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COMMONWEALTH OF MASSACHUSETTS
THE SUPREME JUDICIAL COURT

ESSEX, SS SJC-13073

SAUNDRA R. EDWARDS

v.

COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE PLAINTIFF - APPELLEE SAUNDRA R EDWARDS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

ISSUES PRESENTED..7

PROCEDURAL HISTORY..7

FACTUAL BACKGROUND 8

A. Sex Offender Registration 8

B. The Bernard Sigh/Paglia Matter 12

C. Ms. Edwards is Appointed Chair of the SORB 18

D. The Commonwealth's Termination of Ms. Edwards' Employment.. 23

SUMMARY OF THE ARGUMENT 26

ARGUMENT..29

I. THE COMMONWEALTH'S LEGAL ARGUMENTS CONCERNING THE GOVERNOR LACK MERIT. MS. EDWARDS, A COMMONWEALTH EMPLOYEE, IS ENTITLED TO SEEK REMEDIES UNDER THE WHISTLEBLOWER ACT 29

A. Standard of Review - Whistleblower Protection................................29

B. The WBA, Like MCAD Covers All Commonwealth Employees Without Regard to Their Appointing Authority. 32

C Ms. Edwards was a Commonwealth Employee............................ 34

D. The Governor Acted as an Agent of the Commonwealth, in Appointing and Firing her—he is not a Free agent 34

II. MS EDWARDS PRESENTED SUFFICIENT EVIDENCE ON EVERY ELEMENT OF HER PRIMA FACIE CASE UNDER THE WHISTLEBLOWER ACT -- THE COMMONWEALTH FAILED TO MEET ITS BURDEN TO SHOW THERE WERE NO FACTS IN DISPUTE IN THIS CLASSIC WHISTLEBLOWER CLAIM..........37

A. The Summary Judgment Standard...38

B. Ms. Edwards provided sufficient proof for a jury to consider that she: (3) Object[ed] to and refuse[d] to participate in any activity, policy or practice which the employee reasonably believe[d] [was] in violation of a law, or a rule or regulation promulgated pursuant to law, or which the reasonably believe[d] pose[d] a risk to public health, safety or the environment." 39

C & D. There are Record Facts Showing the Governor knew about the protected activity and that Ms. Edwards activities were a substantial or motivating reason for the adverse employment action she suffered. 44

E. The idea that Ms. Edwards simply "resigned" is a complete fiction; The Record Facts Support that She Was Fired. 47

IV. A SUIT AGAINST THE COMMONWEALTH FOR REMEDIES BY EMPLOYEES UNDER THE WHISTLEBLOWER ACT, AN ACT TO PROTECT CONSCIENTIOUS EMPLOYEES, IN NO WAY ENCUMBERS THE SO-CALLED "POLICY MAKING" POWER OF THE GOVERNOR. 49

V. THE COMMONWEALTH'S THEORY OF SEPARATION OF POWERS LACKS LEGAL SUPPORT. 52

CONCLUSION 54

ADDENDUM 55

CERTIFICATE PURSUANT TO MASS. R. APP. P. 16(k) 79

CERTIFICATE OF SERVICE.................................. 80

TABLE OF AUTHORITIES

Massachusetts Cases.

Arthurs v. Board of Registration in Medicine, 383 Mass. 299 (1981) 41

Babets v. Secy of Human Services, 403 Mass. 230 (1988)..........................49

Batchelder v. Allied Stores Corp., 393 Mass. 819 (1985)............................30

Boston Housing Authority v. Labor Relations Commission,
398 Mass. 715 (1986)...52

Brennan v. Election Comm'rs of Boston, 310 Mass. 784 (1942) 32

Capazzoli v. Holzwasser, 397 Mass. 158 (1986)..49

Chambers v. RDI Logistics, Inc., 476 Mass. 95 (2016)........................ 38-39

College-Town Div. of Interco, Inc. v. Massachusetts Commission Against
Discrimination, 400 Mass. 156 (1987) 35 n.5

Commissioner of Administration v. Kelley, 350 Mass. 501 (1966)............53

Commonwealth v. Becker, 71 Mass. App. Ct. 812 (2008) 20-21

Commonwealth v. Chretien, 383 Mass. 123 (1981) 43

Commonwealth v. Guilfoyle, 402 Mass. 130 (1988)..................................36

Commonwealth v. Lightfoot, 391 Mass. 718 (1984) 31

Depianti v. Jan-Pro Franchising International, Inc.,
465 Mass. 607 (2013)... 30-31

Desrosiers v. The Governor, 486 Mass. 369 (2020) 36

DeWolfe v. Hingham Centre, Ltd., 464 Mass. 795 (2013) 38

Flesner v. Technical Communications Corporation,
410 Mass. 805 (1991) 33

General Elec. Co. v. Department of Envtl. Protection,
429 Mass. 798 (1999) 32

Hastings v. Commissioner of Correction, 424 Mass. 46 (1997) 41

Homer v. Fall River, 326 Mass. 673 (1951) 52

John DOE, Sex Offender Registry Board No. 380316 v. Sex Offender Registry Board, 473 Mass. 297 (2015) 42

North Shore Realty Trust v. Commonwealth, 434 Mass. 109 (2001) 53

Opinion of the Justices, 365 Mass. 639 (1974)...52

Quincy Mut. Fire Ins. Co. v. Abernathy, 393 Mass. 81 (1984)....................38

Smith-Pfeffer v. Superintendent of the Walter E. Fernald State School,
404 Mass. 145 (1989) 33

Terra Nova Ins. Co. v. Fray-Witzer, 449 Mass. 406 (2007)........................30

Tryon v. Massachusetts Bay Transportation Authority,
98 Mass. App. Ct. 673 (2020)..44, 47

Willar v. Commonwealth, 297 Mass. 527 (1937) 34

Federal Cases:

Higgins v. Town of Concord, 246 F.Supp.3d 502 (D.Mass. 2017) 47

Massachusetts Constitutional Provisions:

Mass.Const. Part 2, c.2, § 1, art1, ... 34-35

Preamble, para 1&2, Massachusetts Constitution........................... 35-36

Art. 30...52

Massachusetts Statutes:

G.L. c. 149, § 185, An Act to Protect Conscientious Employees
(the Whistleblower Act (WBA)...*passim*

G.L. c. 6, §§178C-178Q (the "Sex Offender Law")
(Chapter 74, Acts 1999, §2)...*passim*

G.L. c. 151B (MCAD)...*passim*

ISSUES PRESENTED

I. Whether an employee of the Commonwealth, who is appointed by and "serves at the pleasure of the governor," is entitled to the remedies for retaliation provided by the Legislature for those who engage in activities protected by the Massachusetts Whistleblower Act (WBA), G.L. c. 149, §185, An Act to Protect Conscientious Employees, where there is no exception in this straightforward statute permitting those Commonwealth employees to be treated differently.

II. Whether Ms. Edwards presented record evidence showing the existence of a prima facie case for relief, whether the Commonwealth has met its burden of demonstrating otherwise, where to reach its conclusion, the Commonwealth omits salient facts and cites only portions of the statute.

III. Where there is no executive "policy making" privilege in the Commonwealth, whether policies suggested in the Commonwealth's brief which would encourage secrecy and governmental abuses should be adopted by this court to discourage protection of whistleblowing – contrary to the express policy of the Legislature.

IV. Whether separation of powers was violated where the Legislature (a) enacted a statute to protect the public safety by requiring violent sexual predators to register and permitted the governor to appoint the chair of that registry to "serve at his pleasure," and (b) enacted a statute to provide remedies for Commonwealth employees who qualify as "whistleblowers," and where the Legislature did not interfere in the appointment power by directing or compelling the governor to appoint or dismiss any particular person.

PROCEDURAL HISTORY

Plaintiff/Appellee Saundra Edwards filed her initial complaint on December 31, 2014 in the Essex County Superior Court. (RA4). Her three-count amended complaint was filed on or about February 27, 2015. *Id.* Count I alleged a violation of the Massachusetts Whistleblower Act ("WBA"), G.L.c. 149, §185 based on

former Governor Deval Patrick's retaliatory act of firing her from the position of Chair of the SORB because she engaged in WBA protected activities.

Counts II and III, alleging that Patrick engaged in defamation when he deliberately made false, derogatory, and public statements about Ms. Edwards, were dismissed by this court. Edwards v. Commonwealth, 477 Mass 254 (2017).

On September 18, 2019, after the close of discovery, the Commonwealth moved for summary judgment on the remaining Count of the Complaint alleging a violation of the WBA. (RA15-16,21,23,48,69,76). On January 13, 2020, in a thoughtful, well-reasoned decision, Superior Court Judge Salim Rodriguez Tabit denied the Motion for Summary Judgment.

The Commonwealth sought leave of the Single Justice of the Appeals Court to file an interlocutory appeal of the denial, No.2020-J-0073. On September 10, 2020, the Single Justice granted the Commonwealth's request for leave to appeal. On February 17, 2021, this Court allowed the Commonwealth's petition for Direct Appellate Review, DAR-28047

FACTUAL BACKGROUND

A. Sex Offender Registration.

The Legislature enacted G.L. c. 6, §§178C-178Q (the "Sex Offender Law"), as amended, to protect the public from the grave danger of recidivism posed by sex offenders and aid law enforcement officials in protecting their

communities. (Chapter 74, Acts 1999, §2). The Legislature considered the protection of "vulnerable members of our communities from sexual offenders" so important that it amended the statute on an emergency basis, because it believed that "deferred operation" would defeat its purpose. *Id.* Further, the Legislature identified a lack of information about known sex offenders as an impediment to the ability of law enforcement agencies to "protect their communities, conduct investigations and quickly apprehend sex offenders" that could cause an inability of "the criminal justice system to identify, investigate, apprehend and prosecute sex offenders." *Id.* To combat that deficiency, the Legislature enacted a system of registering sex offenders as "a proper exercise of the commonwealth's police powers" in order to "provide law enforcement with additional information critical to preventing sexual victimization and to resolve incidents involving sexual abuse promptly." *Id.*

The Legislature also declared that it is "the commonwealth's policy . . . to assist local law enforcement agencies' efforts to protect their communities by requiring sex offenders to register and to authorize the release of necessary and relevant information about certain sex offenders to the public as provided in this act." *Id.* Consistent with that policy, the Legislature created the Sex Offender Registry Board ("SORB"). *Id.*;RA88¶5,1204¶5). The SORB is an

administrative agency in the Executive Office of Public Safety and Security ("EOPSS"). (RA76¶1;RA371).

The SORB establishes and maintains a central computerized registry of all sex offenders, as defined by the Sex Offender Law and it is responsible for enforcing the provisions of that Law. RA76¶2;RA88¶ 7;RA1204¶7. The SORB promulgates rules, regulations, and guidelines to implement the provisions of the Sex Offender Law. RA88¶8;RA1204¶8. The SORB is responsible for determining the level of risk of re-offense and the degree of dangerousness posed to the public of each sex offender listed in the sex offender registry and for preparing a recommended classification level of each offender. RA373. Sex Offenders are classified from level 1 to 3, with three being the highest risk to reoffend. RA1157. It also notifies each sex offender of its recommended classification level, the offender's duty to register, if any, and the offender's right to petition the SORB to request an evidentiary hearing to challenge the classification and duty to register. RA372-74.

A sex offender is any "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" after August 1, 1981. G.L. c. 6, §178C. No sex offender who has been determined to be a sexually dangerous predator, has been convicted of two or more specific sex offenses on different occasions, or has been

convicted of a sexually violent offense can escape the obligation to register. G.L. c. 6, §178E(f). The term "sexually violent offense" is defined in the Sex Offender Law to include, among others, the crime of rape and any "like violation of the law of another state." G.L. c. 6, §178C;RA286,1230.

The SORB's employees include seven Board members: the Chair; the executive director; hearing officers; and support staff. RA375-76. The SORB includes an Administrative Unit, a Classification and Registration Unit, a Hearings Unit that is comprised of both administrative staff and hearing officers, a Victim's Services Unit, an Operations Unit and a Legal Unit. RA119-23. Board members other than the Chair are appointed by the governor for six-year terms. G.L. c. 6, §178K(1). The Chair "serve[s] at the pleasure of the governor." *Id.*;RA76¶3. The Chair reports to the Undersecretary of Criminal Justice, who in turn, reports to the Secretary of Public Safety - a member of the governor's cabinet. RA371-72.

The duties of Board members and hearing officers include conducting hearings when requested by an offender. RA89¶13;RA1205¶13. The SORB staff includes a General Counsel within its Legal Unit. RA1220. The General Counsel is responsible for advising the Board on all legal matters. RA89¶14; RA1205¶14;RA1221. The SORB Legal Unit is also responsible for advising the Board on whether and how sex offenses committed in other states convert

to sex offenses under Massachusetts law. RA89¶15;RA1205¶15. The Board is then charged with recommending a classification level for offenders who commit sex offenses out of state and determining whether such offenders will be required to register with the SORB upon relocating to Massachusetts. *Id.*

B. The Bernard Sigh/Paglia Matter

On September 20, 1993, Bernard Sigh pleaded guilty in a California court to raping his wife, the sister of former Governor Deval Patrick. RA379-380; RA1199-2000. In October 2006, that conviction and Sigh's failure to register as a sex offender in Massachusetts was introduced as a campaign issue by the media while Patrick was running for governor. RA730-31,382,1157,1193-97. The first of many "out of the ordinary" features of the Sigh/SORB matter was that Sigh's attorney, who had no familiarity with SORB, spoke with SORB's General Counsel, Daniel Less, even before the initial determination was made by a SORB analyst as to the proposed classification of Sigh. RA713-14,735-36,1230.

SORB recommended classifying Sigh as a Level 1 offender, thus requiring him to register. RA90¶22;1205¶22. Sigh requested a hearing, and his matter was assigned to Shawn Jenkins, SORB member, for hearing. Jenkins did not hear the matter. RA1158,1168-70.

Shortly after publication of the calendar of hearings which included the Sigh matter, Hearing Officer Attilio Paglia went to Jenkins' office. *Id.* That calendar contained, among other information, the names of the petitioners and the dates and places of hearings. RA1169. Paglia told Jenkins he wanted to handle Jenkins' hearing on the date and place at which the Sigh hearing was to be held. RA1168-70. Jenkins acceded and Paglia took the Sigh packet from Jenkins. RA749. Paglia's claim that he did so because Jenkins was scheduled to be at two different hearing locations on the same day, RA748, was contradicted by Jenkins. Jenkins said that all hearings for a given officer for a particular day were always held at the same place. RA1170. Paglia knew at the time he took the case that Sigh was Patrick's brother-in-law. RA665,¶4;RA749.

SORB took the position that Sigh's recommended classification obviated the need for an evidentiary hearing because, under the statute, a sex offender convicted of a violent sex offense like rape, could not be relieved of the obligation to register and the California crime of spousal rape was a "like offense" to the Massachusetts crime of rape. RA1230-31. Because being completely relieved of the obligation to register was the only classification lower than the Level 1 that had been recommended for Sigh, and the SORB did not have the discretion to relieve him of the obligation to register because of his

violent sex offense, a hearing would not accomplish anything. RA285-86;1230-31. Accordingly, William Burke, who handled the Sigh matter for SORB's Legal Division, filed a routine motion for a required finding of Level 1 classification. RA285&1231. Careful not to dictate how Paglia was to decide the question of "like offense," Less advised that there should be no evidentiary hearing; rather, the issue of whether spousal rape was a like offense to rape presented a legal issue to be briefed by the parties. RA1262-66. Sigh filed a motion seeking relief from registration, contending spousal rape was not a like offense to the Massachusetts crime of rape. RA768.

SORB's Acting Director, Robert Baker and others, instructed Paglia not to decide the motions until the Attorney General's office could opine on the like offense issue. RA773-76. Paglia disobeyed that instruction and held a hearing. RA781. Director of Hearings, Martin Whitkin, also told Paglia not to decide the motions, pending the Attorney General's opinion, but Paglia disobeyed the instructions he was given and decided the motions, denying both. RA780-82,125. Whitkin told Paglia not to conduct a hearing on the merits, RA782-83, but Paglia was again insubordinate and conducted a three-day hearing that concluded on August 31, 2007. RA784,1134.

At the hearing, the following testimony was presented: on August 29, 1993, in California, Sigh broke into the apartment of his estranged wife, threw

her onto a bed, choked her, covered her mouth with his hand when she screamed, and had sexual intercourse with her against her will. RA164. Paglia heard and understood the testimony about the violent rape. RA665¶4. Also presented at the hearing was testimony that on or about September 20, 1993, Sigh pleaded guilty to the charge of "spousal rape", admitting that: "I accomplished an act of sexual intercourse with my wife against her will by means of force." RA165,1199-1200. Paglia then took the unprecedented step, RA1176, of issuing his decision orally at the conclusion of the hearing, RA784, that Sigh need not register because spousal rape did not convert to rape, but rather to indecent assault and battery, which is not classified as a sexually dangerous crime, and that Sigh was not likely to re-offend. RA167-68;RA1233. That oral decision was contrary to the established procedure of SORB and denied both the Director of Hearings and the Legal Division of the opportunity to vet proposed decisions to avoid glaring legal errors. RA1221-22,1233,1239. Less described Paglia's decision as a "slap in the face" of the Board, RA1239, "faulty and inconsistent with established law as it was being applied throughout the agency," RA1238-39, and contrary to the instructions to all hearing officers as to how to do an equivalency of offenses analysis. Paglia knew how to do such an analysis, but did not do it. RA1239-40.

Less believed that Paglia did not have a legal basis for his decision and that relieving Sigh of the obligation to register undermined the core mission of the SORB, which is to do assessments of the risks posed to the public by sex offenders. RA1238-39. He thought that requiring the registration of individuals convicted of a violent sex offense served an important public safety goal and that requiring the registration of such individuals, even those who present a low risk, was a critical part of the legislative mission of the SORB. RA1239. Less also thought that Paglia's decision had consequences that went beyond the faulty analysis and threat to public safety. According to him, SORB, a relatively new agency, had worked hard to gain credibility with the court system and the public at large, and Paglia's decision undermined that credibility by showing that if you were the Governor's brother-in-law, you would get better treatment than others. *Id.* The perception that the SORB made decisions based on only the criminal history of sex offenders, utilizing a uniform set of factors was damaged. *Id.*

In the immediate aftermath of Paglia's oral decision that spousal rape was not rape, SORB consulted with EOPSS and its legal staff and with the Office of the Massachusetts Attorney General as to how to proceed. RA1234. Paglia produced a written decision on September 14, 2007, but it was not issued while the question of how to deal with the erroneous process and decision was being considered. RA189-190, RA806-808. The SORB statute and regulations at

that time allowed the petitioner, but not the SORB, to seek judicial review of a decision. RA141-42.

The nature of the on-going discussion is shown in this email between Robert Carnes, Hearings Supervisor, and Whitkin:

From: Carnes, Robert (SOR)
Sent Saturday, September 15,2007 8:56 AM
To: Carnes, Robert (SOR)
Cc: Whitkin, Martin (SOR)
Subject: SIGH CASE - CONFIDENTIAL

Marty,

> AJ [Paglia] submitted his first draft on this case for editing yesterday. A quick read of the draft suggests to me that the decision to publish it unedited should be rethought. Besides the usual editing concerns, as Atty Gillis has shown in some of his motions, Petitioners' Counsels are sharing decisions and if we want to uniformly use the NY decision for our "like offense" analysis, this case (as written) is going to provide counter and conflicting authority. The decision not to find that Calif. Spousal rape is the equivalent of Mass. rape is made worse in this case is the fact that the Victim and Petitioner both testified at the hearing and acknowledged that forcible sexual intercourse had taken place. It might be better for the sake of future cases just to administratively note (incorrectly) that Calif spousal rape = indecent A&B and drop the analysis entirely.
>
> Also note AJ's inclusion of all pre-hearing publicity info and his decision to announce at the hearing that P was relieved from registration. RA1180.

Mr. Whitkin replied, asking Carnes to "hold off," and that he intended "to simply issue an order succinctly" stating "AFTER HEARING MOTION OF THE PETITIONER FOR RELIEF FROM REGISTRATION OBLIGATION IS

ALLOWED" He wished to do this to "FOREGO SUBJECTING THE AGENCY TO RIDICULE." *Id.*

This is the environment that Ms. Edwards was thrust into when she was appointed by then Governor Patrick to be the Chair of the SORB in early November 2007. RA78,¶11;RA502.

C. <u>Ms. Edwards is Appointed Chair of the SORB</u>

Ms. Edwards is a graduate of Wellesley College and Suffolk University Law School. She has been an attorney in good standing since 1993. She is admitted to the Massachusetts Bar, the United States District Court for Massachusetts and the United States Court of Appeals for the First Circuit. Prior to her appointment to the SORB, Ms. Edwards worked for thirteen years as a prosecutor with the Plymouth County District Attorney's Office, specializing in the prosecution of sexual assault, child abuse and domestic violence cases. RA1246-47.

On November 5, 2007, Ms. Edwards was appointed by Patrick as Chair of the SORB. RA78,¶11. She was recruited for the job by someone at EOPSS who she worked with at the D.A.'s office. RA113. Ms. Edwards had met Patrick on two occasions prior to the appointment, but she was never introduced to him. RA114. As Chair, from November 5, 2007 to September 16, 2014, Ms. Edwards was the executive and administrative head of the SORB and had the authority and responsibility of directing assignments of members of the SORB

and was the appointing and removing authority for members of the SORB staff. RA92,¶35;RA1207,¶35.

Upon taking office and assessing the situation at SORB, Ms. Edwards learned that SORB was not in compliance with the Sex Offender Law[1] and that staff morale was very low. RA664¶1;RA671-72,¶12. Ms. Edwards hired an Executive Director to assist in the turn-around of the SORB. RA123-24. By statute, the governor is required to appoint Board members with specific credentials. RA123024. Patrick admitted that he failed to satisfy this statutory obligation until near the end of his eight-years as governor. RA402-403.

Within a couple of weeks of Ms. Edwards' employment, Paglia, upset about events surrounding some unspecified decision of his, entered Ms. Edwards' office and handed her a file which she did not immediately review. RA158-61 The next day, Less, Whitkin, and Carnes presented Ms. Edwards with the problems of the erroneous legal conversion by Paglia of spousal rape to indecent assault and battery, the erroneous oral decision of relief from registration by Paglia on August 31, 2007, and the written decision drafted by Paglia which still had not issued because the SORB was assessing what might

[1] The SORB's seven members are appointed by the Governor and the statute calls for members who have specific expertise, such as criminal justice experience; probation, parole, or corrections experience; experience in dealing with victims of sexual abuse, or be licensed psychologists or psychiatrists with specialized expertise. G.L.c.6,§178K.

be done to correct the errors of law in the case, all involving the Governor's brother-in-law Sigh. RA162-64. This was when Ms. Edwards first connected the file left by Paglia with Sigh. *Id*

Ms. Edwards obtained and listened to the audio tapes of the SORB hearing where Paglia presided. After hearing the victim's testimony about the brutal rape she suffered and Sigh's admission that he raped her, Ms. Edwards reconvened with Less and Whitkin and (possibly Carnes) and asked "what is going on" in light of the acknowledged rape and obvious error committed by Paglia. RA164-65. Based on her review of the hearing tapes and her experience as a prosecutor, Ms. Edwards had no doubt that what Sigh admitted doing constituted rape in Massachusetts. *Id.* She also opined that Sigh's level of dangerousness and likelihood to reoffend was *not just* a Level 1. *Id.*

Months of discussions ensued among SORB supervisory personnel, EOPSS and the Attorney General. RA665,¶3;RA1234, *see also* RA808-809. Ms. Edwards and Undersecretary Marybeth Heffernan had numerous discussions about how to proceed. RA190. During that time, the Appeals Court decided <u>Commonwealth v. Becker</u>, 71 Mass.App.Ct. 812 (2008), which affirmed the position of SORB Legal that the term "like offense" means "the same or nearly the same." <u>See</u> RA1234-35 (SORB's legal department utilized the <u>Becker</u>

analysis to determine how out of states sex crimes converted to Massachusetts crimes).

Whitkin circulated several draft decisions on the Sigh matter during the time Becker was pending, all with the same result of relief from registration. RA808-815. At no time from August 31, 2007 to May 2, 2008 did anyone pressure Paglia to change his decision, according to Paglia himself. RA818-19.

On May 2, 2008, Whitkin circulated to all hearing officers the Becker decision. RA819. On May 8, 2008, he circulated another draft decision in the Sigh matter, but this time he applied Becker and required Sigh to register. RA821-23. Paglia, unhappy with the May 8, 2008 draft, met with Ms. Edwards the next day to discuss the Sigh matter. RA79,¶17.

At that meeting, Paglia told Ms. Edwards that he had made up his mind about the case after hearing the motions -- before any evidence was presented. R665-66¶4. He said that he did not consider the evidence presented at the hearing because he had already made up his mind. *Id.* Ms. Edwards discussed the elements of the crime of rape with Paglia and he demonstrated a knowledge of what constituted rape in Massachusetts. He also acknowledged that he heard testimony at the hearing that Sigh violently raped his wife. *Id.* Ms. Edwards asked Paglia if he believed that a man can rape his wife and he said yes, "legally", but that "it's not fair." *Id.* Ms. Edwards reiterated to him that a man

can be guilty of raping his wife. *Id.* She told Paglia that "rape is rape" and that the California "spousal rape" statute is a like statute to the Massachusetts rape statute. *Id.* Paglia offered to do whatever Ms. Edwards wanted with the Sigh decision, but Ms. Edwards declined to tell him what to do and referred him to Whitkin for any help with the legal analysis. *Id.* At no time during that conversation did Ms. Edwards pressure or attempt to pressure Paglia to change his decision, per Paglia himself. RA861-863.

On May 9, 2008, Ms. Edwards had a final consultation with EOPSS, Undersecretary Heffernan, and with SORB's General Counsel regarding how to proceed with the Sigh matter. RA149-150,190. All determined that the unedited written decision, as authored by Paglia in September 2007, would issue and an emergency regulation would immediately be enacted so that future errors of law by a hearing officer could be corrected. RA149-50,190-91. The Paglia decision issued on May 29, 2008, and one day later SORB issued the emergency regulation. RA78,¶¶10,21;RA873.

With the advice and counsel of EOPSS and SORB's General Counsel, and as part of her statutorily-mandated managerial and administrative duties and in furtherance of the overall purpose of the SORB to protect the public from sex offenders, Ms. Edwards, having determined that said purpose was, at best, unfulfilled and, at worst, ignored in the Sigh matter, ordered

that all SORB staff, including Paglia, undergo training regarding classification hearings and training on the elements of Massachusetts sex crimes. RA179,185,191-92. Patrick admitted that such uniform training did not constitute the disciplining of Paglia. RA456-57.

Rather than complete the training, Paglia resigned and filed a lawsuit against the SORB and others, including Ms. Edwards in her capacity as Chair, claiming retaliation and seeking damages, injunctive relief, and other relief. RA94,¶43;RA1207-1208,¶43. Paglia was never demoted. RA1238.

During her entire tenure at the SORB, Ms. Edwards received excellent reviews from her supervisors and was applauded for her accomplishments, leadership ability, and the productive changes and initiatives she introduced to the agency, including a revision of key SORB regulations. RA507-531;RA1183-91. See also RA667¶6.

D. The Commonwealth's Termination of Ms. Edwards' Employment

On July 8, 2014, Paglia settled his claim with the SORB and dismissed his lawsuit. RA94,¶46;RA1208,¶46.

On the evening of September 15, 2014, Ms. Edwards was instructed to attend a mandatory meeting the next day (September 16) at Patrick's office with SORB Executive Director Jeanne Holmes, EOPSS General Counsel Doug Levine, EOPSS Chief of Staff Michelle Smalls, and Patrick's Director of Boards

and Commissions Kendra Foley ("Foley"). RA667-68¶7. She was not given a reason for the meeting. *Id.*

When she arrived at Patrick's office the next morning, Ms. Edwards was taken to an office to meet with Foley, Governor's Counsel Pat Moore, and Veronica Pierce from the EOPSS Human Resources Department. *Id.* Ms. Foley told her: "As you know, you serve at the Governor's pleasure. He has decided to replace you as the Chairperson of the Sex Offender Registry Board." *Id.*;RA81,¶27. When Ms. Edwards asked if there was a problem and asked whether she had done anything wrong, Foley admitted that Ms. Edwards had done nothing wrong, but reiterated that Ms. Edwards' employment was terminated. RA667-68¶7. Ms. Edwards was told to direct all further questions to her immediate supervisor, EOPSS Undersecretary Sandra McCroom. *Id.*;RA109-110. The meeting lasted approximately five minutes. RA667-668.

Ms. Edwards, hoping to avoid the stigma associated with being terminated from a highly visible public position, especially where the termination was without cause, called Ms. McCroom after she had been fired and asked if she could tender a letter of resignation. RA211-212. Ms. McCroom said that she had to check, and she called Ms. Edwards back and said that a letter of resignation would be accepted so long as it was dated September 16, 2014. *Id.* Ms. Edwards wrote the resignation letter on September 17, but dated it the 16th.

RA112. See also RA95,¶51;RA1208,¶51. Ms. McCroom said that she had been asked to fire Ms. Edwards, but she refused to do it. RA212.

Despite Ms. Edwards ostensibly being permitted to resign, on September 22, 2014, Patrick told the press *he had fired* Ms. Edwards because she had interfered with Paglia's performance of his duties:

> "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 the Executive Director of a hearing officer to change the outcome of a case. The hearing officer did not 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." RA82¶31.[2]

Just after Ms. Edwards commenced this action. Patrick, on or about January 2, 2015, made the following additional statements about Ms. Edwards to members of the press. He abandoned any other alleged reasons for her firing and homed in on his brother-in-law's case:

> 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

[2] Other stated reasons for the termination included an alleged loss of confidence in the SORB, a failure to update regulations, and low morale. RA82¶31. These reasons were false. RA670-71¶12.

> 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. RA1244.

Patrick's statements that Ms. Edwards pressured or attempted to influence a hearing officer were absolutely false. Those statements were designed to, and did, hurt Ms. Edwards and her reputation.[3] Patrick likened her firing to an "execution." RA1217.

SUMMARY OF THE ARGUMENT

Ms. Saundra Edwards alleges that she engaged in protected activities under the WPA, G.L. c.149, §185, as inserted by Acts 1993, §471 An Act to Protect Conscientious Employees. And, that the Commonwealth violated the Act when she was unlawfully terminated as Chair of the Sex Offender Registry Board (SORB), G.L.c. 6, §178K, by the Commonwealth's agent, former Governor Patrick. He likened his actions to "an execution," and specified that he dismissed her from her position because of how she addressed his brother-in-law's relief from the lifetime obligation to register as a sex offender.

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[3] Patrick admitted knowing that Ms. Edwards' "resignation" was designed to offer her "a more dignified way" to step aside, RA466, but he nonetheless told the press that she was fired (executed) and denied her that dignity.

Ms. Edwards presented a claim that she "(3) Object[ed] to, or refuse[d] 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." G.L.c.149, §185(b)(3). Ms. Edwards objected to and actively fought against a policy and related procedures that would equate spousal rape with indecent assault and battery, thereby, relieving violent sex offenders of what should be a lifetime obligation to register with the SORB. Her belief that improperly classifying sex offenders threatened the safety of the public was reasonable, and consistent with the Legislature's unambiguous announcement that requiring sex offenders to register to help law enforcement protect the public was an important policy of the Commonwealth at the same time it created the Sex Offender Registry on an emergency basis. G.L.c. 6, §178K,, Chapter 74, Acts 1999. Pp,*infra, passim*.

A. Ms. Edwards agrees that she was not employed by Patrick, as defined by the statute. She was a Commonwealth employee, and the WBA covers all Commonwealth employees, without exception. Patrick acted as an agent of the Commonwealth – he was not a "free agent" -- when he took adverse employment action against her. Pp.29-36.

B. Ms. Edwards provided sufficient record evident to make a prima facie case under the WBA, and the Commonwealth has not met its burden of demonstrating otherwise. Pp37-48.

C. There is no gubernatorial policy making power in the Commonwealth like the power of the President of the United States. No policy of the Commonwealth allows the governor to break the laws set forth by the Legislature. The existence of the WPA no more "restrains" the policy making power of the governor than any other law protecting employees, including for example discrimination, harassment or wage and hour laws. Pp49-51.

D. The Commonwealth misconstrues the separation of powers doctrine in claiming that the Legislature cannot both enact a statute providing for protection for whistleblowers and enact a statute permitting the governor to act as an appointing authority who can dismiss someone "at his pleasure." The Legislature did not interfere in the power it delegated to Patrick to appoint or remove someone, because it never told him who to appoint or remove. The Legislature is free to enact employment laws which provide consequences for illegal actions. Pp52-54.

ARGUMENT

I. THE COMMONWEALTH'S LEGAL ARGUMENTS CONCERNING THE GOVERNOR LACK MERIT. MS. EDWARDS, A COMMONWEALTH EMPLOYEE, IS ENTITLED TO SEEK REMEDIES UNDER THE WHISTLEBLOWER ACT.

The Commonwealth argues that, as matter of law, (1) employees of the Commonwealth are exempt from coverage under the statute if they serve "at the pleasure of the governor"; (2) that Patrick was not Ms. Edwards' employer, but alternatively; (3) contends that Patrick acted purely on his own, as a free-agent, and not as an agent of the Commonwealth when he fired her. CBr20-21. The Commonwealth's arguments miss the mark.

A. Standards of Review - Whistleblower Protection.

The purpose of the WBA is to safeguard the public interest and protect those public employees who "do the right thing" in shielding the public from a variety of wrongs and abuses. G.L.c. 149, §185 as inserted by Acts 1993, §471. The Legislature entitled it "An Act to Protect Conscientious Employees," and provided remedies for public employees retaliated against and subjected to "discharge, suspension or demotion . . . or other adverse employment action" for engaging in any one of several actions in an effort to protect the public from actions of their public employers that the employee "reasonably believes poses a risk to public health, safety or the environment." G.L.c. 149, §185(b)(3). The Legislature used

very broad terms and provided a comprehensive array of damages to encourage and support public employees who blow the whistle on wrongdoing.

The statute is remedial, so it is "entitled to liberal construction." Depianti v. Jan-Pro Franchising International, Inc., 465 Mass. 607, 620 (2013), quoting Batchelder v. Allied Stores Corp., 393 Mass. 819, 822 (1985) and citing Terra Nova Ins. Co. v. Fray-Witzer, 449 Mass. 406, 420 (2007)(statute is remedial where it is "intended to address misdeeds suffered by individuals," rather than to punish public wrongs). Statutes related to employment are "liberally construed, 'with some imagination of the purposes which lie behind them.'" Depianti, supra , further citations and quotations omitted.

A claim for remedies for "retaliation against employees reporting violations of law or risks to public health, safety or [the] environment," G. L. c. 149, §185, is proven here by showing that an employer engaged in the following prohibited action, note that section three does not require actual "reporting" for an employee to qualify for protection:

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

> (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.
>
> (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.

G.L.c. 149,§185, in pertinent part, emphasis supplied. See also, §185(d), defining remedies.

The meaning of this statute is plain from its language. To the extent that it is capable of interpretation, it must be interpreted "according to the intent of the Legislature ascertained from all the words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." Depianti, supra at 619, further citation omitted. "In addition, our respect for the Legislature's considered judgment dictates that we interpret the statute to be sensible, rejecting unreasonable interpretations unless the clear meaning of the language requires such an interpretation." Id. Statutory language is the principal source of insight into legislative intent, Commonwealth v. Lightfoot, 391 Mass.

718, 720 (1984), and statutes should be construed as they are written, Brennan v. Election Comm'rs of Boston, 310 Mass. 784, 789 (1942).

B. The WBA, Like MCAD, Covers All Commonwealth Employees Without Regard to Their Appointing Authority.

There is no indication that the Legislature intended to exclude Commonwealth employees from Whistleblower protection depending on who might have appointed them, the governor included. Quite similar language is used in G.L. c. 151B to define employer: "the commonwealth and all political subdivisions, boards, departments and commissions thereof" and the Commonwealth admits the governor's appointees are protected by that statute. CBr49.

Ms. Edwards was appointed to her position via a letter on Commonwealth letterhead, RA505, and her separation letter was on Commonwealth letterhead. RA1009. The question is not whether the Patrick directly supervised Ms. Edwards or whether she reported directly to him. See CBr25,&n.7. This court should reject the Commonwealth's attempts to graft requirements onto this clear and unambiguous statute which simply are not there. General Elec. Co. v. Department of Envtl. Protection, 429 Mass. 798, 803 (1999) ("We are not permitted to add words to a statute that 'the Legislature did not see fit to put there.").

Ms. Edwards reported in a chain-of-command of other Commonwealth employees leading directly to the governor. Employees in that same chain-of-command executed his order to fire her. She qualifies under the statute as "any individual who performs services for and under the control and direction of an employer," here the Commonwealth, through the governor's other designees including the Undersecretary of EOPSS, "for wages or other remuneration." She was not self-employed or working without compensation.[4]

Recognition that public policy reasons, such as those engendered in the WBA should overcome the general restrictions on recovery by at-will employees, is not a new idea in the Commonwealth. See Flesner v. Technical Communications Corporation, 410 Mass. 805, 810 (1991)("We have recognized an exception to the traditional doctrine that at-will employees may be discharged for any reason or no reason at all, where the discharge is for reasons that violate public policy."); Smith-Pfeffer v. Superintendent of the Walter E. Fernald State School, 404 Mass. 145, 149-50(1989)(Redress is available for employees whose employment is terminated for asserting a legally guaranteed right, for doing what the law requires, or for refusing to do that which the law forbids.). Contrary to the Commonwealth's arguments, this court has not "strictly construed" section

[4] Alternatively, she was employed by SORB or EOPPS, and should be permitted to make that ministerial amendment to her complaint if required.

(a)(2) to exclude certain Commonwealth employers from its scope. Nor should it under established tenants of statutory construction requiring liberal construction of this remedial statute. See Depianti supra. In support of its "strictly construed" argument, the Commonwealth cites trial cases which are easily distinguishable, see, CBr23, having been brought against private employers including Boston Childrens' Hospital, the Massachusetts Turnpike Authority (an independent body politic), and Genzyme, Inc.

C. Ms. Edwards was a Commonwealth Employee.

Ms. Edwards was a Commonwealth employee entitled to protection under the WBA. The Commonwealth readily and repeatedly concedes that Patrick was not Ms. Edwards' employer. CBr22-24. It has not identified anyone other than the Commonwealth as her employer, and rightly so. See G. L. c. 149, §185(a)(2) (among others, employers for purposes of the Act include "*the commonwealth,* and its agencies or political subdivisions....").
As such she falls squarely within the class of employees protected by the statute.

D. The Governor Acted as an Agent of the Commonwealth, in Appointing and Firing her—he was not a Free agent.

"[T]he Commonwealth must act through its lawfully authorized officers." Willar v. Commonwealth, 297 Mass. 527, 528 (1937). The Governor, as the Commonwealth's "supreme executive magistrate," Mass. Const. pt. II, c.2,§1,

art1, is one of those officers. Ms. Edwards' employment was wrongfully terminated in violation of the WBA by her employer, the Commonwealth, acting by and through its agent, the governor at the time, Patrick.[5] The governor is not a "principal," he is an agent of the people with the duty to faithfully execute their laws. See Mass Constitution, Preamble.

The Legislature permitted Patrick to fill the position Chair of the Sex Offender Registry Board, by appointing someone to it, as a Commonwealth employee, and he acted as the Commonwealth's agent in so doing.[6] Patrick had no independent ability to make any appointment at all. That the Legislature permitted Patrick to appoint Ms. Edwards to the position as Chair of the SORB demonstrates further that he acted as an agent of the Commonwealth.

The Executive headed by the governor is one part of the Commonwealth. The role of governor has no independent existence outside the "Frame of Government" which is the Commonwealth created by the

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[5] See, e.g., College-Town Div. of Interco, Inc. v. Massachusetts Commission Against Discrimination, 400 Mass. 156, 165 (1987) (employer can be held "vicariously liable for the acts of its agent--its supervisory personnel").

[6] G. L. c. 6, §178K(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 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,..."

Massachusetts Constitution: "The people, inhabiting the territory formerly called the Province of Massachusetts Bay, do hereby solemnly and mutually agree with each other, to form themselves into a free, sovereign, and independent body politic, or state by the name of "THE COMMONWEALTH OF MASSACHUSETTS." Mass.Const. preamble.

The Commonwealth would have utterly no means of functioning if it did not work through its agents, the governor included. In the WPA, the Legislature used the broadest of terms - "Commonwealth" – to include the entire government, as that word is set forth in the constitution. Had the Legislature chosen to exclude certain of the Commonwealth's agents or employees, the Governor, Attorney General, Treasurer, Secretary of State or any other from the statute, it knew how to do so. It did not. See Commonwealth v. Guilfoyle, 402 Mass. 130,134 (1988) (legislature said "any person" so court rejected idea that it should restrict reach of statute to just adults).

The governor may only act as an agent of, and on behalf of, the Commonwealth. The only other choice would be to define the governor as having the status of a "free agent." To the extent there was any doubt that the governor is not a free agent, it was settled by this court in Desrosiers v. The Governor, 486 Mass. 369 (2020), where this court held the governor acted properly in using emergency powers as permitted by the Legislature. Finally, the Commonwealth's

position in this matter is incompatible with the oath of office taken by a governor, which is required by the constitution and tradition.

I, NAME HERE, do solemnly swear that I will bear true faith and allegiance and will support the constitution of the Commonwealth of Massachusetts, so help me god.

I NAME HERE, do solemnly swear and affirm that I will faithfully and impartially discharge and perform all of the duties incumbent upon me as governor of the Commonwealth of Massachusetts according to the best of my abilities and understanding, agreeably to the rules and regulations of the constitution and the laws of this commonwealth, so help me god.

I NAME HERE, do solemnly swear that I will support the constitution of the United States.

No one takes an oath of loyalty to the governor. The governor is subservient to the laws and the constitutions of the state and the federal government.

II. MS EDWARDS PRESENTED SUFFICIENT EVIDENCE ON EVERY ELEMENT OF HER PRIMA FACIE CASE UNDER THE WHISTLEBLOWER ACT -- THE COMMONWEALTH FAILED TO MEET ITS BURDEN TO SHOW THERE WERE NO FACTS IN DISPUTE IN THIS CLASSIC WHISTLEBLOWER CLAIM.

As ruled by the Superior Court and the single justice, appropriately taken in the light most favorable to Ms. Edwards, she presented sufficient facts on every element of her prima facie case, and disputed issues of material fact exist. The Commonwealth has not shown otherwise. These facts should be resolved by a jury. Decision/14.

In short, the Commonwealth claims the judge erred in finding any of the four elements of a prima facia case in dispute. Truncating the statue, the

Commonwealth claims (1) Ms. Edwards did not object to "an activity, policy, or practice", (2) her employer did not know about the protected activity, (3) she "resigned" so there was no adverse employment action; and (4) her WBA activities were not a substantial or motivating reason for the adverse employment action she suffered. See CBr28-29.

Contrary to settled law, the Commonwealth mistakenly presents the facts in the light most favorable to itself, the moving party, and omits or downplays facts favorable to Ms. Edwards. The Commonwealth cites just to segments of the statute and asks the court to measure its burden in a half-hearted way without considering all the statutory language.

A. The Summary Judgment Standard. In this interlocutory appeal, the Commonwealth seeks reversal of the denial of its motion for summary judgment. The Commonwealth, "as the moving [party], bear[s] the "burden of establishing that there is no genuine issue as to any material fact and that [it is] entitled to judgment as a matter of law." Chambers v. RDI Logistics, Inc., 476 Mass. 95, 100 (2016), quoting DeWolfe v. Hingham Centre, Ltd., 464 Mass. 795, 799 (2013). "The granting of summary judgment in a case where a party's state of mind or motive constitutes an essential element of the cause of action is disfavored." Quincy Mut. Fire Ins. Co. v. Abernathy, 393 Mass. 81, 86 (1984). All facts are construed in the light most favorable to Ms. Edwards, the non-

moving party. Chambers, supra at 96. This court reviews the matter de novo, without deference to the judge of the Superior Court who denied the motion.

B. Ms. Edwards provided sufficient proof for a jury to consider that she: (3) Object[ed] to and refuse[d] to participate in any activity, policy or practice which the employee reasonably believe[d] [was] in violation of a law, or a rule or regulation promulgated pursuant to law, or which the reasonably believe[d] pose[d] a risk to public health, safety or the environment."

The Legislature could not have been clearer -- it identified the registration of sex offenders as a vital aspect of public safety and created the Sex Offender Registry as emergency legislation. The actions Ms. Edwards took related to the Sigh decision were directly related to protecting the safety of the public and, the Court should not overlook Sigh's subsequent violations.[7] The legislative purpose in adopting G.L. c. 6, §§178C-178Q (the "Sex Offender Law") is to protect the public from "the danger of recidivism posed by sex offenders, especially sexually violent offenders" who "commit predatory acts" and to aid law enforcement officials in protecting their communities. *See* c.74, Acts 1999. Any offender who has been convicted of a "sexually violent offense," which is defined, in part, as the crime of rape and any

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[7] This is certainly not to say that Sigh would definitively have refrained from committing subsequent rapes had he been required to register, but there can be no doubt that the requirement may have been a deterrent. The Legislature thought registration was vitally important and the Court must necessarily take into account in this case when considering Ms. Edwards' actions under the WBA.

"like violation of the law of another state," must register with the SORB. G.L. c. 6, §178C.

Ms. Edwards objected to the conduct of hearing officer Paglia — failing to wait for a determination by the Attorney General on the question of whether spousal rape in California converts to rape in Massachusetts, failing to apply the proper test, failing to take the matter under advisement so the decision on Sigh's matter could be vetted — and to his legally unsupportable — in the words of SORB General Counsel Less — conclusion that spousal rape does not equal rape. Paglia's conduct and decision was "activity" to which Ms. Edwards objected. She also objected to the practices undertaken by Paglia and refused to accept, or participate in, those practices. Ms. Edwards objected to the policy, that spousal rape did not equal rape, which was established by the Paglia decision.

The Commonwealth insinuation that no policy was created by the Paglia decision because decisions were not made public and that the SORB was free in the next case to make a totally different ruling that spousal rape is rape – suggests that SORB should, as a matter of policy, base its decisions on the potential registrant's identity and relationships. This policy is nearly as distasteful as spousal rape not equaling rape. Patrick himself testified that the policy that rape is rape, whether or not the perpetrator and victim were spouses, is "commonsensical." (RA-414).

The Commonwealth's argument that no policy or procedure was adopted by the Sigh decision is rebutted by the law and the record. First, it is a recognized principle of administrative law that an agency may adopt policies through adjudication as well as through rulemaking." Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 312-13 (1981). "Policies announced in adjudicatory proceedings may serve as precedents for future cases." Id., at 313, further citation omitted. The "choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." Hastings v. Commissioner of Correction, 424 Mass. 46, 49 (1997), further citation omitted.

As a matter of fact, the adjudicatory decisions of SORB hearing officers were being argued as precedent by counsel for sex offenders appearing before SORB, thus necessitating that classification decisions be consistent. On September 15, 2007, in connection with the matter of Paglia's hearing of the Sigh matter, two supervisors in the hearings unit, Mr. Carnes and Whitkin, communicated by email discussing "Petitioners' Counsels ... sharing decisions" and his concern that Paglia's decision would constitute "conflicting authority" to a prior conversion decision of the SORB." (RA1180). It was in SORB's interest that its classification decisions, especially those that dealt with the conversion of

out-of-state offenses to like offenses in Massachusetts, be as consistent as possible.

Ms. Edwards' belief that Paglia's rush to judgment, without the typical vetting of the decision, and his wrongly deciding that a rapist need not register as a sex offender in Massachusetts posed a risk to public health and safety, was, and remains, most reasonable. The language of G. L. c. 6, §§178C-178Q and the rationale for the very existence of the SORB demonstrate that all of the SORB's actions are designed to protect the public from dangerous sexual predators — of which Sigh is one — and that registration by those predators is an important step in protecting the public.

As described in John DOE, Sex Offender Registry Board No. 380316 v. Sex Offender Registry Board, 473 Mass. 297, 302 (2015), the sex offender registry law was enacted in 1996 "to protect the public from the danger of recidivism posed by sex offenders and to aid law enforcement officials in the apprehension of sex offenders by providing them with additional information critical to preventing sexual victimization and to resolving incidents involving sexual abuse and exploitation." Id., internal quotations and additional citations omitted. In 1999, the act was amended and improved – as an emergency law, "its purpose, which is to protect forthwith the vulnerable members of our communities from sexual offenders." Acts 1999, c.74, §1, in part ("SECTION 1. The general court hereby

finds that: (1) the danger of recidivism posed by sex offenders, especially sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior, to be grave and that the protection of the public from these sex offenders is of paramount interest to the government…").

Furthermore, Ms. Edwards objected to and refused to participate in any activity, policy or practice that allowed hearing officers, like Paglia, to substitute their own idiosyncratic views rather than applying the elements of crimes, including those involving spousal rape. She insisted that "rape is rape" even when the victim was a spouse. See Commonwealth v. Chretien, 383 Mass. 123 (1981) (recognizing for the first time in Massachusetts that there is no immunity for or privilege permitting spousal rape). As Less noted, the proper registration of sexually violent sex offenders, like Sigh, is a critical part of the SORB's legislative mission and is important to public safety. RA1239. Ms. Edwards believed as much.

The Commonwealth as much as admits that Ms. Edwards did object and refuse to participate as required in the statute. See CBr29-30. However, in the view of the Commonwealth in so doing, Ms. Edwards was "just doing her job." Nothing in the WBA says that just doing one's job precludes recovery. The statute does not distinguish between any job-related versus non-job-related objections or refusals, and for good reason. In the normal course, most

employees will come across "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" in the course of their employment. The exception suggested by the Commonwealth would all but swallow the statue whole. Moreover, the Appeals Court did not make any distinction when an employee, in the course of "just doing his job," discovered other employees falsifying records, and he was retaliated against for that action some ten years later. See Tryon v. Massachusetts Bay Transportation Authority, 98 Mass. App. Ct. 673 (2020).

C & D. There are Record Facts Showing the Governor knew about Ms. Edwards' protected activities and that her activities were a substantial or motivating reason for the adverse employment action she suffered.

The Superior Court correctly found that "there is sufficient record evidence from which a trier-of fact could conclude that the Commonwealth and its agents were aware of Ms. Edwards' objections to how the Paglia matter was handled." Decision/14-15. A jury could find that Patrick generally knew about the protected activity, even if he did not know the moment-by-moment details of Ms. Edwards' actions, and could find a causal nexus between it and adverse employment action. Patrick said that he had Ms. Edwards' actions investigated, and that he was told about her actions.

RA397,406,419-420,424-428. There is no requirement in the WBA requiring the retaliator to have contemporaneous knowledge of the protected activity. What is important is that Patrick learned that Ms. Edwards had addressed critical issues that she reasonably believed threatened public safety due to the Sigh matter in a way that he did not like (he said so on several occasions), and that he retaliated against her for engaging in those protected activities.

The Commonwealth was very much aware that Ms. Edwards objected to Paglia's conduct and decision. She discussed Paglia's handling of the Sigh matter, the consequences of his decision, and how to respond to that decision many times with her immediate supervisor Marybeth Heffernan, the Undersecretary at EOPSS, and later the Secretary of EOPSS, (RA-190).

Moreover, it is beyond peradventure that, at the time he fired Ms. Edwards in September 2014, Patrick was well aware of Ms. Edwards' reaction to Paglia's activity, her objection to that activity, and her refusal to treat or adopt a policy at SORB that spousal rape was not rape. That Patrick chose to mischaracterize Ms. Edwards's reaction — falsely accusing her of "inappropriate, at least, maybe perhaps unlawful, pressuring" of Paglia when even Paglia said that was not the case — is not inconsistent with his knowledge of the Plaintiff's objection.

Patrick complained about the effect that Ms. Edwards' protected activities allegedly had on his family (i.e., his sister and Sigh, his brother-in-law). He held a grudge and acted upon it. Ms. Edwards was unceremoniously fired after being assured she had done nothing wrong. She was later allowed to resign. But, the governor told the public he fired her – all this happened because Ms. Edwards engaged in activities protected by the whistleblower statute.

The best evidence of causal connection is offered by Patrick himself. Initially, he said on September 22, 2014 that one of the reasons for firing Ms. Edwards was her alleged improperly influence vis-à-vis Paglia. (RA-1014). The allegation is false, but shows that the conduct which motivated him, on behalf of the Commonwealth, to terminate the Plaintiff's employment related to the Sigh matter. At the time, he cited several other reasons, none of which were true.

When later asked about the matter, Patrick dropped all pretense that there was any reason other than the Sigh matter, identifying the alleged attempt to influence Paglia as the only reason for termination. (RA1244).

Much of the Commonwealth's argument is focused on the six-year gap between some of Ms. Edwards' activities and objections and the adverse action. See CBr39. Patrick admitted that he waited years to fire Ms. Edwards because he was concerned about the public reaction, considering it was personal with him. However, he felt comfortable terminating her employment in 2014

because "I was nearing the end of my time ... as Governor." (RA415-417). In any event, the case of Tryon v. Massachusetts Bay Transportation Authority, settles this argument against the Commonwealth. Id. at 98 Mass. App. Ct. 673 (2020). In Tryon, the protected activity occurred in 2001 and the adverse action was in 2010-2012, years apart. The Tryon court recognized that someone could lie in wait for many years until retaliating, as happened here.

E. The idea that Ms. Edwards simply "resigned" is a complete fiction; The Record Facts Support that She Was Fired.

A jury could readily conclude on the record evidence that Ms. Edwards was subject to adverse employment action. See, Higgins v. Town of Concord, 246 F.Supp.3d 502, 512 (D. Mass. 2017)(plaintiff told to resign voluntarily or to be fired, entitle to WBA protection). Patrick told the press he fired her. When Ms. Edwards left the five-minute meeting with Kendra Foley, she knew that she was fired, that the termination took effect "immediately," and that her replacement had already been selected. She was told and believed that she had done nothing wrong, and that she was being replaced because she served at the pleasure of the governor.

Ms. Edwards tendered a resignation the day *after* that meeting. She called her direct supervisor and asked whether she could resign to forestall a record of being fired. This happened days before Patrick told the media that he fired her.

The record is devoid of any evidence that Ms. Edwards resigned voluntarily. RA, passim.

In arguing to the contrary, the Commonwealth omits much of the statutory language in the definition of "retaliatory action." It can be shown in ways short of actual discharge: "(5) "Retaliatory action", the discharge, suspension or demotion of an employee, or <u>other adverse employment action taken against an employee in the terms and conditions of employment</u>." G.L. c. G.L. c. 149,§185(b)(5)(emphasis supplied to highlight language omitted in the CBr21&35).

The Commonwealth's argument that Ms. Edwards was not subject to a "retaliatory action" is utterly baseless. Ms. Edwards did not leave a job she loved, and was receiving accolades for, of her own free will. The governor readily admitted that he fired Ms. Edwards. RA466. He told the press that he did so. RA1250. He likened Ms. Edwards's termination to an "execution." (RA1217). Patrick made it clear that this was not a case where an employee voluntarily left employment: "[S]he was removed." (RA421,422)

Foley, who delivered the news to Ms. Edwards that she was being fired, testified that she was involuntarily "replaced". (RA972). Sandra McCroom (RA577-578), confirmed that the decision to replace Ms. Edwards as SORB Chair was not Ms. Edwards' voluntary decision. (RA618-678).

IV. A SUIT AGAINST THE COMMONWEALTH FOR REMEDIES BY EMPLOYEES UNDER THE WHISTLEBLOWER ACT IN NO WAY ENCUMBERS THE SO-CALLED "POLICY MAKING" POWER OF THE GOVERNOR.

Here in the Commonwealth, unlike the federal government, there is no executive privilege, deliberative process privilege, or immunity for acts of the executive. See Babets v. Secy of Human Services, 403 Mass. 230, 233 (1988). Decisions of the Supreme Court discussing the President of the United States' executive policy making power are simply inapplicable. See CBr40-43.

In the Commonwealth, a governor, like any other person, must follow all of the laws and obey the constitution. That includes all wage and hour laws as well as those that forbid the abuse, harassment, or other illegal acts vis-a-vis employees. Neither the governor, nor anyone else in government has a privilege to retaliate against public employees who take action to object to or oppose actions that threaten the public health, safety or the environment. Indeed, it would be singularly bad policy to expect that some inner circle of government employees must keep illegal or dangerous activities or policies secret based on some non-existent executive "policy-making" power. See Capazzoli v. Holzwasser, 397 Mass. 158, 160 (1986) (we "look to the expressions of the Legislature and to those of this court" to determine public policy).

Even without a Whistleblower statute in existence, nothing constrains employees from acting to protect the public as Ms. Edwards did here. A

governor can still fire anyone who does not support his policies. The Act does nothing more than provide remedies for those who protect the public in the ways described in the Act.

Nonetheless, despite the clear words of the Act, without support, the Commonwealth argues there is some sort of "governor's inner circle" exception to the WBA allowing the governor to fire anyone in that supposed policy-making circle for any reason despite protections created for Commonwealth employees by the Legislature. No Legislation has established any such "inner circle" or an "inner circle" exception. Even if the Commonwealth were correct, its interpretation would merely create a factual question bearing on who is in this "inner circle." Patrick did not even know Ms. Edwards much less consider her a policy maker in his inner circle. The governor testified that he did not recall ever meeting her, and the two undersecretaries who oversaw the SORB during her tenure testified that they never spoke to Patrick about her. RA545-46.

As to the Commonwealth's concern that a court may order reinstatement of Ms. Edwards to her former position, the Legislature provided judges with a panoply of possible remedies for a party injured under the WBA. None is mandatory. Ms. Edwards has not sought the remedy of which the Commonwealth complains – reinstatement. The Commonwealth's argument is entirely hypothetical. The potential remedies set forth in the statute are quite broad, and

include all those available in tort as well as any legal or equitable relief. The Legislature trusted the court to use its sound discretion in administering these many remedies by simply making it clear that equitable as well as monetary relief was available. The breadth of potential remedies is an indication of the seriousness of the Whistleblower protections. See, e.g., G.L.c.151B, providing the Massachusetts Commission Against Discrimination, an administrative agency, and the courts an arsenal of legal and equitable remedies to address the important public policy of eliminating unlawful discrimination. There is no reason to believe that the court will impose an unsought remedy of reinstatement of an employee to an appointed position.[8] If it does, the Commonwealth can appeal that award in the normal course.

The Superior Court correctly concluded that the WBA and the SORB enabling act were not in conflict. After noting that courts interpreting statutes "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," Decision/12, the Superior Court found, "[e]ven on a cursory review, it is clear that the two statutes address completely different subject matters." Id. This finding is correct and disposes of the AG's related argument that rules of construction for incompatible statutes

[8] The legislature trusts the courts to judiciously order the equitable remedy of reinstatement. In this case, even if Ms. Edwards had requested reinstatement, it would not be a practical solution, most notably because there is a new administration in place.

require the WBA, a “general” statute to give way to the “specific” SORB statute. Both are general statutes meant to “provide comprehensive coverage of the subject area” so the tenant of statutory construction cited by the AG does not apply. Boston Housing Authority v. Labor Relations Commission, 398 Mass. 715, 718-719 (1986).

V. THE COMMONWEALTH’S THEORY OF SEPARATION OF POWERS LACKS SUPPORT.

The Commonwealth’s claims here rely on its contention that, as a legal matter, the Legislature violates separation of powers, art. 30, when it does two unrelated things – enacts a law protecting the public from violent sex offenders by requiring them to register and allowing the governor to appoint and remove a Commonwealth employee as the chair of that registry, and then quite separately enacts a law providing remedies for a Commonwealth employee who is wrongfully fired. Separation of powers does not require a complete absence of overlap between the three branches of government. The question is whether there is “interference.” As this court said in Opinion of the Justices, 365 Mass. 639, 642 (1974), internal citations omitted:

> "[t]here is nothing inherently repugnant to the concept of separation of powers that agents of one branch also act as agents of . . . [an] other." Some flexibility in allocating functions whose classification would be at best ambiguous is no doubt desireable, so long as it "creates no interference by . . . [one] department with the power of . . . [another] department."

The WBA does not direct the governor to hire any particular person, nor does it forbid the governor from firing an employee -- even for an illicit reason -- the governor may do so. Thus, there is no interference in the appointment power that the Legislature delegated to Patrick. The Legislature has not told the governor who he must hire, or who he must fire. See Commissioner of Administration v. Kelley, 350 Mass. 501, 505 (1966). Whether there are consequences attendant to the governor/employer's actions are an entirely different matter. Significantly, Patrick testified to his belief that he could not remove an appointee for an unlawful reason. RA366

Accepting the Commonwealth's argument that separation of powers prevents the Legislature from providing remedies for employees would eliminate or abrogate protections for Commonwealth employees on a number of grounds that the Legislature has established. It would also lead to the illogical conclusion that actions that fall short of termination would not implicate the governor's power to appoint or remove employees who serve at his pleasure. Thus, those employees would be protected by the WBA, while those employees who experience discharge would not be. North Shore Realty Trust v. Commonwealth, 434 Mass. 109, 112 (2001) (statute "should not be so interpreted as to cause absurd or unreasonable results when the language is susceptible of a sensible meaning").

The Legislature has chosen to protect employees from unlawful discrimination, harassment, and retaliation and provided remedies for those who are subject to such unlawful acts. G.L. c. 151B (MCAD). There is no carve out in G. L. c. 151B for individuals in an imagined inner circle. The WBA, similarly, does not exempt individuals in the governor's inner circle.

CONCLUSION

For the foregoing reasons and those this court may find just and appropriate, Ms. Edwards respectfully requests that this honorable court deny the Commonwealth's appeal and award her reasonable attorney's fees.

Respectfully submitted,

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ADDENDUM

Table of Contents

Provisions of the Massachusetts Constitution

Massachusetts Constitution, preamble, ...56

Part the Second, c. 2, §1, art. 1 (1780) 56

art. 30..56

Statutory Provisions

G. L. c. 6, § 178K; Sex Offender Registry Board (excerpt)...........................57

ACTS 1999, c. 74, § 1 58

G. L. c. 149, § 185, as inserted by Acts 1993, § 471 An Act to Protect Conscientious Employees; Retaliation against employees reporting violations of law or risks to public health, safety or environment; remedies......................59

G. L. c. 151B, (excerpt) 61

Decisions

Memorandum of Decision and Order on the Commonwealth of Massachusetts' Motion for Summary Judgment Tabit, J.. 63-78

Massachusetts Constitution.

PREAMBLE (1780)

The end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them.

We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain and establish the following *Declaration of Rights, and Frame of Government,* as the **CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS**.

Part the Second, c. 2, §1, art. 1 (1780)

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.

Article 30 (1780).

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.

Statutory Provisions

G. L. c. 6, § 178K, Sex offender registry board (excerpt)

Section 178K. (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.

. . .

ACTS 1999, c. 74, § 1,

SECTION 1. The general court hereby finds that: (1) the danger of recidivism posed by sex offenders, especially sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior, to be grave and that the protection of the public from these sex offenders is of paramount interest to the government; (2) law enforcement agencies' efforts to protect their communities, conduct investigations and quickly apprehend sex offenders are impaired by the existing lack of information known about sex offenders who live within their jurisdictions and that the lack of information shared with the public may result in the failure of the criminal justice system to identify, investigate, apprehend and prosecute sex offenders; (3) the system of registering sex offenders is a proper exercise of the commonwealth's police powers regulating present and ongoing conduct, which will provide law enforcement with additional information critical to preventing sexual victimization and to resolve incidents involving sexual abuse promptly; (4) in balancing offenders' rights with the interests of public security and safety, the release of information about sex offenders to law enforcement before the opportunity for an individual determination of the sex offender's risk of reoffense is necessary to protect the public safety; (5) registration by sex offenders is necessary in order to permit classification of such offenders on an individualized basis according to their risk of reoffense and degree of dangerousness; (6) the public interest in having current information on certain sex offenders in the hands of local law enforcement officials, including prior to such classification, far outweighs whatever liberty and privacy interests the registration requirements may implicate. Therefore, the commonwealth's policy, which will bring the state into compliance with federal requirements, is to assist local law enforcement agencies' efforts to protect their communities by requiring sex offenders to register and to authorize the release of necessary and relevant information about certain sex offenders to the public as provided in this act.

G.L. c. 149, § 185, Retaliation against employees reporting violations of law or risks to public health, safety or environment; remedies

Section 185. (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).

G. L. c. 151B, (excerpt, emphasis supplied).

Section 1: Definitions

Section 1. As used in this chapter

1. The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and the commonwealth and all political subdivisions, boards, and commissions thereof.

. . .

4. The term "unlawful practice" includes only those unlawful practices specified in section four.

5. The term "employer" does not include a club exclusively social, or a fraternal association or corporation, if such club, association or corporation is not organized for private profit, nor does it include any employer with fewer than six persons in his employ, but shall include an employer of domestic workers including those covered under section 190 of chapter 149, the commonwealth and all political subdivisions, boards, departments and commissions thereof. 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, and which limits membership, enrollment, admission, or participation to members of that religion, from giving preference in hiring or employment to members of the same religion 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.

6. The term "employee" does not include any individual employed by his parents, spouse or child.

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

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[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.

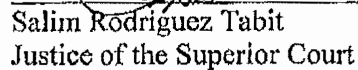
Massachusetts jurisprudence has a long history of acknowledging the legal construct of constructive discharge. See *GTE Products, Corp.* v. *Stewart*, 421 Mass. 22, 33-34 (1995). A "[c]onstructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee 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



Salim Rodriguez Tabit
Justice of the Superior Court

Dated: January 10, 2020

CERTIFICATE PURSUANT TO MASS. R. APP. P. 16(k)

I, Gail M. McKenna, do hereby certify that the BRIEF OF PLAINTIFF-APPELLEE SAUNDRA R. EDWARDS - IN OPPOSITION TO THE COMMONWEALTH'S APPEAL OF THE DENIAL OF ITS MOTION FOR SUMMARY JUDGMENT filed herein, in the case of Saundra R. Edwards v. Commonwealth, SJC-13073, complies with Mass. R. App. P. 16(k), as applicable.

Compliance with the applicable briefing length limit was ascertained, by using the font Times New Roman, size 14, at less than 11,000 words, and the word count feature of Microsoft Word.

/s/ Gail M. McKenna

Gail M. McKenna
BBO # 557173

Dated: April 20, 2021

CERTIFICATE OF SERVICE

I, Gail M. McKenna, hereby certify that I have this date, April 20, 2021 2020 efiled the BRIEF OF PLAINTIFF-APPELLEE SAUNDRA R. EDWARDS - IN OPPOSITION TO THE COMMONWEALTH'S APPEAL OF THE DENIAL OF ITS MOTION FOR SUMMARY JUDGMENT in the case of Saundra R. Edwards v. Commonwealth, SJC-13073, and simultaneously e-served

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Signed under the pains and penalties of perjury.

/s/ Gail M. McKenna

Gail M. McKenna
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