pending or potential litigation which are not records of any court.

The County argues that Grimaldi's request for McDonaugh's resume pertains to this litigation because it would support his belief that McDonaugh never graduated from the University of Delaware. Grimaldi argues that McDonaugh's resume does not pertain to this litigation because it will not prove or disprove any element of the claims that he is pursuing. The rationale for the "pending litigation exception" is that it recognizes the practical reality that when parties to litigation against a public body seek information relating to the litigation, they are not doing so to advance "the public's right to know," but rather to advance their own personal stake in the litigation.[55] Delaware courts will not allow litigants to use FOIA as a means to obtain discovery which is not available under the Court's rules of procedure."[56]

***10** I have concluded that Grimaldi's request for McDonaugh's resume is very much related to this litigation because she and her resume are part of one of Grimaldi's claims against Gordon. The "Background" portion of Grimaldi's complaint has 31 paragraphs. Ten of them involve McDonaugh. In Count IV of Grimaldi's complaint, he alleges, in part, that Gordon fired him for criticizing McDonaugh. Grimaldi goes on to allege that Gordon told the press and public that he fired Grimaldi for using his position to get out of a traffic ticket in an effort to cover up his real reason for firing Grimaldi. Thus, if McDonaugh's resume shows that she did not graduate from the University of Delaware—which

Grimaldi certainly believes, as evidenced by his allegations in paragraph 19 of the Complaint—then it would tend to prove Grimaldi's allegation that the real reason that Gordon fired him was for complaining about McDonaugh, a woman that Gordon was allegedly very close to. Thus, I conclude that McDonaugh's resume is not a public record because it falls within the "pending litigation exception." Accordingly, I will dismiss Count VI of Grimaldi's Complaint because it seeks information that is not a public record under Delaware's Freedom of Information Act.

CONCLUSION

I have dismissed Counts I, II, III and VI. I did not dismiss Count IV. Grimaldi has withdrawn Count V.

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

E. Scott Bradley

All Citations

Not Reported in Atl. Rptr., 2016 WL 4411329, 2016 IER Cases 268,977

Footnotes

1 *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
2 *Id.*
3 *Ramunno v. Crawley*, 705 A.2d 1029 (Del. 1998).
4 See *Vanderbilt Income & Growth Assocs., L.L.C., v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612 (Del. 1996).
5 *Vanderbilt*, 691 A.2d at 613.
6 *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000).
7 *Diamond State Telephone v. University of Delaware*, 269 A.2d 52, 58 (Del. 1970).
8 *Id.*
9 *Id.*
10 *Id.*
11 NCC Code §§ 2.03.300-305.
12 19 *Del. C.* § 1701-08.
13 Grimaldi acknowledges that he has no claims against Gordon under NCCEPA and DEPA.
14 *Mayer v. Hurlock*, 127 A.3d 554, 559-60 (Md. App. 2015).
15 *Finch v. Hercules Incorporated*, 809 F.Supp. 309, 311 (D. Del. 1992).
16 In *Schuster v. Derocili*, 775 A.2d 1029 (Del. 2001), the Delaware Supreme Court held that Delaware recognizes a common law cause of action for breach of a covenant of good faith and fair dealing implied in an at-will employment contract where a plaintiff alleges that her termination directly resulted from her refusal to succumb to sexual harassment in the workplace. Thus, the Supreme Court recognized a cause of action that could be pursued outside the procedural process for pursing discrimination claims set forth in the Delaware Discrimination in Employment Statute. After *Schuster* was decided, the Delaware legislature amended the Delaware Discrimination in Employment Statute to make the procedural process set forth therein to be the exclusive remedy for discrimination claims.
17 Grimaldi and the County also discussed various rules of statutory construction. I did not find any of them to be helpful.
18 9 *Del. C.* § 1120(a).
19 *Thomas v. Independence Tp.,* 463 F.3d 285, 296 (3d Cir. 2006).
20 *Krause v. Buffalo and Erie County Workforce Development Consortium, Inc.*, 425 F. Supp. 352 (W.D.N.Y. 2006).
21 *Id.*
22 *Id.*
23 *Id.*
24 *Krause,* 425 F. Supp. 352.
25 *Nigro v. City of Chicago*, 1992 WL 112239 (N.D. Ill. May 20, 1992).
26 *Id.*
27 Delaware Rules of Evidence Rule 201.

28 *Galli v. New Jersey Meadowlands Commission,* 490 F. 3d 265, 271 (3d Cir. 2007).
29 *Id.* at 271.
30 9 *Del. C.* § 1121(a).
31 9 *Del. C.* § 1121(b).
32 *Id.*
33 355 Fed. Appx. 645 (3d Cir. 2009).
34 9 *Del. C.* § 1341.
35 *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971).
36 *Hill v. Borough of Kutztown*, 455 F.3d 225, 236 (3d Cir. 2006).
37 *Id.*
38 *Id.* (*quoting Codd v. Velger*, 429 U.S. 624, 628 (1977)).
39 *Hill*, 455 F.3d at 236.
40 *Mun. Revenue Servs., Inc., v. McBlain*, 2007 WL 879004, at *4-5 (E.D.Pa. Mar. 19, 2007)(quoting *Hill*, 455 F.3d at 235).
41 *Hill*, 455 F.3d at 236.
42 *Id.* at 238.
43 *Bushnell Corp. v. ITT, Corp*. 973 F. Supp. 1276, 1287 (D. Kan. 1997).
44 429 U.S. 624 (1977).
45 *Riley v. Moyed,* 529 A.2d 248, 251 (Del. 1987).
46 *Id.*
47 *Hill*, 455 F.3d at 236.
48 *Mun. Revenue Servs., Inc., v. McBlain*, 2007 WL 879004, at *4-5 (E.D.Pa. Mar. 19, 2007)(quoting *Hill*, 455 F.3d at 235).
49 *Hill*, 455 F.3d at 238.
50 *Id.*
51 *Del. Op. Atty. Gen.* 99-IB03 (April 28, 1999).
52 *Id.*
53 *Core v. U.S. Postal Service*, 730 F.2d 946, 949, (4th Cir. 1984); *Arizona Board of Regents v. Phoenix Newspapers, Inc.,* 806 P.2d 348, 352 (Ariz. 1991).
54 *Id.*
55 *ACLU v. Danberg*, 2007 WL 901592, at *4 (Del. Super. March 15, 2007) (citing *Mell v. New Castle County,* 835 A.2d 141, 147 (Del. Super. 2003).
56 *ACLU,* 2007 WL 901592.

EXHIBIT 4

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2019-0366

BOSTON MUNICIPAL COURT
DEPARTMENT
CENTRAL DIVISION
No. 1901CR004769

COMMONWEALTH

vs.

RODERICK WEBBER

JUDGMENT

This matter came before the court, GAZIANO, J., on the Commonwealth's emergency petition for relief pursuant to G. L. c. 211, § 3, from a Boston Municipal Court judge's refusal to accept entry of a nolle prosequi by the Commonwealth in this case, where a complaint had issued against the defendant for disorderly conduct under G. L. c. 272, § 53 (b).

1. Standard of review. Relief under G. L. c. 211, § 3, is extraordinary and shall be granted only where the petitioner establishes a substantial harm to a substantive right that cannot be remedied in the ordinary course. See Black v. Commonwealth, 459 Mass. 1003 (2011). Here, the Commonwealth has established that it is entitled to such relief. The judge's refusal to accept the

Commonwealth's entry of a nolle prosequi, on the purported ground of a violation of G. L. c. 258B, § 3 (g), precluded the Commonwealth from exercising a fundamental right guaranteed by art. 30 of the Massachusetts Declaration of Rights. See Commonwealth v. Cheney, 440 Mass. 568, 574 (2003); Mass. R. Crim. P. 16. The judge's decision, purporting to "deny" the entry of a nolle prosequi, and apparently requiring the Commonwealth to prosecute a case it has deemed inappropriate for prosecution, is not reviewable under any other established procedure.

2. Discussion. a. Authority under article 30. Fundamentally, the judge had no authority to "deny" the Commonwealth's entry of a nolle prosequi. His effort to do so violated the Commonwealth's constitutional rights under art. 30 of the Massachusetts Declaration of Rights, and infringed upon the separation of powers enshrined therein. "In the government of this [C]ommonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." Article 30 of the Declaration of Rights of the Massachusetts Constitution.

"In the context of criminal prosecutions, the executive power

affords prosecutors wide discretion in deciding whether to prosecute a particular defendant, and that discretion is exclusive to them." Cheney, 440 Mass. at 574, and cases cited. The prosecutor's sole authority to determine which cases to prosecute, and when not to pursue a prosecution, has been affirmed repeatedly by this court since the beginning of the nineteenth century. Commonwealth v. Wheeler, 2 Mass. 172, 174 (1806) ("The power of entering a nolle prosequi is to be exercised at the discretion of the attorney who prosecutes for the government, and for its exercise he [or she] alone is responsible"). See Commonwealth v. Gordon, 410 Mass. 498, 500 (1991) (noting "long-standing proposition that the decision to nol pros a criminal case is within the discretion of the executive branch of government, free from judicial intervention"); Manning v. Municipal Court of Roxbury District, 372 Mass. 314, 318 (1977), and cases cited ("A district attorney has wide discretion in determining whether to prosecute an individual, just as he [or she] has wide discretion in determining whether to discontinue a prosecution once commenced").

b. Victims' bill of rights. At the hearing, the judge issued on oral order that the Commonwealth's "motion" to enter a nolle prosequi was "denied;" this language also appears in a margin notation on the Commonwealth's filing. The judge stated at the hearing, over the Commonweal's repeated objections, that the ground

of denial was that the Commonwealth had failed to comply with the provisions of G. L. c. 258B, § 3 (g), that it notify the "victims" of the offense so that they could appear at the hearing, or have an opportunity to "confer" with the prosecutor prior to the termination of the case.

According to the judge, the "victims" of the defendant's alleged disorderly conduct are the members of Super Happy Fun America, whose one-mile "Straight Pride Parade" the defendant and approximately 2,000 others were protesting; the judge determined that the defendant's actions interfered with the marchers' exercise of their rights to free speech under the First Amendment to the United States Constitution. This was error for several reasons.

First, the offense of disorderly conduct, G. L. c. 272, § 53 (b), is an offense against the public and not against a specific victim. See Commonwealth v. Accime, 476 Mass. 469, 473 (2017). General Laws c. 272, § 53 (b), "provides that being a '[d]isorderly person[ ] and disturber[ ] of the peace' is a criminal offense punishable by a fine for the first offense. In order to interpret the term and ensure its constitutionality, this court has 'engrafted the Model Penal Code definition of "disorderly" onto the separate § 53 offense' of being a disorderly person. Accime, supra, quoting Commonwealth v. Chou, 433 Mass. 229, 231-232 (2001).

"As so construed, the disorderly conduct provision in § 53

requires proof that a person, 'with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof,' engaged in 'fighting or threatening, or in violent or tumultuous behavior' or created 'a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.'" Accime, supra, quoting Commonwealth v. Sholley, 432 Mass. 721, 727 n.7 (2000), cert. denied, 532 U.S. 980 (2001), quoting Model Penal Code § 250.2 (Official Draft and Revised Comments, 1980). "The comments to the Model Penal Code emphasize that '[n]othing less than conscious disregard of a substantial and unjustifiable risk of public nuisance will suffice for liability.'" Accime, supra, quoting Model Penal Code § 250.2 comment 2, at 328-329 (1980). Thus, there were no specific "victims" to notify regarding the Commonwealth's decision to enter a nolle prosequi on the complaint for disorderly conduct.

Second, even had there been victims of an offense who had not been notified, the judge had no authority to "deny" the Commonwealth's entry of a nolle prosequi. General Laws c. 258B, § 3 (g), does not trump the Commonwealth's constitutional right to determine when to enter a nolle prosequi, nor vest that authority in a trial judge. See art. 30 of the Declaration of Rights. See, e.g., Commonwealth v. Hart, 149 Mass. 7, 8-9 (1889):

> "Only an attorney authorized by the commonwealth to represent it has authority to declare that he [or she] will not further

> prosecute a case in behalf of the commonwealth. A court is not a prosecuting officer, and does not act as the attorney for the commonwealth. Its office is judicial, to hear and determine between the commonwealth and the defendant. The fact that no authorized attorney for the commonwealth is before the court does not give to it the character and authority of an attorney. A court may terminate a prosecution by discharging a defendant before trial, (Com[monwealth] v. Bressant, 126 Mass. 246 [(1879),) or during a trial, (Sayles v. Briggs, 4 Metc. 421 [(1842];) but it is by the judgment of a court, and not by the act of a prosecuting officer."

See also Commonwealth v. Brandano, 359 Mass. 332, 335 (1971) ("A district attorney has the absolute power to enter a nolle prosequi on his official responsibility without the approval or intervention of the court. He [or she] alone is answerable for the exercise of his [or her] discretion in this particular. His [or her[action is final").

To be sure, in some rare circumstances, the Commonwealth's authority to enter a nolle prosequi has been curtailed. Prior to trial, the power to enter a nolle prosequi is absolute in the prosecutor "except possibly in instances of scandalous abuse of authority." Commonwealth v. Dascalakis, 246 Mass. 12, 18 (1923).[1] See Mass. R. Crim. P. 16 (b). See generally Attorney General v. Tufts, 239 Mass. 458 (1921) (egregious misconduct including extortion for personal financial gain by prosecutor). Here, the

[1] After jeopardy attaches, the prosecutor's authority to enter a nolle prosequi gives way to the defendant's right "to have that tribunal pass upon his guilt by verdict and thus secure a bar to another prosecution for the same offense." Commonwealth v. Dascalakis, 246 Mass. 12, 18 (1923). See Mass. R. Crim. P. 16 (b).

prosecutor, in the exercise of her constitutionally-guaranteed discretion, decided that the public's interests would best be served by dropping the charge of disorderly conduct against the defendant. Such a decision, in which a prosecutor decides how to allocate her limited resources, is made countless times every day in courthouses throughout the Commonwealth. The entry of a nolle prosequi in this case hardly qualifies as a "scandalous abuse of authority" warranting judicial intervention.

3. Expungement. The Commonwealth requests also that the defendant's record as a result of this incident be expunged from Boston Municipal Court, Commissioner of Probation, and Boston police department files. Ordinarily, when a nolle prosequi is entered in a case, the appropriate action to protect a defendant's privacy, and to avoid potential negative consequences, inter alia, with respect to housing, employment, and loan applications, is an order to seal the records. See Commonwealth v. Boe, 456 Mass. 337 (2010); G. L. c. 276, § 100C. Nonetheless, a court has inherent power to order expungement, and, in certain circumstances, expungement is appropriate under this authority. See Police Com'r of Boston v. Municipal Court of Dorchester Dist., 374 Mass. 640, 665 n.18 (1978) ("The judicial remedy of expungement is inherent and is not dependent on express statutory provision, and it exists to vindicate substantial rights provided by statute as well as by organic law").

"[I]n determining whether the remedy of sealing is the exclusive option, the critical question is whether the records accurately reflect the charging decision made by the prosecution and the police." Commonwealth v. Alves, 86 Mass. App. Ct. 210, 214 (2014). "Where a statute might generally apply, a court still may have inherent authority to expunge at least some kinds of records, 'in the rare and limited circumstances where the judge has found by clear and convincing evidence that the order was obtained through fraud on the court.'" Commonwealth v. Moe, 463 Mass. 370, 373 (2012). See Commonwealth v. Alves, 86 Mass. App. Ct. 210, 214 (2014).

In addition, in circumstances such as these, expungement is explicitly provided for by statute. See G. L. c. 276, § 100K (a) and (a)(6)("Notwithstanding the requirements of section 100I and section 100J, a court may order the expungement of a record created as a result of criminal court appearance, juvenile court appearance or dispositions if the court determines based on clear and convincing evidence that the record was created as a result of: . . . (6) demonstrable errors by court employees").

Upon consideration, it is ORDERED that the petition for extraordinary relief under G. L. c. 211, § 3, shall be, and hereby is, ALLOWED. The arraignment shall be vacated and set aside. The matter is remanded to the Boston Municipal Court for entry of the Commonwealth's nolle prosequi in this case.

It is FURTHER ORDERED that the Commonwealth's motion to expunge the defendant's criminal record created as a result of the improper arraignment, where the Commonwealth repeatedly requested that no arraignment take place, shall be, and hereby is, ALLOWED. The clerk of the Boston Municipal Court, Central Division, shall expunge all records of the matter from its files, and shall notify the Commissioner of Probation and the Criminal History Systems board to do so as well.

By the Court (Gaziano, J.),

_____
Assistant Clerk

Entered:

EXHIBIT 5

Code of Massachusetts Regulations
Title 803: Department of Criminal Justice Information Services
Chapter 1.00: Sex Offender Registry Board: Registration, Classification and Dissemination (Refs & Annos)

803 CMR 1.04

1.04: Registration and Classification Process

Currentness

(1) Preamble. Pursuant to M.G.L. c. 6, § 178K(1), the Board is required to publish guidelines for determining each sex offender's level of risk of reoffense and degree of dangerousness posed to the public, or for relief from the obligation of registration. Pursuant to M.G.L. c. 6, § 178K(1) and (2), these guidelines shall provide for three levels of notification based on a sex offender's risk of reoffense and degree of dangerousness. The offender's final classification level determines the amount of information that can be disseminated about him or her to the public through the notification procedures, pursuant to M.G.L. c. 6, §§ 178C through 178Q. The registration and classification process is a two stage process.

(2) In the first stage, the Board makes a recommendation regarding each sex offender's duty to register and classification level pursuant to M.G.L. c. 6, § 178L. During the recommendation process, the sex offender is entitled to present documentary evidence for the Board to consider. The sex offender will be notified in writing of the Board's recommendation. The sex offender may either accept or reject the recommendation. The recommendation process is set forth at 803 CMR 1.06 through 1.08. If the sex offender accepts the Board's recommendation, then the recommended classification level shall become final and is not subject to judicial review, pursuant to M.G.L. c. 30A.

(3) If the sex offender rejects the Board's recommendation, the process moves into the second stage which is set forth at 803 CMR 1.09 through 1.22. The sex offender is provided with a *de novo* hearing at which all relevant evidence is evaluated by a Hearing Examiner to reach a final decision regarding the sex offender's duty to register and final classification level. The Hearing Examiner shall base his or her decision on the totality of all the relevant evidence introduced at the sex offender's individualized hearing. The final agency decision issued by the Hearing Examiner is subject to judicial review in the Superior Court, pursuant to M.G. L. c. 30A.

(4) Factors. M.G.L. c. 6, §§ 178K(2) and 178L(1), sets forth criteria to be considered by the Board in determining risk of reoffense and degree of dangerousness and authorize the Board to identify and utilize additional risk factors and criteria not specifically listed in the statute. Based on this statutory authority, the Board created 803 CMR 1.33 which describes and defines the factors that the Board shall consider in making all registration and classification decisions. In determining the final classification, the Hearing Examiner shall be guided by the definitions, explanations, principles, and authorities contained in the Factors set forth in 803 CMR 1.33 and shall not be bound by the Board's recommendations.

The Massachusetts Administrative Code titles are current through Register No. 1434, dated January 8, 2021. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 803, § 1.04, 803 MA ADC 1.04

End of Document

EXHIBIT 6

Code of Massachusetts Regulations
Title 803: Department of Criminal Justice Information Services
Chapter 1.00: Sex Offender Registry Board: Registration, Classification and Dissemination (Refs & Annos)

803 CMR 1.14

1.14: Classification Hearings

Currentness

(1) Scope of the Classification Hearing. The hearing shall be a *de novo* review of the evidence and be limited to determining, by clear and convincing evidence, the sex offender's duty to register and, if applicable, his or her final classification level. The Board shall bear the burden of proof.

(2) Closed to Public. Hearings held by the Board are not open to the public. For purposes of 803 CMR 1.14(2), correctional staff required by the facility to be present at the hearing shall not be considered members of the public.

(3) The hearing may be conducted via video conference.

(4) Conduct of the Hearing. The Hearing Examiner shall govern the conduct of every phase of the hearing, including, but not limited to, the interpretation and construction of 803 CMR 1.00 and the conduct of all parties. All parties, authorized representatives, witnesses and other persons present shall conduct themselves in a professional manner consistent with the standards of decorum commonly observed in the courts of the Commonwealth. If a party's conduct interferes with the orderly presentation of the evidence, the Hearing Examiner may take any appropriate action, including, but not limited to, continuing the hearing in the absence of the offending participant and rendering a decision based on the evidence admitted.

(5) Order of Presentation. Unless otherwise determined by the Hearing Examiner, the Board proceeds first at all stages in the hearing, except that the Board proceeds last with its closing argument.

(6) Swearing in of Witnesses. A witness's testimony shall be under oath or affirmation, administered by the Hearing Examiner.

The Massachusetts Administrative Code titles are current through Register No. 1434, dated January 8, 2021. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 803, § 1.14, 803 MA ADC 1.14

End of Document

EXHIBIT 7

Code of Massachusetts Regulations
Title 803: Department of Criminal Justice Information Services
Chapter 1.00: Sex Offender Registry Board: Registration, Classification and Dissemination (Refs & Annos)

803 CMR 1.22

1.22: Administrative Record

Currentness

(1) General Principles. Pursuant to M.G.L. c. 30A, § 11(4), all documents, testimony and other evidence offered and accepted into evidence by the Hearing Examiner shall become part of the administrative record. For purposes of judicial review, the record shall include the Hearing Examiner's final decision issued pursuant to 803 CMR 1.20.

(2) Excluded Evidence. Any evidence offered at the hearing, but not accepted by the Hearing Examiner will be marked for identification purposes only and be included in the record.

(3) Transcript of Hearing.

(a) All evidence and testimony at the hearing will be recorded electronically, digitally, stenographically, or by any other recording device deemed necessary or appropriate by the Board, in its discretion. The Board shall incur the cost of recording. Pursuant to M.G.L. c. 30A, § 11(6), transcripts will be made and supplied to the sex offender or his or her authorized representative, upon written request, at the offender's expense, and in accordance with any procedures the Board may establish. Upon written request, a sex offender who has been determined to be indigent for the classification hearing shall receive a transcript at no cost.

(b) Corrections to the transcript are permitted at the discretion of the Hearing Examiner. The Hearing Examiner may accept corrections by agreement of the parties, or if the parties cannot agree, the Hearing Examiner may accept recommended corrections from each party to determine what corrections, if any, are necessary.

(4) The administrative record is not available to the public.

The Massachusetts Administrative Code titles are current through Register No. 1434, dated January 8, 2021. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 803, § 1.22, 803 MA ADC 1.22

End of Document

EXHIBIT 8

Code of Massachusetts Regulations
Title 803: Department of Criminal Justice Information Services
Chapter 1.00: Sex Offender Registry Board: Registration, Classification and Dissemination (Refs & Annos)

803 CMR 1.23

1.23: Notification of the Final Decision

Currentness

(1) Notification of the final decision made pursuant to 803 CMR 1.20 will be mailed to the sex offender and his or her authorized representative as soon as practicable. The sex offender or his or her authorized representative may request in writing, at the time of his or her administrative hearing, that the final decision made pursuant to 803 CMR 1.20 be sent to him or her *via* facsimile.

(2) Relief from Registration. If the final decision is to relieve the sex offender from his or her obligation to register as set forth in M.G.L. c. 6, § 178K and 803 CMR 1.20(3), the Board shall promptly remove information pertaining to the offender from the Sex Offender Registry.

(3) Duty to Register and Final Classification Level. If the final decision requires the sex offender to register and a final classification level is assigned, pursuant to M.G.L. c. 6, §§ 178K and 178L, the notification shall also inform the sex offender of his or her registration obligations as set forth in M.G.L. c. 6, §§ 178F or 178F1/2, and 178Q.

The Massachusetts Administrative Code titles are current through Register No. 1434, dated January 8, 2021. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 803, § 1.23, 803 MA ADC 1.23

End of Document

EXHIBIT 9

Code of Massachusetts Regulations
Title 803: Department of Criminal Justice Information Services
Chapter 1.00: Sex Offender Registry Board: Registration, Classification and Dissemination (Refs & Annos)

803 CMR 1.26

1.26: Registration Requirements and Dissemination of Information

Currentness

(1) A sex offender who has not been finally classified or is finally classified as a Level 1 sex offender shall register annually in accordance with the requirements in M.G.L. c. 6, §§ 178E, 178F and 178Q. The general public shall not have access to this sex offender information, pursuant to M.G.L. c. 6, §§ 178D, 1781, 178J and 178K(2)(a).

(2) A sex offender who is finally classified as a Level 2 or Level 3 sex offender shall register in accordance with the requirements in M.G.L. c. 6,§§ 178E, 178F1/2 and 178Q. The public shall have access to this sex offender information, pursuant to M.G.L. c. 6, §§ 178D, 178I 178J and 178K(2)(b) and (c).

(3) A Level 3 sex offender designated as a sexually violent predator, pursuant to M.G.L. c. 6, § 178K(1)(c) shall register in accordance with the requirements in M.G.L. c. 6, §§ 178E, 178F1/2 and 178Q. The public shall have access to this sex offender information, pursuant to M.G.L. c. 6, §§ 178D, 1781, 178J and 178K(2)(b) and (c),

(4) Dissemination of Information to Victims. Upon the request of a victim who has enrolled with the Board's Victim Services Unit, the Board may inform that victim of the sex offender's final registration and classification determination.

(5) Updating Information. Pursuant to M.G.L. c. 6, § 178D, the Board is required to keep the registry up-to-date and accurate. Pursuant to M.G.L. c. 6, §§ 178E, 178F and 178F1/2, the sex offender is required to verify that his or her registration data is current and accurate. Upon verifying registration data or giving notice of a change of address or intended change of address, the sex offender shall provide independent written verification of the address at which he or she is registered or, if changing address, will be registered. For purposes of 803 CMR 1.26(5), independent written verification shall include:

Any two types of the following five types of unaltered original documents bearing the name of the sex offender and his or her present address:

(a) rent or mortgage receipt;

(b) utility bill;

(c) bank or credit card statement;

(d) passport, driver's license or official photo identification issued by the Registry of Motor Vehicles; and

(e) any other current written document the Sex Offender Registry Board deems sufficient.

With the exception of a passport, driver's license or official photo identification issued by the Registry of Motor Vehicles, all other documentation must be dated within 45 days of presentation to the Sex Offender Registry Board or the police department

(6) Sex Offender Registration Fee.

(a) Pursuant to M.G.L. c. 6, § 178Q, the sex offender shall pay an annual sex offender registration fee to the Board.

(b) Waiver. The sex offender may request that the Board waive payment of the sex offender registry fee. The request must be made on a form approved by the Board and submitted to the Board at the time the sex offender submits his or her registration form to the Board. The Board may waive the fee if it determines that payment would constitute an undue hardship on the offender or his or her family due to limited income, employment status, or any other relevant factor. The Board shall use the indigency standards developed pursuant to M.G.L. c. 211D to determine whether the payment of the fee constitutes an undue hardship on the offender. If the Board determines that payment of the fee is not an undue hardship, the Board shall notify the offender informing the offender that he or she must pay the fee within ten days of receiving the notice. If the Board determines that payment of the fee is an undue hardship, it shall waive the fee for the offender for one year. The offender may renew his or her request for a waiver when payment of his next annual fee is due.

The Massachusetts Administrative Code titles are current through Register No. 1434, dated January 8, 2021. Some sections may be more current; see credits for details.

Mass. Regs. Code tit. 803, § 1.26, 803 MA ADC 1.26

End of Document

EXHIBIT 10

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title I. Jurisdiction and Emblems of the Commonwealth, the General Court, Statutes and Public Documents (Ch. 1-5)
Chapter 4. Statutes (Refs & Annos)

M.G.L.A. 4 § 7

§ 7. Definitions of statutory terms; statutory construction

Effective: December 31, 2020
Currentness

In construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears:

First, "Aldermen", "board of aldermen", "mayor and aldermen", "city council" or "mayor" shall, in a city which has no such body or officer, mean the board or officer having like powers or duties.

Second, "Annual meeting", when applied to towns, shall mean the annual meeting required by law to be held in the month of February, March or April.

Second A, "Appointing authority", when used in connection with the operation of municipal governments shall include the mayor of a city and the board of selectmen of a town unless some other local office is designated as the appointing authority under the provisions of a local charter.

Third, "Assessor" shall include any person chosen or appointed in accordance with law to perform the duties of an assessor.

Third A, "Board of selectmen", when used in connection with the operation of municipal governments shall include any other local office which is performing the duties of a board of selectmen, in whole or in part, under the provisions of a local charter.

<[There is no clause Fourth.]>

Fifth, "Charter", when used in connection with the operation of city and town government shall include a written instrument adopted, amended or revised pursuant to the provisions of chapter forty-three B which establishes and defines the structure of city and town government for a particular community and which may create local offices, and distribute powers, duties and responsibilities among local offices and which may establish and define certain procedures to be followed by the city or town government. Special laws enacted by the general court applicable only to one city or town shall be deemed to have the force of a charter and may be amended, repealed and revised in accordance with the provisions of chapter forty-three B unless any such special law contains a specific prohibition against such action.

Fifth A, "Chief administrative officer", when used in connection with the operation of municipal governments, shall include the mayor of a city and the board of selectmen in a town unless some other local office is designated to be the chief administrative officer under the provisions of a local charter.

Fifth B, “Chief executive officer”, when used in connection with the operation of municipal governments shall include the mayor in a city and the board of selectmen in a town unless some other municipal office is designated to be the chief executive officer under the provisions of a local charter.

Sixth, “City solicitor” shall include the head of the legal department of a city or town.

Sixth A, “Coterminous”, shall mean, when applied to the term of office of a person appointed by the governor, the period from the date of appointment and qualification to the end of the term of said governor; provided that such person shall serve until his successor is appointed and qualified; and provided, further, that the governor may remove such person at any time, subject however to the condition that if such person receives notice of the termination of his appointment he shall have the right, at his request, to a hearing within thirty days from receipt of such notice at which hearing the governor shall show cause for such removal, and that during the period following receipt of such notice and until final determination said person shall receive his usual compensation but shall be deemed suspended from his office.

Seventh, “District”, when applied to courts or the justices or other officials thereof, shall include municipal.

Eighth, “Dukes”, “Dukes county” or “county of Dukes” shall mean the county of Dukes county.

Ninth, “Fiscal year”, when used with reference to any of the offices, departments, boards, commissions, institutions or undertakings of the commonwealth, shall mean the year beginning with July first and ending with the following June thirtieth.

Tenth, “Illegal gaming,” a banking or percentage game played with cards, dice, tiles or dominoes, or an electronic, electrical or mechanical device or machine for money, property, checks, credit or any representative of value, but excluding: (i) a lottery game conducted by the state lottery commission, under sections 24, 24A and 27 of chapter 10; (ii) a game conducted under chapter 23K; (iii) pari-mutuel wagering on horse races under chapters 128A and 128C and greyhound races under said chapter 128C; (iv) a game of bingo conducted under chapter 271; and (v) charitable gaming conducted under said chapter 271.

Eleventh, “Grantor” may include every person from or by whom a freehold estate or interest passes in or by any deed; and “grantee” may include every person to whom such estate or interest so passes.

Twelfth, “Highway”, “townway”, “public way” or “way” shall include a bridge which is a part thereof.

Thirteenth, “In books”, when used relative to the records of cities and towns, shall not prohibit the making of such records on separate leaves, if such leaves are bound in a permanent book upon the completion of a sufficient number of them to make an ordinary volume.

Fourteenth, “Inhabitant” may mean a resident in any city or town.

<[There is no clause Fifteenth.]>

Sixteenth, “Issue”, as applied to the descent of estates, shall include all the lawful lineal descendants of the ancestor.

Seventeenth, “Land”, “lands” and “real estate” shall include lands, tenements and hereditaments, and all rights thereto and interests therein; and “recorded”, as applied to plans, deeds or other instruments affecting land, shall, as affecting registered land, mean filed and registered.

<[Clause Eighteenth effective until July 24, 2020. For text effective July 24, 2020, see below.]>

Eighteenth, "Legal holiday" shall include January first, July fourth, November eleventh, and Christmas Day, or the day following when any of said days occurs on Sunday, and the third Monday in January, the third Monday in February, the third Monday in April, the last Monday in May, the first Monday in September, the second Monday in October, and Thanksgiving Day. "Legal holiday" shall also include, with respect to Suffolk county only, Evacuation Day, on March seventeenth, and Bunker Hill Day, on June seventeenth, or the day following when said days occur on Sunday; provided, however, that all state and municipal agencies, authorities, quasi-public entities or other offices located in Suffolk county shall be open for business and appropriately staffed on Evacuation Day, on March seventeenth, and Bunker Hill Day, on June seventeenth, and that section forty-five of chapter one hundred and forty-nine shall not apply to Evacuation Day, on March seventeenth, and Bunker Hill Day, on June seventeenth, or the day following when said days occur on Sunday.

<[Clause Eighteenth as amended by 2020, 124, Sec. 3 effective July 24, 2020. For text effective until July 24, 2020, see above.]>

Eighteenth, "Legal holiday" shall include January first, June nineteenth, July fourth, November eleventh, and Christmas Day, or the day following when any of said days occurs on Sunday, and the third Monday in January, the third Monday in February, the third Monday in April, the last Monday in May, the first Monday in September, the second Monday in October, and Thanksgiving Day. "Legal holiday" shall also include, with respect to Suffolk county only, Evacuation Day, on March seventeenth, and Bunker Hill Day, on June seventeenth, or the day following when said days occur on Sunday; provided, however, that all state and municipal agencies, authorities, quasi-public entities or other offices located in Suffolk county shall be open for business and appropriately staffed on Evacuation Day, on March seventeenth, and Bunker Hill Day, on June seventeenth, and that section forty-five of chapter one hundred and forty-nine shall not apply to Evacuation Day, on March seventeenth, and Bunker Hill Day, on June seventeenth, or the day following when said days occur on Sunday.

Eighteenth A, "Commemoration day" shall include March fifteenth, in honor of Peter Francisco day, May twentieth, in honor of General Marquis de Lafayette and May twenty-ninth, in honor of the birthday of President John F. Kennedy. The governor shall issue a proclamation in connection with each such commemoration day.

Eighteenth B, "Legislative body", when used in connection with the operation of municipal governments shall include that agency of the municipal government which is empowered to enact ordinances or by-laws, adopt an annual budget and other spending authorizations, loan orders, bond authorizations and other financial matters and whether styled a city council, board of aldermen, town council, town meeting or by any other title.

Nineteenth, "Month" shall mean a calendar month, except that, when used in a statute providing for punishment by imprisonment, one "month" or a multiple thereof shall mean a period of thirty days or the corresponding multiple thereof; and "year", a calendar year.

Nineteenth A, "Municipality" shall mean a city or town.

Twentieth, "Net indebtedness" shall mean the indebtedness of a county, city, town or district, omitting debts created for supplying the inhabitants with water and other debts exempted from the operation of the law limiting their indebtedness, and deducting the amount of sinking funds available for the payment of the indebtedness included.

Twenty-first, "Oath" shall include affirmation in cases where by law an affirmation may be substituted for an oath.

Twenty-second, "Ordinance", as applied to cities, shall be synonymous with by-law.

Twenty-third, "Person" or "whoever" shall include corporations, societies, associations and partnerships.

Twenty-fourth, "Place" may mean a city or town.

Twenty-fifth, "Preceding" or "following", used with reference to any section of the statutes, shall mean the section last preceding or next following, unless some other section is expressly designated in such reference.

Twenty-sixth, "Public records" shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32, unless such materials or data fall within the following exemptions in that they are:

(a) specifically or by necessary implication exempted from disclosure by statute;

(b) related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding;

<[Subclause (c) of clause Twenty-sixth effective until December 31, 2020. For text effective December 31, 2020, see below.]>

(c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy;

<[Subclause (c) of clause Twenty-sixth as amended by 2020, 253, Sec. 2 effective December 31, 2020. For text effective until December 31, 2020, see above.]>

(c) personnel and medical files or information and any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy; provided, however, that this subclause shall not apply to records related to a law enforcement misconduct investigation.

(d) inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based;

(e) notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit;

(f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest;

(g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit;

(h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person;

(i) appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired;

(j) the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards;

<[There is no subclause (k).]>

(*l*) questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument;

(m) contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six *I*, a nonprofit hospital service corporation or medical service corporation organized pursuant to chapter one hundred and seventy-six A and chapter one hundred and seventy-six B, respectively, a health insurance corporation licensed under chapter one hundred and seventy-five or any legal entity that is self insured and provides health care benefits to its employees.

(n) records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, cyber security or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (c) of section 10 of chapter 66, is likely to jeopardize public safety or cyber security.

(*o*) the home address, personal email address and home telephone number of an employee of the judicial branch, an unelected employee of the general court, an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof or of an authority established by the general court to serve a public purpose, in the custody of a government agency which maintains records identifying persons as falling within those categories; provided that the information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180, or a criminal justice agency as defined in section 167 of chapter 6.

(p) the name, home address, personal email address and home telephone number of a family member of a commonwealth employee, contained in a record in the custody of a government agency which maintains records identifying persons as falling within the categories listed in subclause (o).

(q) Adoption contact information and indices therefore of the adoption contact registry established by section 31 of chapter 46.

(r) Information and records acquired under chapter 18C by the office of the child advocate.

(s) trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure

will adversely affect its ability to conduct business in relation to other entities making, selling or distributing electric power and energy; provided, however, that this subclause shall not exempt a public entity from disclosure required of a private entity so licensed.

(t) statements filed under section 20C of chapter 32.

(u) trade secrets or other proprietary information of the University of Massachusetts, including trade secrets or proprietary information provided to the University by research sponsors or private concerns.

(v) records disclosed to the health policy commission under subsections (b) and (e) of section 8A of chapter 6D.

Any person denied access to public records may pursue the remedy provided for in section 10A of chapter sixty-six.

Twenty-seventh, "Salary" shall mean annual salary.

Twenty-eighth, "Savings banks" shall include institutions for savings.

<[There is no clause Twenty-ninth.]>

Thirtieth, "Spendthrift" shall mean a person who is liable to be put under guardianship on account of excessive drinking, gaming, idleness or debauchery.

Thirty-first, "State", when applied to the different parts of the United States, shall extend to and include the District of Columbia and the several territories; and the words "United States" shall include said district and territories.

Thirty-second, "State auditor" and "state secretary" shall mean respectively the auditor of the commonwealth and the secretary of the commonwealth. "State treasurer" or "treasurer of the commonwealth" shall mean the treasurer and receiver general as used in the constitution of the commonwealth, and shall have the same meaning in all contracts, instruments, securities and other documents.

Thirty-third, "Swear" shall include affirm in cases in which an affirmation may be substituted for an oath. When applied to public officers who are required by the constitution to take oaths therein prescribed, it shall refer to those oaths; and when applied to any other officer it shall mean sworn to the faithful performance of his official duties.

Thirty-fourth, "Town", when applied to towns or officers or employees thereof, shall include city.

Thirty-fifth, "Valuation", as applied to a town, shall mean the valuation of such town as determined by the last preceding apportionment made for the purposes of the state tax.

Thirty-sixth, "Water district" shall include water supply district.

Thirty-seventh, "Will" shall include codicils.

Thirty-eighth, "Written" and "in writing" shall include printing, engraving, lithographing and any other mode of representing words and letters; but if the written signature of a person is required by law, it shall always be his own handwriting or, if he is unable to write, his mark.

Thirty-ninth, "Annual election", as applied to municipal elections in cities holding such elections biennially, shall mean biennial election.

Fortieth, “Surety” or “Sureties”, when used with reference to a fidelity bond of an officer or employee of a county, city, town or district, shall mean a surety company authorized to transact business in the commonwealth.

Forty-first, “Population”, when used in connection with the number of inhabitants of a county, city, town or district, shall mean the population as determined by the last preceding national census.

<[There is no clause Forty-second.]>

Forty-third, “Veteran” shall mean (1) any person, (a) whose last discharge or release from his wartime service as defined herein, was under honorable conditions and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States, or on full time national guard duty under Titles 10 or 32 of the United States Code or under sections 38, 40 and 41 of chapter 33 for not less than 90 days active service, at least 1 day of which was for wartime service; provided, however, than any person who so served in wartime and was awarded a service-connected disability or a Purple Heart, or who died in such service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete 90 days of active service; (2) a member of the American Merchant Marine who served in armed conflict between December 7, 1941 and December 31, 1946, and who has received honorable discharges from the United States Coast Guard, Army, or Navy; (3) any person (a) whose last discharge from active service was under honorable conditions, and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States for not less than 180 days active service; provided, however, that any person who so served and was awarded a service-connected disability or who died in such service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete 180 days of active service.

“Wartime service” shall mean service performed by a “Spanish War veteran”, a “World War I veteran”, a “World War II veteran”, a “Korean veteran”, a “Vietnam veteran”, a “Lebanese peace keeping force veteran”, a “Grenada rescue mission veteran”, a “Panamanian intervention force veteran”, a “Persian Gulf veteran”, or a member of the “WAAC” as defined in this clause during any of the periods of time described herein or for which such medals described below are awarded.

“Spanish War veteran” shall mean any veteran who performed such wartime service between February fifteenth, eighteen hundred and ninety-eight and July fourth, nineteen hundred and two.

“World War I veteran” shall mean any veteran who (a) performed such wartime service between April sixth, nineteen hundred and seventeen and November eleventh, nineteen hundred and eighteen, or (b) has been awarded the World War I Victory Medal, or (c) performed such service between March twenty-fifth, nineteen hundred and seventeen and August fifth, nineteen hundred and seventeen, as a Massachusetts National Guardsman.

“World War II veteran” shall mean any veteran who performed such wartime service between September 16, 1940 and July 25, 1947, and was awarded a World War II Victory Medal, except that for the purposes of chapter 31 it shall mean all active service between the dates of September 16, 1940 and June 25, 1950.

“Korean veteran” shall mean any veteran who performed such wartime service between June twenty-fifth, nineteen hundred and fifty and January thirty-first, nineteen hundred and fifty-five, both dates inclusive, and any person who has received the Korea Defense Service Medal as established in the Bob Stump National Defense Authorization Act for fiscal year 2003.

“Korean emergency” shall mean the period between June twenty-fifth, nineteen hundred and fifty and January thirty-first, nineteen hundred and fifty-five, both dates inclusive.

“Vietnam veteran” shall mean (1) any person who performed such wartime service during the period commencing August fifth, nineteen hundred and sixty-four and ending on May seventh, nineteen hundred and seventy-five, both dates inclusive, or (2) any person who served at least one hundred and eighty days of active service in the armed forces of the United States during the

period between February first, nineteen hundred and fifty-five and August fourth, nineteen hundred and sixty-four; provided, however, that for the purposes of the application of the provisions of chapter thirty-one, it shall also include all active service between the dates May seventh, nineteen hundred and seventy-five and June fourth, nineteen hundred and seventy-six; and provided, further, that any such person who served in said armed forces during said period and was awarded a service-connected disability or a Purple Heart, or who died in said service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete one hundred and eighty days of active service.

“Lebanese peace keeping force veteran” shall mean any person who performed such wartime service and received a campaign medal for such service during the period commencing August twenty-fifth, nineteen hundred and eighty-two and ending when the President of the United States shall have withdrawn armed forces from the country of Lebanon.

“Grenada rescue mission veteran” shall mean any person who performed such wartime service and received a campaign medal for such service during the period commencing October twenty-fifth, nineteen hundred and eighty-three to December fifteenth, nineteen hundred and eighty-three, inclusive.

“Panamanian intervention force veteran” shall mean any person who performed such wartime service and received a campaign medal for such service during the period commencing December twentieth, nineteen hundred and eighty-nine and ending January thirty-first, nineteen hundred and ninety.

“Persian Gulf veteran” shall mean any person who performed such wartime service during the period commencing August second, nineteen hundred and ninety and ending on a date to be determined by presidential proclamation or executive order and concurrent resolution of the Congress of the United States.

“WAAC” shall mean any woman who was discharged and so served in any corps or unit of the United States established for the purpose of enabling women to serve with, or as auxiliary to, the armed forces of the United States and such woman shall be deemed to be a veteran.

None of the following shall be deemed to be a “veteran”:

(a) Any person who at the time of entering into the armed forces of the United States had declared his intention to become a subject or citizen of the United States and withdrew his intention under the provisions of the act of Congress approved July ninth, nineteen hundred and eighteen.

(b) Any person who was discharged from the said armed forces on his own application or solicitation by reason of his being an enemy alien.

(c) Any person who has been proved guilty of wilful desertion.

(d) Any person whose only service in the armed forces of the United States consists of his service as a member of the coast guard auxiliary or as a temporary member of the coast guard reserve, or both.

(e) Any person whose last discharge or release from the armed forces is dishonorable.

“Armed forces” shall include army, navy, marine corps, air force and coast guard.

“Active service in the armed forces”, as used in this clause shall not include active duty for training in the army national guard or air national guard or active duty for training as a reservist in the armed forces of the United States.

Forty-fourth, "Registered mail", when used with reference to the sending of notice or of any article having no intrinsic value shall include certified mail.

Forty-fifth, "Pledge", "Mortgage", "Conditional Sale", "Lien", "Assignment" and like terms, when used in referring to a security interest in personal property shall include a corresponding type of security interest under chapter one hundred and six of the General Laws, the Uniform Commercial Code.

Forty-sixth, "Forester", "state forester" and "state fire warden" shall mean the commissioner of environmental management or his designee.

Forty-seventh, "Fire fighter", "fireman" or "permanent member of a fire department", shall include the chief or other uniformed officer performing similar duties, however entitled, and all other fire officers of a fire department, including, without limitation, any permanent crash crewman, crash boatman, fire controlman or assistant fire controlman employed at the General Edward Lawrence Logan International Airport, members of the 104th fighter wing fire department, members of the Devens fire department established pursuant to chapter 498 of the acts of 1993 or members of the Massachusetts military reservation fire department.

Forty-eighth, "Minor" shall mean any person under eighteen years of age.

Forty-ninth, "Full age" shall mean eighteen years of age or older.

Fiftieth, "Adult" shall mean any person who has attained the age of eighteen.

Fifty-first, "Age of majority" shall mean eighteen years of age.

Fifty-second, "Superior court" shall mean the superior court department of the trial court, or a session thereof for holding court.

Fifty-third, "Land court" shall mean the land court department of the trial court, or a session thereof for holding court.

Fifty-fourth, "Probate court", "court of insolvency" or "probate and insolvency court" shall mean a division of the probate and family court department of the trial court, or a session thereof for holding court.

Fifty-fifth, "Housing court" shall mean a division of the housing court department of the trial court, or a session thereof for holding court.

Fifty-sixth, "District court" or "municipal court" shall mean a division of the district court department of the trial court, or a session thereof for holding court, except that when the context means something to the contrary, said words shall include the Boston municipal court department.

Fifty-seventh, "Municipal court of the city of Boston" shall mean the Boston municipal court department of the trial court, or a session thereof for holding court.

Fifty-eighth, "Juvenile court" shall mean a division of the juvenile court department of the trial court, or a session thereof for holding court.

Fifty-ninth, "Gender identity" shall mean a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth. Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that

the gender-related identity is sincerely held as part of a person's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose.

Sixtieth, "Age of criminal majority" shall mean the age of 18.

Sixty-first, "Offense-based tracking number" shall mean a unique number assigned by a criminal justice agency, as defined in section 167 of chapter 6, for an arrest or charge; provided, however, that any such designation shall conform to the policies of the department of state police and the department of criminal justice information services.

Credits

Amended by St.1934, c. 283; St.1935, c. 26; St.1936, c. 180; St.1937, c. 38; St.1938, c. 245; St.1941, c. 91, § 1; St.1941, c. 509, § 1; St.1945, c. 242, § 1; St.1945, c. 637, § 1; St.1946, c. 190; St.1948, c. 241; St.1951, c. 215, § 1; St.1953, c. 319, § 2; St.1954, c. 128, § 1; St.1954, c. 627, § 1; St.1955, c. 99, §§ 1, 2; St.1955, c. 403, § 1; St.1955, c. 683; St.1956, c. 281, §§ 1, 2; St.1957, c. 164, § 1; St.1957, c. 765, § 3; St.1958, c. 140; St.1958, c. 626, § 1; St.1960, c. 299; St.1960, c. 544, § 1; St.1960, c. 812, § 1; St.1962, c. 427, § 1; St.1962, c. 616, § 1; St.1964, c. 322; St.1965, c. 875, §§ 1, 2; St.1966, c. 716; St.1967, c. 437; St.1967, c. 844, § 23; St.1968, c. 24, § 1; St.1968, c. 531, § 1; St.1969, c. 544, § 1; St.1969, c. 831, § 2; St.1970, c. 215, § 1; St.1973, c. 925, § 1; St.1973, c. 1050, § 1; St.1974, c. 205, § 1; St.1974, c. 493, § 1; St.1975, c. 706, § 2; St.1976, c. 112, § 1; St.1976, c. 156; St.1977, c. 130; St.1977, c. 691, § 1; St.1977, c. 977; St.1978, c. 12; St.1978, c. 247; St.1978, c. 478, § 2; St.1979, c. 230; St.1982, c. 189, § 2; St.1983, c. 113; St.1984, c. 363, §§ 1 to 4; St.1985, c. 114; St.1985, c. 220; St.1985, c. 451, § 1; St.1986, c. 534, §§ 1, 2; St.1987, c. 465, §§ 1, 1A; St.1987, c. 522, § 1; St.1987, c. 587, § 1; St.1988, c. 180, § 1; St.1989, c. 665, § 1; St.1991, c. 109, §§ 1, 2; St.1992, c. 133, § 169; St.1992, c. 286, § 1; St.1992, c. 403, § 1; St.1996, c. 204, § 3; St.1996, c. 450, §§ 1 to 4; St.2002, c. 313, § 1; St.2004, c. 116, § 1, eff. Aug. 26, 2004; St.2004, c. 122, § 2, eff. Sept. 1, 2004; St.2004, c. 149, § 8, eff. July 1, 2004; St.2004, c. 349, eff. Dec. 15, 2004; St.2005, c. 130, § 1, eff. Nov. 11, 2005; St.2007, c. 109, § 1, eff. Dec. 5, 2007; St.2008, c. 176, § 2, eff. July 8, 2008; St.2008, c. 308, § 1, eff. Sept. 1, 2008; St.2008, c. 445, § 1, eff. Mar. 30, 2009; St.2010, c. 131, § 5, eff. July 1, 2010; St.2011, c. 176, § 1, eff. Feb. 16, 2012; St.2011, c. 194, § 3, eff. Nov. 22, 2011; St.2011, c. 199, § 1, eff. July 1, 2012; St.2012, c. 139, § 5, eff. July 1, 2012; St.2013, c. 38, § 4, eff. July 1, 2013; St.2014, c. 313, § 1, eff. Sept. 9, 2014; St.2016, c. 121, §§ 1 to 5, eff. Jan. 1, 2017; St.2017, c. 161, § 1, eff. Oct. 15, 2017; St.2018, c. 69, § 1, eff. April 13, 2018; St.2019, c. 41, § 4, eff. July 1, 2019; St.2020, c. 124, § 3, eff. July 24, 2020; St.2020, c. 253, § 2, eff. Dec. 31, 2020.

Notes of Decisions (202)

M.G.L.A. 4 § 7, MA ST 4 § 7
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 11

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 6. The Governor, Lieutenant Governor and Council, Certain Officers Under the Governor and Council, and State Library (Refs & Annos)

M.G.L.A. 6 § 178C

§ 178C. Definitions applicable to Secs. 178C to 178P

Effective: November 7, 2018
Currentness

As used in sections 178C to 178P, inclusive, the following words shall have the following meanings:--

“Agency”, an agency, department, board, commission or entity within the executive or judicial branch, excluding the committee for public counsel services, which has custody of, supervision of or responsibility for a sex offender as defined in accordance with this chapter, including an individual participating in a program of any such agency, whether such program is conducted under a contract with a private entity or otherwise. Each agency shall be responsible for the identification of such individuals within its custody, supervision or responsibility. Notwithstanding any general or special law to the contrary, each such agency shall be certified to receive criminal offender record information maintained by the department for the purpose of identifying such individuals.

“Employment”, includes employment that is full-time or part-time for a period of time exceeding 14 days or for an aggregate period of time exceeding 30 days during any calendar year, whether compensated or uncompensated.

“Institution of higher learning”, a post secondary institution.

“Mental abnormality”, a congenital or acquired condition of a person that affects the emotional or volitional capacity of such person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes such person a menace to the health and safety of other persons.

“Predatory”, an act directed at a stranger or person with whom a relationship has been established, promoted or utilized for the primary purpose of victimization.

“Secondary addresses”, the addresses of all places where a sex offender lives, abides, lodges, or resides for a period of 14 or more days in the aggregate during any calendar year and which is not a sex offender's primary address; or a place where a sex offender routinely lives, abides, lodges, or resides for a period of 4 or more consecutive or nonconsecutive days in any month and which is not a sex offender's permanent address, including any out-of-state address.

“Sentencing court”, the court that sentenced a sex offender for the most recent sexually violent offense or sex offense or the superior court if such sentencing occurred in another jurisdiction or the sex offender registry board to the extent permitted by federal law and established by the board's regulations.

"Sex offender", a person who resides, has secondary addresses, works or attends an institution of higher learning in the commonwealth and who has been convicted of a sex offense or who has been adjudicated as a youthful offender or as a delinquent juvenile by reason of a sex offense or a person released from incarceration or parole or probation supervision or custody with the department of youth services for such a conviction or adjudication or a person who has been adjudicated a sexually dangerous person under section 14 of chapter 123A, as in force at the time of adjudication, or a person released from civil commitment pursuant to section 9 of said chapter 123A, whichever last occurs, on or after August 1, 1981.

"Sex offender registry", the collected information and data that is received by the department pursuant to sections 178C to 178P, inclusive, as such information and data is modified or amended by the sex offender registry board or a court of competent jurisdiction pursuant to said sections 178C to 178P, inclusive.

"Sex offense", an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B ½ of said chapter 265; a repeat offense under section 13B ¾ of said chapter 265; indecent assault and battery on a mentally retarded person under section 13F of said chapter 265; indecent assault and battery on a person age 14 or over under section 13H of said chapter 265; rape under section 22 of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; a repeat offense under section 22C of said chapter 265; rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; a repeat offense under section 23B of said chapter 265; assault with intent to commit rape under section 24 of said chapter 265; assault of a child with intent to commit rape under section 24B of said chapter 265; kidnapping of a child under section 26 of said chapter 265; enticing a child under the age of 16 for the purposes of committing a crime under section 26C of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude under section 50 of said chapter 265; a second or subsequent violation of human trafficking for sexual servitude under section 52 of chapter 265; enticing away a person for prostitution or sexual intercourse under section 2 of chapter 272; drugging persons for sexual intercourse under section 3 of said chapter 272; inducing a minor into prostitution under section 4A of said chapter 272; living off or sharing earnings of a minor prostitute under section 4B of said chapter 272; second and subsequent adjudication or conviction for open and gross lewdness and lascivious behavior under section 16 of said chapter 272, but excluding a first or single adjudication as a delinquent juvenile before August 1, 1992; incestuous marriage or intercourse under section 17 of said chapter 272; disseminating to a minor matter harmful to a minor under section 28 of said chapter 272; posing or exhibiting a child in a state of nudity under section 29A of said chapter 272; dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; possession of child pornography under section 29C of said chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; engaging in sexual contact with an animal under section 77C of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority.

"Sex offense involving a child", an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B ½ of said chapter 265; a repeat offense under section 13B ¾ of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; a repeat offense under section 22C of said chapter 265; rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; a repeat offense under section 23B of said chapter 265; assault of a child with intent to commit rape under section 24B of said chapter 265; kidnapping of a child under the age of 16 under section 26 of said chapter 265; enticing a child under the age of 16 for the purposes of committing a crime under section 26C of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude upon a person under 18 years of age under subsection (b) of section 50 of said chapter 265; inducing a minor into prostitution under section 4A of chapter 272; living off or sharing earnings of a

minor prostitute under section 4B of said chapter 272; disseminating to a minor matter harmful to a minor under section 28 of said chapter 272; posing or exhibiting a child in a state of nudity under section 29A of said chapter 272; dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority.

"Sexually violent offense", indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B ½ of said chapter 265; a repeat offense under section 13B ¾ of said chapter 265; indecent assault and battery on a mentally retarded person under section 13F of said chapter 265; rape under section 22 of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; a repeat offense under section 22C of said chapter 265; assault with intent to commit rape under section 24 of said chapter 265; assault of a child with intent to commit rape under section 24B of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude under section 50 of chapter 265; a second or subsequent violation of human trafficking for sexual servitude under section 52 of chapter 265; drugging persons for sexual intercourse under section 3 of chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the law of another state, the United States or a military, territorial or Indian tribal authority, or any other offense that the sex offender registry board determines to be a sexually violent offense pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071.

"Sexually violent predator", a person who has been convicted of a sexually violent offense or who has been adjudicated as a youthful offender or as a delinquent juvenile by reason of a sexually violent offense, or a person released from incarceration, parole, probation supervision or commitment under chapter 123A or custody with the department of youth services for such a conviction or adjudication, whichever last occurs, on or after August 1, 1981, and who suffers from a mental abnormality or personality disorder that makes such person likely to engage in predatory sexually violent offenses.

Credits

Added by St.1996, c. 239, § 1. Amended by St.1999, c. 74, § 2; St.2003, c. 77, §§ 1 to 3, eff. Sept. 30, 2003; St.2006, c. 139, §§ 5, 6, eff. July 1, 2006; St.2010, c. 256, § 38, eff. Nov. 4, 2010; St.2010, c. 267, §§ 1 to 3, eff. Nov. 5, 2010; St.2011, c. 178, §§ 1 to 3, eff. Feb. 19, 2012; St.2018, c. 219, § 1, eff. Nov. 7, 2018.

Notes of Decisions (78)

M.G.L.A. 6 § 178C, MA ST 6 § 178C
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 12

M.G.L.A. 6 § 178D

§ 178D. Sex offender registry

Effective: July 1, 2013
Currentness

The sex offender registry board, known as the board, in cooperation with the department, shall establish and maintain a central computerized registry of all sex offenders required to register pursuant to sections 178C to 178P, inclusive, known as the sex offender registry. The sex offender registry shall be updated based on information made available to the board, including information acquired pursuant to the registration provisions of said sections 178C to 178P, inclusive. The file on each sex offender required to register pursuant to said sections 178C to 178P, inclusive, shall include the following information, hereinafter referred to as registration data:

(a) the sex offender's name, aliases used, date and place of birth, sex, race, height, weight, eye and hair color, social security number, home address, any secondary addresses and work address and, if the sex offender works at or attends an institution of higher learning, the name and address of the institution;

(b) a photograph and set of fingerprints;

(c) a description of the offense for which the sex offender was convicted or adjudicated, the city or town where the offense occurred, the date of conviction or adjudication and the sentence imposed;

(d) any other information which may be useful in assessing the risk of the sex offender to reoffend; and

(e) any other information which may be useful in identifying the sex offender.

Notwithstanding sections 178C to 178P, inclusive, or any other general or special law to the contrary and in addition to any responsibility otherwise imposed upon the board, the board shall make the sex offender information contained in the sex offender registry, delineated below in subsections (i) to (viii), inclusive, available for inspection by the general public in the form of a comprehensive database published on the internet, known as the “sex offender internet database”; provided, however, that no registration data relating to a sex offender given a level 1 designation by the board under section 178K shall be published in the sex offender internet database but may be disseminated by the board as otherwise permitted by said sections 178C to 178P,

inclusive; and provided further, that the board shall keep confidential and shall not publish in the sex offender internet database any information relating to requests for registration data under sections 178*I* and 178J:

(i) the name of the sex offender;

(ii) the offender's home address and any secondary addresses;

(iii) the offender's work address;

(iv) the offense for which the offender was convicted or adjudicated and the date of the conviction or adjudication;

(v) the sex offender's age, sex, race, height, weight, eye and hair color;

(vi) a photograph of the sex offender, if available;

(vii) whether the sex offender has been designated a sexually violent predator; and

(viii) whether the offender is in compliance with the registration obligations of sections 178C to 178P, inclusive.

All information provided to the general public through the sex offender internet database shall include a warning regarding the criminal penalties for use of sex offender registry information to commit a crime or to engage in illegal discrimination or harassment of an offender and the punishment for threatening to commit a crime under section 4 of chapter 275. The sex offender internet database shall be updated regularly, based on information available to the board and shall be open to searches by the public at any time without charge or subscription. The board shall promulgate rules and regulations to implement, update and maintain such a sex offender internet database, to ensure the accuracy, integrity and security of information contained therein, to ensure the prompt and complete removal of registration data for persons whose duty to register has terminated or expired under section 178G, 178L or 178M or any other law and to protect against the inaccurate, improper or inadvertent publication of registration data on the internet.

The board shall develop standardized registration and verification forms, which shall include registration data as required pursuant to sections 178C to 178P. The board shall make blank copies of such forms available to all agencies having custody of sex offenders and all city and town police departments; provided, however, that the board shall determine the format for the collection and dissemination of registration data, which may include the electronic transmission of data. Records maintained in the sex offender registry shall be open to any law enforcement agency in the commonwealth, the United States or any other state. The board shall promulgate rules and regulations to implement the provisions of sections 178C to 178P, inclusive. Such rules and regulations shall include provisions which may permit police departments located in a city or town that is divided into more than one zip code to disseminate information pursuant to the provisions of section 178J categorized by zip code and to disseminate such information limited to one or more zip codes if the request for such dissemination is so qualified; provided, however, that for the city of Boston dissemination of information may be limited to one or more police districts.

The board may promulgate regulations further defining in a manner consistent with maintaining or establishing eligibility for federal funding pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071, the eligibility of sex offenders to be relieved of the obligation to register, including but not limited

to, regulations limiting motions under subsection (e) of section 178E, section 178G and relief from registration pursuant to paragraph (d) of subsection (2) of section 178K.

Credits

Added by St.1996, c. 239, § 1. Amended by St.1999, c. 74, § 2; St.2003, c. 77, § 4, eff. Sept. 30, 2003; St.2003, c. 140, § 5, eff. Nov. 26, 2003; St.2006., c. 139, §§ 7, 8, eff. July 1, 2006; St.2010, c. 256, § 39, eff. Nov. 4, 2010; St.2013, c. 38, § 7, eff. July 1, 2013.

Notes of Decisions (34)

M.G.L.A. 6 § 178D, MA ST 6 § 178D
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 13

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 6. The Governor, Lieutenant Governor and Council, Certain Officers Under the Governor and Council, and State Library (Refs & Annos)

M.G.L.A. 6 § 178I

§ 178*I*. Report identifying sex offender; request for information; confidentiality

Currentness

Any person who is 18 years of age or older and who states that he is requesting sex offender registry information for his own protection or for the protection of a child under the age of 18 or another person for whom the requesting person has responsibility, care or custody shall receive at no cost from the board a report to the extent available pursuant to sections 178C to 178P, inclusive, which indicates whether an individual identified by name, date of birth or sufficient personal identifying characteristics is a sex offender with an obligation to register pursuant to this chapter, the offenses for which he was convicted or adjudicated and the dates of such convictions or adjudications. Any records of inquiry shall be kept confidential, except that the records may be disseminated to assist or defend in a criminal prosecution.

Information about an offender shall be made available pursuant to this section only if the offender is a sex offender who has been finally classified by the board as a level 2 or level 3 sex offender.

All reports to persons making inquiries shall include a warning regarding the criminal penalties for use of sex offender registry information to commit a crime or to engage in illegal discrimination or harassment of an offender and the punishment for threatening to commit a crime under section 4 of chapter 275.

The board shall not release information identifying the victim by name, address or relation to the offender.

Credits
Added by St.1996, c. 239, § 1. Amended by St.1999, c. 74, § 2.

Notes of Decisions (28)

M.G.L.A. 6 § 178I, MA ST 6 § 178I
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 14

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 6. The Governor, Lieutenant Governor and Council, Certain Officers Under the Governor and Council, and State Library (Refs & Annos)

M.G.L.A. 6 § 178J

§ 178J. Request for sex offender information; notice of penalty for misuse; data required to receive report

Effective: July 31, 2008
Currentness

(a) A person who requests sex offender registry information shall:

(1) be 18 years of age or older;

(2) appear in person at a city or town police station and present proper identification;

(3) require sex offender registry information for his own protection or for the protection of a child under the age of 18 or another person for whom such inquirer has responsibility, care or custody, and so state; and

(4) complete and sign a record of inquiry, designed by the board, which shall include the following information: the name and address of the person making the inquiry, the person or geographic area or street which is the subject of the inquiry, the reason for the inquiry and the date and time of the inquiry.

Such records of inquiries shall include a warning regarding the criminal penalties for use of sex offender registry information to commit a crime or to engage in illegal discrimination or harassment of an offender and the punishment for threatening to commit a crime under the provisions of section 4 of chapter 275. Such records of inquiries shall state, before the signature of the inquirer, as follows: “I understand that the sex offender registry information disclosed to me is intended for my own protection or for the protection of a child under the age of 18 or another person for whom I have responsibility, care or custody.” Such records of inquiries shall be kept confidential, except that such records may be disseminated to assist in a criminal prosecution.

(b) The person making the inquiry may either:

(1) identify a specific individual by name or provide personal identifying information sufficient to allow the police to identify the subject of the inquiry; or

(2) inquire whether any sex offenders live, work or attend an institution of higher learning within the same city or town at a specific address including, but not limited to, a residential address, a business address, school, after-school program, child care center, playground, recreational area or other identified address and inquire in another city or town whether any sex offenders live, work or attend an institution of higher learning within that city or town, upon a reasonable showing that the sex offender registry information is requested for his own protection or for the protection of a child under the age of 18 or another person for whom the inquirer has responsibility, care or custody; or

(3) inquire whether any sex offenders live, work or attend an institution of higher learning on a specific street within the city or town in which such inquiry is made.

(c) If the search of the sex offender registry results in the identification of a sex offender required to register pursuant to this chapter who has been finally classified by the board as a level 2 or level 3 offender under section 178K, the police shall disseminate to the person making the inquiry:

(1) the name of the sex offender;

(2) the home address and any secondary address if located in the areas described in clause (2) or (3) of subsection (b);

(3) the work address if located in the areas described in said clause (2) or (3) of said subsection (b);

(4) the offense for which he was convicted or adjudicated and the dates of such conviction or adjudication;

(5) the sex offender's age, sex, race, height, weight, eye and hair color; and

(6) a photograph of the sex offender, if available.

(7) the name and address of the institution of higher learning where the sex offender works or is enrolled as a student, if located in the areas described in clause (2) or (3) of subsection (b).

The police shall not release information identifying the victim by name, address or the victim's relation to the offender.

Credits

Added by St.1996, c. 239, § 1. Amended by St.1999, c. 74, § 2; St.2003, c. 77, §§ 17, 18, eff. Sept. 30, 2003; St.2006, c. 139, § 28, eff. July 1, 2006; St.2008, c. 215, § 2, eff. July 31, 2008.

Notes of Decisions (30)

M.G.L.A. 6 § 178J, MA ST 6 § 178J
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 15

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 6. The Governor, Lieutenant Governor and Council, Certain Officers Under the Governor and Council, and State Library (Refs & Annos)

M.G.L.A. 6 § 178K

§ 178K. Sex offender registry board; member qualifications; guidelines to assess risk of reoffense; notification; information sharing system relevant for determination or reevaluation of sex offender's level designation

Effective: December 11, 2020
Currentness

(1) There shall be, in the executive office of public safety and security, a sex offender registry board which shall consist of seven members who shall be appointed by the governor for terms of six years, with the exception of the chairman, and who shall devote their full time during business hours to their official duties. The board shall include one person with experience and knowledge in the field of criminal justice who shall act as chairman; at least two licensed psychologists or psychiatrists with special expertise in the assessment and evaluation of sex offenders and who have knowledge of the forensic mental health system; at least one licensed psychologist or psychiatrist with special expertise in the assessment and evaluation of sex offenders, including juvenile sex offenders and who has knowledge of the forensic mental health system; at least two persons who have at least five years of training and experience in probation, parole or corrections; and at least one person who has expertise or experience with victims of sexual abuse. Members shall be compensated at a reasonable rate subject to approval of the secretary of administration and finance.

The chairman shall be appointed by and serve at the pleasure of the governor and shall be the executive and administrative head of the sex offender registry board, shall have the authority and responsibility for directing assignments of members of said board and shall be the appointing and removing authority for members of said board's staff. In the case of the absence or disability of the chairman, the governor may designate one of the members to act as chairman during such absence or disability. The chairman shall, subject to appropriation, establish such staff positions and employ such administrative, research, technical, legal, clerical and other personnel and consultants as may be necessary to perform the duties of said board. Such staff positions shall not be subject to section 9A of chapter 30 or chapter 31.

The governor shall fill any vacancy for the unexpired term. As long as there are four sitting members, a vacancy shall not impair the right of the remaining members to exercise the powers of the board.

The sex offender registry board shall promulgate guidelines for determining the level of risk of reoffense and the degree of dangerousness posed to the public or for relief from the obligation to register and shall provide for three levels of notification depending on such risk of reoffense and the degree of dangerousness posed to the public; apply the guidelines to assess the risk level of particular offenders; develop guidelines for use by city and town police departments in disseminating sex offender

registry information; devise a plan, in cooperation with state and local law enforcement authorities and other appropriate agencies, to locate and verify the current addresses of sex offenders including, subject to appropriation, entering into contracts or interagency agreements for such purposes; and conduct hearings as provided in section 178L. The attorney general and the chief counsel of the committee for public counsel services, or their designees, shall assist in the development of such guidelines. Factors relevant to the risk of reoffense shall include, but not be limited to, the following:

(a) criminal history factors indicative of a high risk of reoffense and degree of dangerousness posed to the public, including:

(i) whether the sex offender has a mental abnormality;

(ii) whether the sex offender's conduct is characterized by repetitive and compulsive behavior;

(iii) whether the sex offender was an adult who committed a sex offense on a child;

(iv) the age of the sex offender at the time of the commission of the first sex offense;

(v) whether the sex offender has been adjudicated to be a sexually dangerous person pursuant to section 14 of chapter 123A or is a person released from civil commitment pursuant to section 9 of said chapter 123A; and

(vi) whether the sex offender served the maximum term of incarceration;

(b) other criminal history factors to be considered in determining risk and degree of dangerousness, including:

(i) the relationship between the sex offender and the victim;

(ii) whether the offense involved the use of a weapon, violence or infliction of bodily injury;

(iii) the number, date and nature of prior offenses;

(c) conditions of release that minimize risk of reoffense and degree of dangerousness posed to the public, including whether the sex offender is under probation or parole supervision, whether such sex offender is receiving counseling, therapy or treatment and whether such sex offender is residing in a home situation that provides guidance and supervision, including sex offender-specific treatment in a community-based residential program;

(d) physical conditions that minimize risk of reoffense including, but not limited to, debilitating illness;

(e) whether the sex offender was a juvenile when he committed the offense, his response to treatment and subsequent criminal history;

(f) whether psychological or psychiatric profiles indicate a risk of recidivism;

(g) the sex offender's history of alcohol or substance abuse;

(h) the sex offender's participation in sex offender treatment and counseling while incarcerated or while on probation or parole and his response to such treatment or counseling;

(i) recent behavior, including behavior while incarcerated or while supervised on probation or parole;

(j) recent threats against persons or expressions of intent to commit additional offenses;

(k) review of any victim impact statement; and

(*l*) review of any materials submitted by the sex offender, his attorney or others on behalf of such offender.

(2) The guidelines shall provide for three levels of notification depending on the degree of risk of reoffense and the degree of dangerousness posed to the public by the sex offender or for relief from the obligation to register:

<[Paragraph (a) of subsection (2) effective until December 11, 2020. For text effective December 11, 2020, see below.]>

(a) Where the board determines that the risk of reoffense is low and the degree of dangerousness posed to the public is not such that a public safety interest is served by public availability, it shall give a level 1 designation to the sex offender. In such case, the board shall transmit the registration data and designation to the police departments in the municipalities where such sex offender lives and works and attends an institution of higher learning or, if in custody, intends to live and work and attend an institution of higher learning upon release and where the offense was committed and to the Federal Bureau of Investigation. The police shall not disseminate information to the general public identifying the sex offender where the board has classified the individual as a level 1 sex offender. The police and the board may, however, release such information identifying such sex offender to the department of correction, any county correctional facility, the department of youth services, the department of children and families, the parole board, the department of probation, the department of early education and care and the department of mental health, all city and town police departments and the Federal Bureau of Investigation.

<[Paragraph (a) of subsection (2) as amended by 2020, 227, Sec. 6 effective December 11, 2020. For text effective until December 11, 2020, see above.]>

(a) Where the board determines that the risk of reoffense is low and the degree of dangerousness posed to the public is not such that a public safety interest is served by public availability, it shall give a level 1 designation to the sex offender. In such case, the board shall transmit the registration data and designation to the police departments in the municipalities where such sex offender lives and works and attends an institution of higher learning or, if in custody, intends to live and work and attend an institution of higher learning upon release and where the offense was committed and to the Federal Bureau of Investigation. The police shall not disseminate information to the general public identifying the sex offender where the board has classified the individual as a level 1 sex offender. The police and the board may, however, release such information identifying such sex offender to

the department of correction, any county correctional facility, the department of youth services, the department of children and families, the parole board, the department of probation, the department of early education and care, the department of mental health, the department of developmental services, all city and town police departments and the Federal Bureau of Investigation.

(b) Where the board determines that the risk of reoffense is moderate and the degree of dangerousness posed to the public is such that a public safety interest is served by public availability of registration information, it shall give a level 2 designation to the sex offender. In such case, the board shall transmit the registration data and designation to the police departments in the municipalities where the sex offender lives, has a secondary address and works and attends an institution of higher learning or, if in custody, intends to live and work and attend an institution of higher learning upon release and where the offense was committed and to the Federal Bureau of Investigation. The public shall have access to the information regarding a level 2 offender in accordance with the provisions of sections 178D, 178*I* and 178J. The sex offender shall be required to register and to verify registration information pursuant to section 178F ½.

(c) Where the board determines that the risk of reoffense is high and the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination, it shall give a level 3 designation to the sex offender. In such case, the board shall transmit the registration data and designation to the police departments in the municipalities where the sex offender lives, has a secondary address and works and attends an institution of higher learning or, if in custody, intends to live and work and attend an institution of higher learning upon release and where the offense was committed and to the Federal Bureau of Investigation. A level 3 community notification plan shall require the police department to notify organizations in the community which are likely to encounter such sex offender and individual members of the public who are likely to encounter such sex offender. The sex offender shall be required to register and to verify registration information pursuant to sections 178F ½. Neighboring police districts shall share sex offender registration information of level 3 offenders and may inform the residents of their municipality of a sex offender they are likely to encounter who resides in an adjacent city or town. The police or the board shall actively disseminate in such time and manner as such police department or board deems reasonably necessary the following information:

(i) the name of the sex offender;

(ii) the offender's home address and any secondary address;

(iii) the offender's work address;

(iv) the offense for which the offender was convicted or adjudicated and the date of the conviction or adjudication;

(v) the sex offender's age, sex, race, height, weight, eye and hair color; and

(vi) a photograph of the sex offender, if available; provided, that such active dissemination may include publication of such information on the internet by the police department at such time and in such manner as the police or the board deem reasonably necessary; and provided further, that the police or the board shall not release information identifying the victim by name, address or relation to the sex offender. All notices to the community shall include a warning regarding the criminal penalties for use of sex offender registry information to commit a crime or to engage in illegal discrimination or harassment of an offender and the punishment for threatening to commit a crime under section 4 of chapter 275.

(vii) the name and address of the institution of higher learning that the sex offender is attending.

The public shall have access to the information regarding a level 3 offender in accordance with sections 178D, 178*I* and 178J.

If the board, in finally giving an offender a level 3 classification, also concludes that such sex offender should be designated a sexually violent predator, the board shall transmit a report to the sentencing court explaining the board's reasons for so recommending, including specific identification of the sexually violent offense committed by such sex offender and the mental abnormality from which he suffers. The report shall not be subject to judicial review under section 178M. Upon receipt from the board of a report recommending that a sex offender be designated a sexually violent predator, the sentencing court, after giving such sex offender an opportunity to be heard and informing the sex offender of his right to have counsel appointed, if he is deemed to be indigent in accordance with section 2 of chapter 211D, shall determine, by a preponderance of the evidence, whether such sex offender is a sexually violent predator. An attorney employed or retained by the board may make an appearance, subject to section 3 of chapter 12, to defend the board's recommendation. The board shall be notified of the determination. A determination that a sex offender should not be designated a sexually violent predator shall not invalidate such sex offender's classification. Where the sentencing court determines that such sex offender is a sexually violent predator, dissemination of the sexually violent predator's registration data shall be in accordance with a level 3 community notification plan; provided, however, that such dissemination shall include such sex offender's designation as a sexually violent predator.

(d) The board may, upon making specific written findings that the circumstances of the offense in conjunction with the offender's criminal history do not indicate a risk of reoffense or a danger to the public and the reasons therefor, relieve such sex offender of any further obligation to register, shall remove such sex offender's registration information from the registry and shall so notify the police departments where said sex offender lives and works or if in custody intends to live and work upon release, and where the offense was committed and the Federal Bureau of Investigation. In making such determination the board shall consider factors, including but not limited to, the presence or absence of any physical harm caused by the offense and whether the offense involved consensual conduct between adults. The burden of proof shall be on the offender to prove he comes within the provisions of this subsection. The provisions of this subsection shall not apply if a sex offender has been determined to be a sexually violent predator; has been convicted of two or more sex offenses defined as sex offenses pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071, committed on different occasions; or has been convicted of a sexually violent offense. The provisions of this subsection shall also not apply if a sex offender has been convicted of a sex offense involving a child or a sexually violent offense, and such offender has not already registered pursuant to this chapter for at least ten years, or if the sex offender is otherwise subject to lifetime or minimum registration requirements as determined by the board pursuant to section 178D.

(e) No sex offender classified as a level 3 offender shall knowingly and willingly establish living conditions within, move to, or transfer to any convalescent or nursing home, infirmary maintained in a town, rest home, charitable home for the aged or intermediate care facility for the mentally retarded which meets the requirements of the department of public health under section 71 of chapter 111. Any sex offender who violates this paragraph shall, for a first conviction, be punished by imprisonment for not more than 30 days in a jail or house of correction; for a second conviction, be punished by imprisonment for not more than 2 ½ years in a jail or house of correction nor more than 5 years in a state prison or by a fine of not more than $1,000, or by both such fine and imprisonment; and for a third and subsequent conviction, be punished by imprisonment in a state prison for not less than 5 years; provided, however, that the sentence imposed for such third or subsequent conviction shall not be reduced to less than 5 years, nor suspended, nor shall any person sentenced herein be eligible for probation, parole, work release or furlough, or receive any deduction from his sentence for good conduct until he shall have served 5 years. Prosecutions commenced hereunder shall neither be continued without a finding nor placed on file.

(3) The sex offender registry board shall make a determination regarding the level of risk of reoffense and the degree of dangerousness posed to the public of each sex offender listed in said sex offender registry and shall give immediate priority to those offenders who have been convicted of a sex offense involving a child or convicted or adjudicated as a delinquent juvenile or as a youthful offender by reason of a sexually violent offense or of a sex offense of indecent assault and battery upon a mentally retarded person pursuant to section 13F of chapter 265, and who have not been sentenced to incarceration for at least 90 days, followed, in order of priority, by those sex offenders who (1) have been released from incarceration within the past 12 months, (2) are currently on parole or probation supervision, and (3) are scheduled to be released from incarceration within six months. All agencies shall cooperate in providing files to the sex offender registry board and any information the sex offender registry board deems useful in providing notice under sections 178C to 178P, inclusive, and in assessing the risk of reoffense and the degree of dangerousness posed to the public by the sex offender. All agencies from which registration data, including data within the control of providers under contract to such agencies, is requested by the sex offender registry board shall make such data available to said board immediately upon request. Failure to comply in good faith with such a request within 30 days shall be punishable by a fine of not more than $1,000 per day.

(4) The sex offender registry board, in cooperation with the executive office of public safety and security, and with the consultation of the offices of the district attorneys, the department of probation, the department of children and families and the Massachusetts Chiefs of Police Association Incorporated, shall establish and maintain a system of procedures for the ongoing sharing of information that may be relevant to the board's determination or reevaluation of a sex offender's level designation among the board, the offices of the district attorneys and any department, agency or office of the commonwealth that reports, investigates or otherwise has access to potentially relevant information, including, but not limited to, the department of youth services, the department of children and families, the department of mental health, the department of developmental services, the department of correction, the department of probation, the department of early education and care, the department of public health and the office of the child advocate, .[1]

The board shall promulgate any rules or regulations necessary to establish, update and maintain this system including, but not limited to, the frequency of updates, measures to ensure the comprehensiveness, clarity and effectiveness of information, and metrics to determine what information may be relevant. When sharing information through this system, all members shall have discretion to delay sharing information where it is reasonably believed that disclosure would compromise or impede an investigation or prosecution or would cause harm to a victim.

(5) The sex offender registry board shall have access to any information that is determined to be relevant to the board's determination or reevaluation of a sex offender's level designation, as defined in subsection (4), through the system of procedures established in said subsection (4).

Credits

Added by St.1996, c. 239, § 1. Amended by St.1998, c. 463, § 6; St.1999, c. 74, § 2; St.2003, c. 77, §§ 19 to 22, eff. Sept. 30, 2003; St.2003, c. 140, § 13, eff. Nov. 26, 2003; St.2004, c. 149, § 13 (b), eff. July 1, 2004; St.2006, c. 139, §§ 29 to 31, eff. July 1, 2006; St.2006, c. 303, § 6, eff. Dec. 20, 2006; St.2008, c. 176, § 9, eff. July 8, 2008; St.2010, c. 256, § 43, eff. Nov. 4, 2010; St.2013, c. 38, §§ 9, 10, eff. July 1, 2013; St.2018, c. 202, § 6; St.2020, c. 227, § 6, eff. Dec. 11, 2020.

Notes of Decisions (75)

Footnotes

1 So in enrolled bill.

M.G.L.A. 6 § 178K, MA ST 6 § 178K

Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 16

M.G.L.A. 6 § 185

§ 185. Massachusetts office on disability; director; appointments

Currentness

There shall be a Massachusetts office on disability, in this section and in sections one hundred and eighty-six to one hundred and eighty-nine, inclusive, called the office, consisting of a director on disability, in this section and in sections one hundred and eighty-six to one hundred and eighty-nine, inclusive, called the director, and an advisory council, as hereinafter described. The director shall be appointed by the governor and shall serve at the pleasure of the governor. The director shall, at the time of his appointment, have substantial professional or administrative experience in a field concerned with disability.

The position of the director shall be classified in accordance with section forty-five of chapter thirty, and the salary shall be determined in accordance with section forty-six C of said chapter thirty. The director shall devote his full time during business hours to the duties of the office.

The director shall, with the advice of the advisory council, have sole charge of the supervision and administration of the office. The director may, subject to appropriation, employ and remove such assistant directors and other employees and consultants as he may deem necessary to enable him to perform his duties. The provisions of chapter thirty-one and section nine A of chapter thirty shall not apply to the director or to such assistant directors and consultants as he may appoint. In making such appointments, the director shall make every reasonable effort to ensure that persons with disabilities are employed.

Credits

Added by St.1981, c. 351, § 289. Amended by St.1985, c. 307, § 1; St.1986, c. 217, § 2A; St.1990, c. 260, § 3.

M.G.L.A. 6 § 185, MA ST 6 § 185
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 17

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 6A. Executive Offices (Refs & Annos)

M.G.L.A. 6A § 2

§ 2. Establishment of executive offices

Effective: July 31, 2017
Currentness

There shall be the following executive offices, each of which shall serve under the governor: administration and finance, education, energy and environmental affairs, health and human services, housing and economic development, labor and workforce development, public safety and security, technology services and security, and transportation and public works.

Credits

Added by St.1969, c. 704, § 3. Amended by St.1970, c. 862, § 2; St.1973, c. 1168, § 6; St.1979, c. 796, § 2; St.1980, c. 329, § 106; St.1982, c. 668, § 2; St.1983, c. 623, § 2; St.1989, c. 730, § 1; St.1990, c. 177, § 10; St.1991, c. 142, § 4; St.1992, c. 133, § 172; St.1996, c. 57, § 2; St.1996, c. 151, § 21; St.2003, c. 26, § 551, eff. July 1, 2003; St.2004, c. 196, § 2, eff. July 21, 2004; St.2007, c. 19, § 3, eff. April 10, 2007; St.2008, c. 27, § 2, eff. Mar. 10, 2008; St.2017, c. 64, § 1, eff. July 31, 2017.

M.G.L.A. 6A § 2, MA ST 6A § 2
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 18

M.G.L.A. 6A § 3

§ 3. Secretary; appointment of undersecretary

Effective: April 10, 2007
Currentness

Each of said executive offices shall be headed by a secretary, who shall be appointed by and serve at the pleasure of the governor. The secretary shall receive such salary as the governor may determine, and shall devote his full time to the duties of his office. Each secretary may, notwithstanding section 45 of chapter 30 and chapter 31, subject to the approval of the governor and subject to appropriation, appoint 1 or more undersecretaries for the executive office, each of whom shall serve at the pleasure of her appointing secretary. Each person appointed as an undersecretary shall have experience and shall know the field or functions of such position, shall receive such salary as the secretary shall determine, subject to the approval of the governor, and shall devote his full time to the duties of the office.

Credits

Added by St.1969, c. 704, § 3. Amended by St.1981, c. 699, § 12; St.1982, c. 44, § 3; St.1990, c. 177, § 11; St.1998, c. 161, § 36; St.2007, c. 19, § 4, eff. April 10, 2007.

M.G.L.A. 6A § 3, MA ST 6A § 3
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 19

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 6A. Executive Offices (Refs & Annos)

M.G.L.A. 6A § 18

§ 18. Agencies within executive office of public safety and security

Effective: March 27, 2017
Currentness

The following state agencies are hereby declared to be within the executive office of public safety and security: the department of fire services; the office of grants and research and the highway safety division; the municipal police training committee; the Massachusetts department of criminal justice information services; the state 911 department; the department of state police; the office of the chief medical examiner; the Massachusetts emergency management agency; the military department; the department of correction, including the parole board; the sex offender registry board; and all other agencies and boards within said departments, committees and boards.

Credits

Added by St.1969, c. 704, § 3. Amended by St.1972, c. 802, § 2; St.1974, c. 806, § 8; St.1979, c. 702, § 8; St.1984, c. 348, § 1; St.1984, c. 413, § 1; St.1986, c. 642, § 1; St.1986, c. 670, § 2; St.1990, c. 255, § 1; St.1990, c. 291, § 1; St.1991, c. 138, § 253; St.1991, c. 412, § 4; St.1996, c. 151, § 29; St.2002, c. 184, § 6; St.2002, c. 196, §§ 13, 14; St.2004, c. 291, § 19, eff. Aug. 10, 2004; St.2008, c. 223, § 1, eff. July 31, 2008; St.2010, c. 256, § 45, eff. Nov. 4, 2010; St.2017, c. 6, § 3, eff. Mar. 27, 2017.

M.G.L.A. 6A § 18, MA ST 6A § 18
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 20

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 6A. Executive Offices (Refs & Annos)

M.G.L.A. 6A § 18 1/2

§ 18 ½ . Undersecretaries; duties

Effective: March 27, 2017
Currentness

The secretary shall, subject to section 3, appoint 4 undersecretaries. Each person appointed as an undersecretary shall have experience and shall know the field or functions of such position, shall receive such salary as the secretary shall determine and shall devote his full time to the duties of the office.

One undersecretary shall be the undersecretary for law enforcement and shall oversee the functions and administration of the following boards and agencies: the department of state police, the municipal police training committee, and the office of grants and research.

One undersecretary shall be the undersecretary of criminal justice and shall oversee the functions and administration of the following boards and agencies: the sex offender registry board, the department of corrections, including the parole board and all other agencies within said department.

One undersecretary shall be the undersecretary of homeland security and shall oversee the functions and administration of the following boards and agencies: the Massachusetts emergency management agency, the department of fire services, the military department and the nuclear safety department.

One undersecretary shall be the undersecretary for forensic sciences. The undersecretary shall oversee the statewide emergency telecommunications board, the department of criminal justice information services, the automated fingerprint identification system, and the state 911 department; and shall work in conjunction with law enforcement authorities and shall coordinate all forensic science resources, appropriations and grants; shall oversee the functions and administration of the office of the chief medical examiner, the state police crime laboratory and such other forensic entities as the secretary shall assign from time to time; and shall convene the forensic science advisory board consistent with the duties set forth in section 184A of chapter 6.

Each undersecretary shall coordinate the functions and the programs of the agencies as directed by the secretary. Each undersecretary shall conduct studies of the operations of each agency and work with each agency in effecting procedures and programs which promote efficiency and improvements in the administration of the agency. Each undersecretary shall assist the secretary in reviewing and acting upon budgetary and other financial matters concerning those agencies in accordance with sections 2C, 3, 3A, 4, 9B and 29 of chapter 29.

Credits

Added by St.1991, c. 138, § 249. Amended by St.2002, c. 196, § 15; St. 2003, c. 26, § 22, eff. July 1, 2003; St.2004, c. 149, § 18, eff. July 1, 2004; St.2008, c. 451, §§ 17, 18, eff. Jan. 5, 2009; St.2010, c. 256, § 46, eff. Nov. 4, 2010; St.2011, c. 68, § 7, eff. July 1, 2011; St.2017, c. 6, §§ 4, 5, eff. Mar. 27, 2017.

M.G.L.A. 6A § 18 1/2, MA ST 6A § 18 1/2
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 21

M.G.L.A. 12 § 8

§ 8. Due application of charity funds enforced

Currentness

The attorney general shall enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof.

Credits
Added by St.1979, c. 716.

Editors' Notes

DISPOSITION TABLE

Showing where the subject matter of former §§ 8 to 8K of this chapter, stricken out by St.1979, c. 716, can now be found in §§ 8 to 8M enacted thereby.

Former Section	New Section
8	8
8A	8A
8B	8B
8C	8C
8D	8D
8E	8E
8F	8F
8G	8G
8H	8H
8*I*	8J
8J	----

8K..... ..... 8K

Section 8J, which related to the filing with the attorney general of charters and other documents by public charities, was derived from St.1962, c. 401, § 2.

Notes of Decisions (29)

M.G.L.A. 12 § 8, MA ST 12 § 8
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 22

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 12. Department of the Attorney General, and the District Attorneys (Refs & Annos)

M.G.L.A. 12 § 27

§ 27. District attorneys; duties; control of attorney general

Currentness

District attorneys within their respective districts shall appear for the commonwealth in the superior court in all cases, criminal or civil, in which the commonwealth is a party or interested, and in the hearing, in the supreme judicial court, of all questions of law arising in the cases of which they respectively have charge, shall aid the attorney general in the duties required of him, and perform such of his duties as are not required of him personally; but the attorney general, when present, shall have the control of such cases. They may interchange official duties.

Notes of Decisions (13)

M.G.L.A. 12 § 27, MA ST 12 § 27
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 23

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 19A. Department of Elder Affairs (Refs & Annos)

M.G.L.A. 19A § 1

§ 1. Establishment; secretary, powers and duties

Effective: July 1, 2003
Currentness

There shall be a department of elder affairs, in this chapter called the department, which shall be under the supervision and control of a secretary of elder affairs, hereinafter called the secretary. The secretary shall be appointed by and serve at the pleasure of the governor. In the event of a vacancy in the office of the secretary, or in the secretary's absence or disability, as determined by the governor, the governor shall designate an assistant secretary of elder affairs to serve as secretary until the vacancy is filled, or until the absence or disability ceases, as determined by the governor, and the assistant secretary so designated shall have all the powers and duties of the secretary. The secretary shall devote his full time to the duties of his office.

The secretary shall be the executive and administrative head of the department and shall be responsible for administering and enforcing the provisions of law relative to the department and each administrative unit thereof.

The secretary shall administer chapter 118E relative to medical care and assistance to eligible persons age 65 and older except for acute care services as defined by the secretary of health and human services. The secretary shall be responsible for administering and coordinating a comprehensive system of long-term care benefits and services for elderly persons, including institutional, home-based and community-based care and services.

Credits
Added by St.1973, c. 1168, § 15. Amended by St. 2003, c. 26, § 17, eff. July 1, 2003.

M.G.L.A. 19A § 1, MA ST 19A § 1
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 24

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 22C. The Department of State Police (Refs & Annos)

M.G.L.A. 22C § 3

§ 3. Colonel of state police; powers and duties

Effective: December 31, 2020
Currentness

<[First paragraph effective until December 31, 2020. For text effective December 31, 2020, see below.]>

The colonel shall be the executive and administrative head of the department and shall have charge of the administration and organization thereof. The colonel may, subject to the approval of the governor and the secretary of public safety and except as otherwise provided, organize such divisions, bureaus, sections and units as he deems necessary for the effective management of the department and, when he deems necessary for such purpose, may abolish or consolidate such divisions, bureaus, sections or units. The colonel shall, except as otherwise provided, direct all inspections and investigations. The colonel shall make all necessary rules and regulations for the government of the department, for reports to be made by employees of the department and for the performance of the duties of said employees. The colonel shall make an annual report to the governor and the secretary of public safety.

<[First paragraph as amended by 2020, 253, Sec. 44 effective December 31, 2020. For text effective until December 31, 2020, see above.]>

The colonel shall be the executive and administrative head of the department and shall have charge of the administration and organization thereof. The colonel may, subject to the approval of the governor and the secretary of public safety and except as otherwise provided, organize such divisions, bureaus, sections and units as the colonel deems necessary for the effective management of the department and, when the colonel deems necessary for such purpose, may abolish or consolidate such divisions, bureaus, sections or units. The colonel shall, except as otherwise provided, direct all inspections and investigations. The colonel shall make all necessary rules and regulations for the government of the department, for reports to be made by employees of the department and for the performance of the duties of said employees. The colonel shall make an annual report to the governor and the secretary of public safety.

<[Second paragraph effective until December 31, 2020. For text effective December 31, 2020, see below.]>

The colonel shall be appointed by the governor, upon the recommendation of the secretary of public safety, and shall be a person who has been employed by the department in a rank above the rank of lieutenant immediately prior to such appointment and shall serve for a term coterminous with that of the governor. The colonel shall devote his full time during business hours to the duties of the office.

<[Second paragraph as amended by 2020, 253, Sec. 45 effective December 31, 2020. For text effective until December 31, 2020, see above.]>

The governor, upon the recommendation of the secretary of public safety and security, shall appoint the colonel, who shall be qualified by training and experience, to direct the work of the department. At the time of appointment, the colonel shall have not less than 10 years of full-time experience as a sworn law enforcement officer and not less than 5 years of full-time experience in a senior administrative or supervisory position in a police force or a military body with law enforcement responsibilities. The appointment shall constitute an appointment as a uniformed member of the department and shall qualify the colonel to exercise all powers granted to a uniformed member under this chapter. The colonel shall serve at the pleasure of the governor and shall devote their full time during business hours to the duties of the office.

Credits

Added by St.1991, c. 412, § 22. Amended by St.2020, c. 253, §§ 44, 45, eff. Dec. 31, 2020.

Notes of Decisions (5)

M.G.L.A. 22C § 3, MA ST 22C § 3
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 25

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 23A. Department of Economic Development (Refs & Annos)

M.G.L.A. 23A § 13E

§ 13E. Office of travel and tourism; executive director; appointment; powers and duties

Effective: August 1, 2010
Currentness

There shall be within the partnership an office of travel and tourism which shall be under the supervision and control of an executive director. The powers and duties given to the executive director of the office of travel and tourism in this chapter and in any other general or special law shall be exercised and discharged subject to the direction, control and supervision of the partnership.

The executive director of the office of travel and tourism shall be appointed by the governor, and serve at the pleasure of the governor. The position of executive director of the office of travel and tourism shall be classified under section 45 of chapter 30 and the executive director of travel and tourism shall devote full time during business hours to the duties of the office of travel and tourism and shall give to the state treasurer a bond for the faithful performance of those duties.

The executive director of travel and tourism shall be the executive and administrative head of travel and tourism and shall be responsible for administering and enforcing the laws relative to travel and tourism and to any administrative unit of that office. Powers and duties given to an administrative unit of travel and tourism by a general or special law shall be exercised subject to the direction, control and supervision of the executive director of travel and tourism.

Credits
Added by St.2010, c. 240, § 34, eff. Aug. 1, 2010.

M.G.L.A. 23A § 13E, MA ST 23A § 13E
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 26

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 23A. Department of Economic Development (Refs & Annos)

M.G.L.A. 23A § 13K

§ 13K. Massachusetts international trade office; executive director

Effective: August 1, 2010
Currentness

(a) There shall be within the partnership a Massachusetts international trade office, which shall be under the supervision and control of an executive director. The executive director shall be appointed by the governor and serve at the pleasure of the governor. The executive director shall devote full time during business hours to the duties of the Massachusetts international trade office. The executive director of the international trade office shall be the executive and administrative head of the office and shall be responsible for administering and enforcing the laws relative to the office and to any administrative unit of the office. The executive director shall also serve as the Massachusetts international trade representative.

(b) The Massachusetts international trade representative shall: (1) serve as the commonwealth's official point of contact with the federal government on matters related to international trade; (2) work with the executive office of housing and economic development and other appropriate state agencies to analyze proposed and enacted international trade agreements and provide an assessment of the impact of those agreements on the commonwealth's economy; (3) serve as the designated recipient of federal requests for the commonwealth to agree to be bound by investment, procurement, services or any other international trade agreements, including those which may infringe upon state law or regulatory authority reserved to the commonwealth; (4) serve as a liaison to the general court on matters of international trade policy oversight including, but not limited to, reporting to members of the general court on a regular basis on the status of ongoing international trade negotiations, international trade litigation and dispute settlement proceedings with implications for existing state laws, state regulatory authority and international trade policy on the commonwealth's economy.

(c) The international trade representative shall, within 30 days of receipt, forward any requests or communications received from the United States Trade Representative relative to any issue of international trade, including requests seeking the commonwealth's consent to be bound by international trade agreements, to the clerks of the house of representatives and the senate, who shall promptly refer the communications or requests to the joint committee on economic development and emerging technologies. The joint committee shall, within 30 days of receipt, conduct a public hearing on any request seeking the commonwealth's consent to be bound by an international trade agreement. The joint committee may issue a report within 120 days of the public hearing including a resolution to the general court relative to the recommendations of the committee on whether the commonwealth should consent to the international trade agreement in question and memorializing the commonwealth's international trade representative and the governor to take appropriate measures within their power to advise the United States Trade Representative of the recommendations of the general court.

Credits

Added by St.2010, c. 240, § 34, eff. Aug. 1, 2010.

M.G.L.A. 23A § 13K, MA ST 23A § 13K
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 27

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 24A. Office of Consumer Affairs and Business Regulation (Refs & Annos)

M.G.L.A. 24A § 1

§ 1. Office of consumer affairs and business regulation; appointment, salary and duties of director; divisions

Effective: January 1, 2010
Currentness

(a) Within the executive office of housing and economic development, there shall be an office of consumer affairs and business regulation, in this chapter called the office. The office shall be headed by a director of consumer affairs and business regulation, hereinafter referred to as the director, who shall be appointed by and serve at the pleasure of the governor and who shall not be subject to the provisions of chapter thirty-one or section nine A of chapter thirty. The director shall receive such salary as the governor may determine, provided that such salary is equivalent to the salary received by the director of labor and workforce development and the director of economic development. The director shall devote full time during business hours to the duties of his office, and shall have the powers and duties provided in sections four to seven, inclusive, of chapter six A.

(b) There shall be within the office the following divisions containing the following state agencies or functions: (1) the division of business regulation, including the department of telecommunications and cable and all other state agencies within that department; the department of banking and insurance and all other state agencies within that department, including the small loans regulatory board and the trustees of the General Insurance Guaranty Fund; (2) the division of consumer affairs, including the division of registration established by section 8 of chapter 13, including the several boards of registration serving in that division; and (3) the division of standards, established by section 5. Nothing in this section shall be construed as conferring any power or imposing any duties upon the director with respect to the foregoing agencies except as expressly provided by law.

Credits
Added by St.1996, c. 151, § 148. Amended by St.1997, c. 43, § 43; St.1997, c. 164, §§ 25 to 27; St.2002, c. 184, § 32; St.2007, c. 19, §§ 19, 20, eff. April 10, 2007; St.2009, c. 4, § 32, eff. Jan. 1, 2010.

M.G.L.A. 24A § 1, MA ST 24A § 1
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 28

M.G.L.A. 25C § 2

§ 2. Commissioner; appointment; duties

Effective: April 10, 2007
Currentness

The department shall be under the supervision and control of a commissioner who shall be appointed by the governor for a term coterminous with that of the governor, and who shall serve at the pleasure of the governor. The commissioner shall devote his full time to the duties of his office. The position of commissioner shall be classified in accordance with sections 45 and 46C of chapter 30.

Credits
Added by St.2007, c. 19, § 29, eff. April 10, 2007.

M.G.L.A. 25C § 2, MA ST 25C § 2
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 29

M.G.L.A. 26 § 6

§ 6. Commissioner of insurance

Currentness

Upon the expiration of the term of office of a commissioner, his successor shall be appointed by the governor for a term coterminous with that of the governor, and shall serve at the pleasure of the governor. The position of commissioner shall be classified in accordance with section forty-five of chapter thirty and the salary shall be determined in accordance with section forty-six C of said chapter thirty and shall devote full time during business hours to the duties of his office. He shall give bond with sureties in the sum of ten thousand dollars, to be approved by the state treasurer, for the faithful performance of his duties.

Credits

Amended by St.1943, c. 317; St.1946, c. 591, § 40; St.1951, c. 776; St.1955, c. 730, § 40; St.1963, c. 801, § 65; St.1967, c. 844, § 20; St.1969, c. 766, § 39; St.1971, c. 116, § 37; St.1972, c. 300, § 35; St.1973, c. 426, § 38; St.1974, c. 422, § 43; St.1977, c. 234, §§ 112 to 114; St.1977, c. 872, §§ 109 to 111; St.1980, c. 329, § 77; St.1981, c. 699, § 50.

Notes of Decisions (2)

M.G.L.A. 26 § 6, MA ST 26 § 6
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 30

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 149. Labor and Industries (Refs & Annos)

M.G.L.A. 149 § 185

§ 185. Retaliation against employees reporting violations of law or risks to public health, safety or environment; remedies

Currentness

(a) As used in this section, the following words shall have the following meanings:--

(1) “Employee”, any individual who performs services for and under the control and direction of an employer for wages or other remuneration.

(2) “Employer”, the commonwealth, and its agencies or political subdivisions, including, but not limited to, cities, towns, counties and regional school districts, or any authority, commission, board or instrumentality thereof.

(3) “Public body”, (A) the United States Congress, any state legislature, including the general court, or any popularly elected local government body, or any member or employee thereof; (B) any federal, state or local judiciary, or any member or employee thereof, or any grand or petit jury; (C) any federal, state or local regulatory, administrative or public agency or authority, or instrumentality thereof; (D) any federal, state or local law enforcement agency, prosecutorial office, or police or peace officer; or (E) any division, board, bureau, office, committee or commission of any of the public bodies described in the above paragraphs of this subsection.

(4) “Supervisor”, any individual to whom an employer has given the authority to direct and control the work performance of the affected employee, who has authority to take corrective action regarding the violation of the law, rule or regulation of which the employee complains, or who has been designated by the employer on the notice required under subsection (g).

(5) “Retaliatory action”, the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.

(b) An employer shall not take any retaliatory action against an employee because the employee does any of the following:

(1) Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or of another employer with whom the employee's employer has a business relationship, that the employee reasonably believes is

in violation of a law, or a rule or regulation promulgated pursuant to law, or which the employee reasonably believes poses a risk to public health, safety or the environment;

(2) Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law, or activity, policy or practice which the employee reasonably believes poses a risk to public health, safety or the environment by the employer, or by another employer with whom the employee's employer has a business relationship; or

(3) Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or which the employee reasonably believes poses a risk to public health, safety or the environment.

(c)(1) Except as provided in paragraph (2), the protection against retaliatory action provided by subsection (b) (1) shall not apply to an employee who makes a disclosure to a public body unless the employee has brought the activity, policy or practice in violation of a law, or a rule or regulation promulgated pursuant to law, or which the employee reasonably believes poses a risk to public health, safety or the environment, to the attention of a supervisor of the employee by written notice and has afforded the employer a reasonable opportunity to correct the activity, policy or practice.

(2) An employee is not required to comply with paragraph (1) if he: (A) is reasonably certain that the activity, policy or practice is known to one or more supervisors of the employer and the situation is emergency in nature; (B) reasonably fears physical harm as a result of the disclosure provided; or (C) makes the disclosure to a public body as defined in clause (B) or (D) of the definition for “public body” in subsection (a) for the purpose of providing evidence of what the employee reasonably believes to be a crime.

(d) Any employee or former employee aggrieved of a violation of this section may, within two years, institute a civil action in the superior court. Any party to said action shall be entitled to claim a jury trial. All remedies available in common law tort actions shall be available to prevailing plaintiffs. These remedies are in addition to any legal or equitable relief provided herein. The court may: (1) issue temporary restraining orders or preliminary or permanent injunctions to restrain continued violation of this section; (2) reinstate the employee to the same position held before the retaliatory action, or to an equivalent position; (3) reinstate full fringe benefits and seniority rights to the employee; (4) compensate the employee for three times the lost wages, benefits and other remuneration, and interest thereon; and (5) order payment by the employer of reasonable costs, and attorneys' fees.

(e)(1) Except as provided in paragraph (2), in any action brought by an employee under subsection (d), if the court finds said action was without basis in law or in fact, the court may award reasonable attorneys' fees and court costs to the employer.

(2) An employee shall not be assessed attorneys' fees under paragraph (1) if, after exercising reasonable and diligent efforts after filing a suit, the employee moves to dismiss the action against the employer, or files a notice agreeing to a voluntary dismissal, within a reasonable time after determining that the employer would not be found liable for damages.

(f) Nothing in this section shall be deemed to diminish the rights, privileges or remedies of any employee under any other federal or state law or regulation, or under any collective bargaining agreement or employment contract; except that the institution of a private action in accordance with subsection (d) shall be deemed a waiver by the plaintiff of the rights and remedies available

to him, for the actions of the employer, under any other contract, collective bargaining agreement, state law, rule or regulation, or under the common law.

(g) An employer shall conspicuously display notices reasonably designed to inform its employees of their protection and obligations under this section, and use other appropriate means to keep its employees so informed. Each notice posted pursuant to this subsection shall include the name of the person or persons the employer has designated to receive written notifications pursuant to subsection (c).

Credits
Added by St.1993, c. 471. Amended by St.1997, c. 19, § 90.

Notes of Decisions (128)

M.G.L.A. 149 § 185, MA ST 149 § 185
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 31

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XXI. Labor and Industries (Ch. 149-154)
Chapter 151B. Unlawful Discrimination Because of Race, Color, Religious Creed, National Origin, Ancestry or Sex (Refs & Annos)

M.G.L.A. 151B § 4

§ 4. Unlawful practices

Effective: October 13, 2018
Currentness

It shall be an unlawful practice:

1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, pregnancy or a condition related to said pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, ancestry or status as a veteran of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

1A. It shall be unlawful discriminatory practice for an employer to impose upon an individual as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such individual to violate, or forego the practice of, his creed or religion as required by that creed or religion including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or holy day and the employer shall make reasonable accommodation to the religious needs of such individual. No individual who has given notice as hereinafter provided shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided, however, that any employee intending to be absent from work when so required by his or her creed or religion shall notify his or her employer not less than ten days in advance of each absence, and that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time at some other mutually convenient time. Nothing under this subsection shall be deemed to require an employer to compensate an employee for such absence. “Reasonable Accommodation”, as used in this subsection shall mean such accommodation to an employee's or prospective employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business. The employee shall have the burden of proof as to the required practice of his creed or religion. As used in this subsection, the words “creed or religion” mean any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by an established church or other religious institution or organization.

Undue hardship, as used herein, shall include the inability of an employer to provide services which are required by and in compliance with all federal and state laws, including regulations or tariffs promulgated or required by any regulatory agency having jurisdiction over such services or where the health or safety of the public would be unduly compromised by the absence

of such employee or employees, or where the employee's presence is indispensable to the orderly transaction of business and his or her work cannot be performed by another employee of substantially similar qualifications during the period of absence, or where the employee's presence is needed to alleviate an emergency situation. The employer shall have the burden of proof to show undue hardship.

1B. For an employer in the private sector, by himself or his agent, because of the age of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

1C. For the commonwealth or any of its political subdivisions, by itself or its agent, because of the age of any individual, to refuse to hire or employ or to bar or discharge from employment such individual in compensation or in terms, conditions or privileges of employment unless pursuant to any other general or special law.

1D. For an employer, an employment agency, the commonwealth or any of its political subdivisions, by itself or its agents, to deny initial employment, reemployment, retention in employment, promotion or any benefit of employment to a person who is a member of, applies to perform, or has an obligation to perform, service in a uniformed military service of the United States, including the National Guard, on the basis of that membership, application or obligation.

1E. (a) For an employer to deny a reasonable accommodation for an employee’s pregnancy or any condition related to the employee’s pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child if the employee requests such an accommodation; provided, however, that an employer may deny such an accommodation if the employer can demonstrate that the accommodation would impose an undue hardship on the employer’s program, enterprise or business. It shall also be an unlawful practice under this subsection to:

(i) take adverse action against an employee who requests or uses a reasonable accommodation in terms, conditions or privileges of employment including, but not limited to, failing to reinstate the employee to the original employment status or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other applicable service credits when the need for a reasonable accommodation ceases;

(ii) deny an employment opportunity to an employee if the denial is based on the need of the employer to make a reasonable accommodation to the known conditions related to the employee’s pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child;

(iii) require an employee affected by pregnancy, or require said employee affected by a condition related to the pregnancy, including, but not limited to, lactation or the need to express breast milk for a nursing child, to accept an accommodation that the employee chooses not to accept, if that accommodation is unnecessary to enable the employee to perform the essential functions of the job;

(iv) require an employee to take a leave if another reasonable accommodation may be provided for the known conditions related to the employee’s pregnancy, including, but not limited to, lactation or the need to express breast milk for a nursing child, without undue hardship on the employer’s program, enterprise or business;

(v) refuse to hire a person who is pregnant because of the pregnancy or because of a condition related to the person's pregnancy, including, but not limited to, lactation or the need to express breast milk for a nursing child; provided, however, that the person is capable of performing the essential functions of the position with a reasonable accommodation and that reasonable accommodation would not impose an undue hardship, demonstrated by the employer, on the employer's program, enterprise or business.

(b) As used in this subsection, the following words shall have the following meanings unless the context clearly requires otherwise:

"Reasonable accommodation", may include, but shall not be limited to: (i) more frequent or longer paid or unpaid breaks; (ii) time off to attend to a pregnancy complication or recover from childbirth with or without pay; (iii) acquisition or modification of equipment or seating; (iv) temporary transfer to a less strenuous or hazardous position; (v) job restructuring; (vi) light duty; (vii) private non-bathroom space for expressing breast milk; (viii) assistance with manual labor; or (ix) a modified work schedule; provided, however, that an employer shall not be required to discharge or transfer an employee with more seniority or promote an employee who is not able to perform the essential functions of the job with or without a reasonable accommodation.

"Undue hardship", an action requiring significant difficulty or expense; provided, however, that the employer shall have the burden of proving undue hardship; provided further, that in making a determination of undue hardship, the following factors shall be considered: (i) the nature and cost of the needed accommodation; (ii) the overall financial resources of the employer; (iii) the overall size of the business of the employer with respect to the number of employees and the number, type and location of its facilities; and (iv) the effect on expenses and resources or any other impact of the accommodation on the employer's program, enterprise or business.

(c) Upon request for an accommodation from the employee or prospective employee capable of performing the essential functions of the position involved, the employee or prospective employee and the employer shall engage in a timely, good faith and interactive process to determine an effective, reasonable accommodation to enable the employee or prospective employee to perform the essential functions of the employee's job or the position to which the prospective employee has applied. An employer may require that documentation about the need for a reasonable accommodation come from an appropriate health care or rehabilitation professional; provided, however, that an employer shall not require documentation from an appropriate health care or rehabilitation professional for the following accommodations: (i) more frequent restroom, food or water breaks; (ii) seating; (iii) limits on lifting more than 20 pounds; and (iv) private non-bathroom space for expressing breast milk. An "appropriate health care or rehabilitation professional" shall include, but shall not be limited to, a medical doctor, including a psychiatrist, a psychologist, a nurse practitioner, a physician assistant, a psychiatric clinical nurse specialist, a physical therapist, an occupational therapist, a speech therapist, a vocational rehabilitation specialist, a midwife, a lactation consultant or another licensed mental health professional authorized to perform specified mental health services. An employer may require documentation for an extension of the accommodation beyond the originally agreed to accommodation.

(d) Written notice of the right to be free from discrimination in relation to pregnancy or a condition related to the employee's pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, including the right to reasonable accommodations for conditions related to pregnancy pursuant to this subsection, shall be distributed by an employer to its employees. The notice shall be provided in a handbook, pamphlet or other means of notice to all employees including, but not limited to: (i) new employees at or prior to the commencement of employment; and (ii) an employee who notifies the employer of a pregnancy or an employee who notifies the employer of a condition related to the employee's pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child not more than 10 days after such notification.

(e) Subject to appropriation, the commission shall develop courses of instruction and conduct public education efforts as necessary to inform employers, employees and employment agencies about the rights and responsibilities established under this subsection not more than 180 days after the appropriation.

(f) This subsection shall not be construed to preempt, limit, diminish or otherwise affect any other law relating to sex discrimination or pregnancy or in any way diminish the coverage for pregnancy or a condition related to pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child under section 105D of chapter 149.

2. For a labor organization, because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry or status as a veteran of any individual, or because of the handicap of any person alleging to be a qualified handicapped person, to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer unless based upon a bona fide occupational qualification.

3. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry or record in connection with employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, pregnancy or a condition related to said pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, ancestry or status as a veteran, or the handicap of a qualified handicapped person or any intent to make any such limitation, specification or discrimination, or to discriminate in any way on the ground of race, color, religious creed, national origin, sex, gender identity, sexual orientation, age, genetic information, pregnancy or a condition related to said pregnancy including, but not limited to, lactation or the need to express breast milk for a nursing child, ancestry, status as a veteran or the handicap of a qualified handicapped person, unless based upon a bona fide occupational qualification.

3A. For any person engaged in the insurance or bonding business, or his agent, to make any inquiry or record of any person seeking a bond or surety bond conditioned upon faithful performance of his duties or to use any form of application in connection with the furnishing of such bond, which seeks information relative to the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, or ancestry of the person to be bonded.

3B. For any person whose business includes granting mortgage loans or engaging in residential real estate-related transactions to discriminate against any person in the granting of any mortgage loan or in making available such a transaction, or in the terms or conditions of such a loan or transaction, because of race, color, religion, sex, gender identity, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, children, national origin, genetic information, ancestry, age or handicap. Such transactions shall include, but not be limited to:

(1) the making or purchasing of loans or the provision of other financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling; or the making or purchasing of loans or the provision of other financial assistance secured by residential real estate; or

(2) the selling, brokering, or appraising of residential real estate.

In the case of age, the following shall not be an unlawful practice:

(1) an inquiry of age for the purpose of determining a pertinent element of credit worthiness;

(2) the use of an empirically derived credit system which considers age; provided, however, that such system is based on demonstrably and statistically sound data; and provided, further, that such system does not assign a negative factor or score to any applicant who has reached age sixty-two;

(3) the offering of credit life insurance or credit disability insurance, in conjunction with any mortgage loan, to a limited age group;

(4) the failure or refusal to grant any mortgage loan to a person who has not attained the age of majority;

(5) the failure or refusal to grant any mortgage loan the duration of which exceeds the life expectancy of the applicant as determined by the most recent Individual Annuity Mortality Table.

Nothing in this subsection prohibits a person engaged in the business of furnishing appraisals of real property from taking into consideration factors other than those hereinabove proscribed.

3C. For any person to deny another person access to, or membership or participation in, a multiple listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against such person in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, gender identity, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, children, national origin, genetic information, ancestry, age, or handicap.

4. For any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five.

4A. For any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter.

5. For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so.

6. For the owner, lessee, sublessee, licensed real estate broker, assignee or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other person having the right of ownership or possession or right to rent or lease, or sell or negotiate for the sale of such accommodations, or any agent or employee of such a person, or any

organization of unit owners in a condominium or housing cooperative: (a) to refuse to rent or lease or sell or negotiate for sale or otherwise to deny to or withhold from any person or group of persons such accommodations because of the race, religious creed, color, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or marital status of such person or persons or because such person is a veteran or member of the armed forces, or because such person is blind, or hearing impaired or has any other handicap; (b) to discriminate against any person because of his race, religious creed, color, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry, or marital status or because such person is a veteran or member of the armed forces, or because such person is blind, or hearing impaired or has any other handicap in the terms, conditions or privileges of such accommodations or the acquisitions thereof, or in the furnishings of facilities and services in connection therewith, or because such a person possesses a trained dog guide as a consequence of blindness, or hearing impairment; (c) to cause to be made any written or oral inquiry or record concerning the race, religious creed, color, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry or marital status of the person seeking to rent or lease or buy any such accommodation, or concerning the fact that such person is a veteran or a member of the armed forces or because such person is blind or hearing impaired or has any other handicap. The word "age" as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over, nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over if the housing owner or manager register biennially with the department of housing and community development. For the purpose of this subsection, housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq.

For purposes of this subsection, discrimination on the basis of handicap includes, but is not limited to, in connection with the design and construction of: (1) all units of a dwelling which has three or more units and an elevator which are constructed for first occupancy after March thirteenth, nineteen hundred and ninety-one; and (2) all ground floor units of other dwellings consisting of three or more units which are constructed for first occupancy after March thirteenth, nineteen hundred and ninety-one, a failure to design and construct such dwellings in such a manner that (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons; (ii) all the doors are designed to allow passage into and within all premises within such dwellings and are sufficiently wide to allow passage by handicapped persons in wheelchairs; and (iii) all premises within such dwellings contain the following features of adaptive design; (a) an accessible route into and through the dwelling; (b) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; (c) reinforcements in bathroom walls to allow later installation of grab bars; and (d) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

7. For the owner, lessee, sublessee, real estate broker, assignee or managing agent of other covered housing accommodations or of land intended for the erection of any housing accommodation included under subsection 10, 11, 12, or 13 of section one, or other person having the right of ownership or possession or right to rent or lease or sell, or negotiate for the sale or lease of such land or accommodations, or any agent or employee of such a person or any organization of unit owners in a condominium or housing cooperative: (a) to refuse to rent or lease or sell or negotiate for sale or lease or otherwise to deny or withhold from any person or group of persons such accommodations or land because of race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or marital status, veteran status or membership in the armed forces, blindness, hearing impairment, or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment or other handicap of such person or persons; (b) to discriminate against any person because of his race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or marital status, veteran status or membership in the armed services, blindness, or hearing impairment or other handicap, or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment in the terms, conditions or privileges of such accommodations or land or the acquisition

thereof, or in the furnishing of facilities and services in the connection therewith or (c) to cause to be made any written or oral inquiry or record concerning the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, marital status, veteran status or membership in the armed services, blindness, hearing impairment or other handicap or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment, of the person seeking to rent or lease or buy any such accommodation or land; provided, however, that this subsection shall not apply to the leasing of a single apartment or flat in a two family dwelling, the other occupancy unit of which is occupied by the owner as his residence. The word "age" as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over, nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over if the housing owner or manager register biennially with the department of housing and community development. For the purpose of this subsection, housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq.

7A. For purposes of subsections 6 and 7 discrimination on the basis of handicap shall include but not be limited to:

(1) a refusal to permit or to make, at the expense of the handicapped person, reasonable modification of existing premises occupied or to be occupied by such person if such modification is necessary to afford such person full enjoyment of such premises; provided, however, that, in the case of publicly assisted housing, multiple dwelling housing consisting of ten or more units, or contiguously located housing consisting of ten or more units, reasonable modification shall be at the expense of the owner or other person having the right of ownership; provided, further, that, in the case of public ownership of such housing units the cost of such reasonable modification shall be subject to appropriation; and provided, further, that, in the case of a rental, the landlord may, where the modification to be paid for by the handicapped person will materially alter the marketability of the housing, condition permission for a modification on the tenant agreeing to restore or pay for the cost of restoring, the interior of the premises to the condition that existed prior to such modification, reasonable wear and tear excepted;

(2) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling; and

(3) discrimination against or a refusal to rent to a person because of such person's need for reasonable modification or accommodation.

Reasonable modification shall include, but not be limited to, making the housing accessible to mobility-impaired, hearing-impaired and sight-impaired persons including installing raised numbers which may be read by a sight-impaired person, installing a door bell which flashes a light for a hearing-impaired person, lowering a cabinet, ramping a front entrance of five or fewer vertical steps, widening a doorway, and installing a grab bar; provided, however, that for purposes of this subsection, the owner or other person having the right of ownership shall not be required to pay for ramping a front entrance of more than five steps or for installing a wheelchair lift.

Notwithstanding any other provisions of this subsection, an accommodation or modification which is paid for by the owner or other person having the right of ownership is not considered to be reasonable if it would impose an undue hardship upon the owner or other person having the right of ownership and shall therefore not be required. Factors to be considered shall include, but not be limited to, the nature and cost of the accommodation or modification needed, the extent to which the accommodation or modification would materially alter the marketability of the housing, the overall size of the housing business of the owner or other person having the right of ownership, including but not limited to, the number and type of housing units, size of

budget and available assets, and the ability of the owner or other person having the right of ownership to recover the cost of the accommodation or modification through a federal tax deduction. Ten percent shall be the maximum number of units for which an owner or other person having the right of ownership shall be required to pay for a modification in order to make units fully accessible to persons using a wheelchair pursuant to the requirements of this subsection.

In the event a wheelchair accessible unit becomes or will become vacant, the owner or other person having the right of ownership shall give timely notice to a person who has, within the previous twelve months, notified the owner or person having the right of ownership that such person is in need of a unit which is wheelchair accessible, and the owner or other person having the right of ownership shall give at least fifteen days notice of the vacancy to the Massachusetts rehabilitation commission, which shall maintain a central registry of accessible apartment housing under the provisions of section seventy-nine of chapter six. During such fifteen day notice period, the owner or other person having the right of ownership may lease or agree to lease the unit only if it is to be occupied by a person who is in need of wheelchair accessibility.

Notwithstanding any general or special law, by-law or ordinance to the contrary, there shall not be established or imposed a rent or other charge for such handicap-accessible housing which is higher than the rent or other charge for comparable nonaccessible housing of the owner or other person having the right of ownership.

7B. For any person to make print, or publish, or cause to be made, printed, or published any notice, statement or advertisement, with respect to the sale or rental of multiple dwelling, contiguously located, publicly assisted or other covered housing accommodations that indicates any preference, limitation, or discrimination based on race, color, religion, sex, gender identity, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, national origin, genetic information, ancestry, children, marital status, public assistance recipiency, or handicap or an intention to make any such preference, limitation or discrimination except where otherwise legally permitted.

8. For the owner, lessee, sublessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, commercial space: (1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons such commercial space because of race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry handicap or marital status of such person or persons. (2) To discriminate against any person because of his race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, handicap or marital status in the terms, conditions or privileges of the sale, rental or lease of any such commercial space or in the furnishing of facilities or services in connection therewith. (3) To cause to be made any written or oral inquiry or record concerning the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, handicap or marital status of a person seeking to rent or lease or buy any such commercial space. The word “age” as used in this subsection shall not apply to persons who are minors, nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in self-contained retirement communities constructed expressly for use by the elderly and which are at least twenty acres in size and have a minimum age requirement for residency of at least fifty-five years.

9. For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or

disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred 3 or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within 3 years immediately preceding the date of such application for employment or such request for information, or (iv) a criminal record, or anything related to a criminal record, that has been sealed or expunged pursuant to chapter 276.

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records.

9 ½. For an employer to request on its initial written application form criminal offender record information; provided, however, that except as otherwise prohibited by subsection 9, an employer may inquire about any criminal convictions on an applicant's application form if: (i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses; or (ii) the employer or an affiliate of such employer is subject to an obligation imposed by any federal or state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1 or more types of criminal offenses.

9A. For an employer himself or through his agent to refuse, unless based upon a bonafide occupational qualification, to hire or employ or to bar or discharge from employment any person by reason of his or her failure to furnish information regarding his or her admission, on one or more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such person has been discharged from such facility or facilities and can prove by a psychiatrist's certificate that he is mentally competent to perform the job or the job for which he is applying. No application for employment shall contain any questions or requests for information regarding the admission of an applicant, on one or more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such applicant has been discharged from such public or private facility or facilities and is no longer under treatment directly related to such admission.

10. For any person furnishing credit, services or rental accommodations to discriminate against any individual who is a recipient of federal, state, or local public assistance, including medical assistance, or who is a tenant receiving federal, state, or local housing subsidies, including rental assistance or rental supplements, because the individual is such a recipient, or because of any requirement of such public assistance, rental assistance, or housing subsidy program.

11. For the owner, sublessees, real estate broker, assignee or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other covered housing accommodations, or other person having the right of ownership or possession or right to rent or lease or sell such accommodations, or any agent or employee of such person or organization of unit owners in a condominium or housing cooperative, to refuse to rent or lease or sell or otherwise to deny to or withhold from any person such accommodations because such person has a child or children who shall occupy the premises with such person or to discriminate against any person in the terms, conditions, or privileges of such accommodations or the acquisition thereof, or in the furnishing of facilities and services in connection therewith, because such person has a child or children who occupy or shall occupy the premises with such person; provided, however, that nothing herein shall limit the applicability of any local, state, or federal restrictions regarding the maximum number of persons permitted to occupy a dwelling. When the commission or a court finds that discrimination in violation of this paragraph has occurred with respect to a residential premises containing dangerous levels of lead in paint, plaster, soil, or other accessible material, notification of such finding shall be sent to the director of the childhood lead poisoning prevention program.

This subsection shall not apply to:

(1) Dwellings containing three apartments or less, one of which apartments is occupied by an elderly or infirm person for whom the presence of children would constitute a hardship. For purposes of this subsection, an "elderly person" shall mean a person sixty-five years of age or over, and an "infirm person" shall mean a person who is disabled or suffering from a chronic illness.

(2) The temporary leasing or temporary subleasing of a single family dwelling, a single apartment, or a single unit of a condominium or housing cooperative, by the owner of such dwelling, apartment, or unit, or in the case of a subleasing, by the sublessor thereof, who ordinarily occupies the dwelling, apartment, or unit as his or her principal place of residence. For purposes of this subsection, the term "temporary leasing" shall mean leasing during a period of the owner's or sublessor's absence not to exceed one year.

(3) The leasing of a single dwelling unit in a two family dwelling, the other occupancy unit of which is occupied by the owner as his residence.

11A. For an employer, or an employer's agent, to refuse to restore certain employees to employment following an absence by reason of a parental leave taken pursuant to section 105D of chapter 149 or to otherwise fail to comply with that section, or for the commonwealth and any of its boards, departments and commissions to deny vacation credit to an employee for the fiscal year during which the employee is absent due to a parental leave taken pursuant to said section 105D of said chapter 149, or to impose any other penalty as a result of a parental leave of absence.

12. For any retail store which provides credit or charge account privileges to refuse to extend such privileges to a customer solely because said customer had attained age sixty-two or over.

13. For any person to directly or indirectly induce, attempt to induce, prevent, or attempt to prevent the sale, purchase, or rental of any dwelling or dwellings by:

(a) implicit or explicit representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular age, race, color, religion, sex, gender identity, national or ethnic origin, or economic level or a handicapped person, or a person having a child, or implicit or explicit representations regarding the effects or consequences of any such entry or prospective entry;

(b) unrequested contact or communication with any person or persons, initiated by any means, for the purpose of so inducing or attempting to induce the sale, purchase, or rental of any dwelling or dwellings when he knew or, in the exercise of reasonable care, should have known that such unrequested solicitation would reasonably be associated by the persons solicited with the entry into the neighborhood of a person or persons of a particular age, race, color, religion, sex, gender identity, national or ethnic origin, or economic level or a handicapped person, or a person having a child;

(c) implicit or explicit false representations regarding the availability of suitable housing within a particular neighborhood or area, or failure to disclose or offer to show all properties listed or held for sale or rent within a requested price or rental range, regardless of location; or

(d) false representations regarding the listing, prospective listing, sale, or prospective sale of any dwelling.

14. For any person furnishing credit or services to deny or terminate such credit or services or to adversely affect an individual's credit standing because of such individual's sex, gender identity, marital status, age or sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object; provided that in the case of age the following shall not be unlawful practices:

(1) an inquiry of age for the purpose of determining a pertinent element of creditworthiness;

(2) the use of empirically derived credit systems which consider age, provided such systems are based on demonstrably and statistically sound data and provided further that such systems do not assign a negative factor or score to any applicant who has reached age sixty-two;

(3) the offering of credit life insurance or credit disability insurance, in conjunction with any credit or services, to a limited age group;

(4) the denial of any credit or services to a person who has not attained the age of majority;

(5) the denial of any credit or services the duration of which exceeds the life expectancy of the applicant as determined by the most recent Individual Annuity Mortality Table; or

(6) the offering of more favorable credit terms to students, to persons aged eighteen to twenty-one, or to persons who have reached the age of sixty-two.

Any person who violates the provisions of this subsection shall be liable in an action of contract for actual damages; provided, however, that, if there are no actual damages, the court may assess special damages to the aggrieved party not to exceed one thousand dollars; and provided further, that any person who has been found to violate a provision of this subsection by a court of competent jurisdiction shall be assessed the cost of reasonable legal fees actually incurred.

15. For any person responsible for recording the name of or establishing the personal identification of an individual for any purpose, including that of extending credit, to require such individual to use, because of such individual's sex or marital status, any surname other than the one by which such individual is generally known.

16. For any employer, personally or through an agent, to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business. For purposes of this subsection, the word employer shall include an agency which employs individuals directly for the purpose of furnishing part-time or temporary help to others.

In determining whether an accommodation would impose an undue hardship on the conduct of the employer's business, factors to be considered include:--

(1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;

(2) the type of the employer's operation, including the composition and structure of the employer's workforce; and

(3) the nature and cost of the accommodation needed.

Physical or mental job qualification requirement with respect to hiring, promotion, demotion or dismissal from employment or any other change in employment status or responsibilities shall be functionally related to the specific job or jobs for which the individual is being considered and shall be consistent with the safe and lawful performance of the job.

An employer may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job, and an employer may invite applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action efforts.

16A. For an employer, personally or through its agents, to sexually harass any employee.

17. Notwithstanding any provision of this chapter, it shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to:

(a) observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this section, except that no such employee benefit plan shall excuse the failure to hire any person, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any person because of age except as permitted by paragraph (b).

(b) require the compulsory retirement of any person who has attained the age of sixty-five and who, for the two year period immediately before retirement, is employed in a bona fide executive or high policymaking position, if such person entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan, or any combination of such plans, of the employer, which equals, in the aggregate, at least forty-four thousand dollars.

(c) require the retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure or similar arrangement providing for unlimited tenure at an independent institution of higher education, or to limit the employment in a faculty capacity of such an employee, or another person who has attained seventy years of age who was formerly employed under a contract of unlimited tenure or similar arrangement, to such terms and to such a period as would serve the present and future needs of the institution, as determined by it; provided, however, that in making such a determination, no institution shall use as a qualification for employment or reemployment, the fact that the individual is under any particular age.

18. For the owner, lessee, sublessee, licensed real estate broker, assignee, or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other covered housing accommodations, or other person having the right of ownership or possession, or right to rent or lease, or sell or negotiate for the sale of such accommodations, or any

agent or employee of such person or any organization of unit owners in a condominium or housing cooperative to sexually harass any tenant, prospective tenant, purchaser or prospective purchaser of property.

Notwithstanding the foregoing provisions of this section, it shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to inquire of an applicant for employment or membership as to whether or not he or she is a veteran or a citizen.

Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

Notwithstanding the foregoing provisions of this section, (a) every employer, every employment agency, including the division of employment and training, and every labor organization shall make and keep such records relating to race, color or national origin as the commission may prescribe from time to time by rule or regulation, after public hearing, as reasonably necessary for the purpose of showing compliance with the requirements of this chapter, and (b) every employer and labor organization may keep and maintain such records and make such reports as may from time to time be necessary to comply, or show compliance with, any executive order issued by the President of the United States or any rules or regulations issued thereunder prescribing fair employment practices for contractors and subcontractors under contract with the United States, or, if not subject to such order, in the manner prescribed therein and subject to the jurisdiction of the commission. Such requirements as the commission may, by rule or regulation, prescribe for the making and keeping of records under clause (a) shall impose no greater burden or requirement on the employer, employment agency or labor organization subject thereto, than the comparable requirements which could be prescribed by Federal rule or regulation so long as no such requirements have in fact been prescribed, or which have in fact been prescribed for an employer, employment agency or labor organization under the authority of the Civil Rights Act of 1964, from time to time amended.[1] This paragraph shall apply only to employers who on each working day in each of twenty or more calendar weeks in the annual period ending with each date set forth below, employed more employees than the number set forth beside such date, and to labor organizations which have more members on each such working day during such period.

Period Ending.	***Minimum Employees or Members.***
June 30, 1965	100
June 30, 1966	75
June 30, 1967	50
June 30, 1968 and thereafter	25

Nothing contained in this chapter or in any rule or regulation issued by the commission shall be interpreted as requiring any employer, employment agency or labor organization to grant preferential treatment to any individual or to any group because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information or ancestry of such individual or group because of imbalance which may exist between the total number or percentage of persons employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization or admitted to or employed in, any apprenticeship or other training program, and the total number or

percentage of persons of such race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information or ancestry in the commonwealth or in any community, section or other area therein, or in the available work force in the commonwealth or in any of its political subdivisions.

19. (a) It shall be unlawful discrimination for any employer, employment agency, labor organization, or licensing agency to

(1) refuse to hire or employ, represent, grant membership to, or license a person on the basis of that person's genetic information;

(2) collect, solicit or require disclosure of genetic information from any person as a condition of employment, or membership, or of obtaining a license;

(3) solicit submission to, require, or administer a genetic test to any person as a condition of employment, membership, or obtaining a license;

(4) offer a person an inducement to undergo a genetic test or otherwise disclose genetic information;

(5) question a person about their genetic information or genetic information concerning their family members, or inquire about previous genetic testing;

(6) use the results of a genetic test or other genetic information to affect the terms, conditions, compensation or privileges of a person's employment, representation, membership, or the ability to obtain a license;

(7) terminate or refuse to renew a person's employment, representation, membership, or license on the basis of a genetic test or other genetic information; or

(8) otherwise seek, receive, or maintain genetic information for non-medical purposes.

<[There is no paragraph (b).]>

Credits

Added by St.1946, c. 368, § 4. Amended by St.1947, c. 424; St.1950, c. 697, §§ 6 to 8; St.1955, c. 274; St.1957, c. 426, §§ 2, 3; St.1959, c. 239, § 2; St.1960, c. 163, § 2; St.1961, c. 128; St.1963, c. 197, § 2; St.1965, c. 213, § 2; St.1965, c. 397, §§ 4 to 6; St.1966, c. 361; St.1969, c. 90; St.1969, c. 314; St.1971, c. 661; St.1971, c. 726; St.1971, c. 874, §§ 1 to 3; St.1972, c. 185; St.1972, c. 428; St.1972, c. 542; St.1972, c. 786, § 2; St.1972, c. 790, § 2; St.1973, c. 168; St.1973, c. 187, §§ 1 to 3; St.1973, c. 325; St.1973, c. 701, § 1; St.1973, c. 929; St.1973, c. 1015, §§ 1 to 3; St.1974, c. 531; St.1975, c. 84; St.1975, c. 367, § 3; St.1975, c. 637, §§ 1, 2; St.1978, c. 89; St.1978, c. 288, §§ 1, 2; St.1979, c. 710, § 2; St.1980, c. 343; St.1983, c. 533, §§ 4 to 6; St.1983, c. 585, § 7; St.1983, c. 628, §§ 1 to 3; St.1984, c. 266, §§ 5 to 7; St.1985, c. 239; St.1986, c. 588, § 3; St.1987, c. 270, §§ 1, 2; St.1987, c. 773, § 11; St.1989, c. 516, §§ 4 to 7 and 9 to 14; St.1989, c. 544; St.1989, c. 722, §§ 13 to 23; St.1990, c. 177, § 341; St.1990, c. 283, §§ 1, 2; St.1996, c. 262; St.1997, c. 2, § 2; St.1997, c. 19, §§ 105, 106; St.1998, c. 161, § 532; St.2000, c. 254, §§ 6 to 23A; St.2001, c. 11, §§ 1, 2; St.2004, c. 355, § 1, eff. Dec. 22, 2004; St.2006, c. 291, §§ 1, 2, eff. Dec. 6, 2006;

St.2010, c. 256, § 101, eff. Nov. 4, 2010; St.2011, c. 199, § 7, eff. July 1, 2012; St.2014, c. 484, § 2, eff. April 7, 2015; St.2016, c. 141, §§ 22 to 24, eff. July 14, 2016; St.2017, c. 54, §§ 1, 2, eff. April 1, 2018; St.2018, c. 69, §§ 103, 104, eff. Oct. 13, 2018.

Notes of Decisions (2570)

Footnotes

1 42 U.S.C.A. § 2000a.

M.G.L.A. 151B § 4, MA ST 151B § 4

Current through Chapter 3 of the 2021 1st Annual Session

EXHIBIT 32

M.G.L.A. 218 § 27A

§ 27A. Jury sessions

Currentness

(a) Every division of the district court department is authorized to hold jury sessions for the purpose of conducting jury trials of cases commenced in the several courts of criminal offenses over which the district courts have original jurisdiction under the provisions of section twenty-six. The Boston municipal court department shall also be authorized for the purpose of conducting jury trials in cases commenced in said department and for the purpose of conducting jury trials of cases commenced in the divisions of the district court department in Suffolk county.

(b) The chief justice for the district court department shall designate at least one division in each county or an adjoining county for the purpose of conducting jury trials; provided, however, that jury trials in cases commenced in the courts within Suffolk county shall be held in the Boston municipal court department or district courts in Suffolk county or with the approval of the chief justice, may be held in such divisions of the district court department the judicial districts of which adjoin Suffolk county as are designated by said chief justice; and jury trials in cases commenced in the divisions for Dukes county and Nantucket county may be held in Barnstable county or Bristol county; and provided further that, with the approval of the chief justice for the superior court department, facilities of said superior court may be designated by the chief justice for administration and management of the trial court for jury trials in cases commenced in the district court department or in the Boston municipal court department. Jurors shall be drawn from the county in which trial is held.

The chief justice of the district court department may also designate one or more divisions in each county for the purpose of conducting jury-waived trials of cases commenced in any court of said county consistent with the requirements of the proper administration of justice.

(c) A defendant in any division of the district court who waives his right to jury trial as provided in section twenty-six A shall be provided a jury-waived trial in the same division.

A defendant in any division of the district court who does not waive his right to jury trial as provided in section twenty-six A shall be provided a jury trial in a jury session in the same division if such has been established in said division. If such session has not been so established, the defendant shall be provided a jury trial in a jury session as hereinbefore designated. In cases where the defendant declines to waive the right to jury trial, the clerk shall forthwith transfer the case for trial in the appropriate jury session. Such transfer shall be governed by procedures to be established by the chief justice for the district court department.

(d) The justice presiding over a jury session shall have and exercise all the powers and duties which a justice sitting in the superior court department has and may exercise in the trial and disposition of criminal cases including the power to report questions of law to the appeals court, but in no case may he impose a sentence to the state prison. No justice so sitting shall act in a case in which he has sat or held an inquest or otherwise taken part in any proceeding therein.

(e) Trials by juries of six persons shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court except that the number of peremptory challenges shall be limited to two to each defendant. The commonwealth shall be entitled to as many challenges as equal the whole number to which all the defendants in the case entitled.[1]

(f) For the jury sessions, jurors shall be provided by the office of the jury commissioner in accordance with the provisions of chapter two hundred and thirty-four A.

(g) The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in the trial of all cases in which the right to jury trial has not been waived and may appear in any other case. The chief justices for the district court department and the Boston municipal court department shall arrange for the sittings of the jury sessions of their respective departments and shall assign justices thereto, to the end that speedy trials may be provided. Review may be had directly by the appeals court, by appeals, report or otherwise in the same manner provided for trials of criminal cases in the superior court.

(h) The justice presiding at such jury session in the Boston municipal court department or district court department shall, upon the request of the defendant, appoint a stenographer; provided, however, that where the defendant claims indigency, such appointment is determined to be reasonably necessary in accordance with the provisions of chapter two hundred and sixty-one. Such stenographer shall be sworn, and shall take stenographic notes of all the testimony given at the trial, and shall provide the parties thereto with a transcript of his notes or any part thereof taken at the trial or hearing for which he shall be paid by the party requesting it at the rate fixed by the chief justice for the department where the case is tried; and provided, further, that such rate shall not exceed the rate provided by section eighty-eight of chapter two hundred and twenty-one. Said chief justice may make regulations not inconsistent with law relative to the assignments, duties and services of stenographers appointed for sessions in his department and any other matter relative to stenographers. The compensation and expenses of a stenographer shall be paid by the commonwealth.

The request for the appointment of a stenographer to preserve the testimony at a trial shall be given to the clerk of the court by the defendant in writing no later than forty-eight hours prior to the proceeding for which the stenographer has been requested. In the Boston municipal court department or the district court department, the defendant shall file with such request an affidavit of indigency and request for payment by the commonwealth of the cost of the transcript and the court shall hold a hearing on such request prior to appointing a stenographer, in those cases where the defendant alleges that he will be unable to pay said cost. Said hearing shall be governed by the provisions of sections twenty-seven A to twenty-seven G, inclusive, of chapter two hundred and sixty-one, and the cost of such transcript shall be considered an extra cost as provided therein. If the court is unable, for any reason, to provide a stenographer, the proceedings may be recorded by electronic means. The original recording of proceedings in the Boston municipal court department or the district court department made with a recording device under the exclusive control of the court shall be the official record of such proceedings. Said record or a copy of all or a part thereof, certified by the chief justices for the Boston municipal court department or the district court department, or his designee, to be an accurate electronic reproduction of said record or part thereof, or a typewritten transcript of all or a part of said record or copy thereof, certified to be accurate by the court or by the preparer of said transcript, or stipulated to by the parties, shall be admissible in any court as evidence of testimony given whenever proof of such testimony is otherwise competent. The defendant may request payment by the commonwealth of the cost of said transcript subject to the same provisions regarding a transcript of a stenographer as provided hereinbefore.

(i) In any case heard in a jury session where a defendant is found guilty and placed on probation, he shall thereafter be supervised by the probation officer of the court in which the case originated, unless the trial justice shall order otherwise and unless the regulations of the commissioner of probation provide otherwise.

Credits

Added by St.1972, c. 620, § 1. Amended by St.1978, c. 478, § 189; St.1979, c. 344, §§ 3, 4; St.1984, c. 371; St.1992, c. 133, § 557; St.1992, c. 379, § 141; St.1993, c. 151, § 50.

Notes of Decisions (31)

Footnotes

1 So in enrolled bill.

M.G.L.A. 218 § 27A, MA ST 218 § 27A

Current through Chapter 3 of the 2021 1st Annual Session

End of Document

EXHIBIT 33

M.G.L.A. Const. Pt. 1, Art. 30

Art. XXX. Separation of legislative, executive and judicial departments

Currentness

Art. XXX. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Notes of Decisions (606)

M.G.L.A. Const. Pt. 1, Art. 30, MA CONST Pt. 1, Art. 30
Current through amendments approved February 1, 2020

End of Document

EXHIBIT 34

Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the Second the Frame of Government (Refs & Annos)
Chapter II. Executive Power
Section I. Governor

M.G.L.A. Const. Pt. 2, C. 2, § 1, Art. 1

Art. I. Supreme executive magistrate; title

Currentness

Art. I. There shall be a supreme executive magistrate, who shall be styled, The Governor of the Commonwealth of Massachusetts; and whose title shall be--His Excellency.

Notes of Decisions (32)

M.G.L.A. Const. Pt. 2, C. 2, § 1, Art. 1, MA CONST Pt. 2, C. 2, § 1, Art. 1
Current through amendments approved February 1, 2020

End of Document