488 Mass. 555
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Saundra R. EDWARDS
v.
COMMONWEALTH & another.[1]

SJC-13073

Supreme Judicial Court of Massachusetts, Essex.

Argued May 5, 2021.
Decided October 12, 2021.

Terence P. McCourt, Special Assistant Attorney General, for the Commonwealth.

Gail M. McKenna, Brockton, for the plaintiff.

Present: Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

GAZIANO, J.

In September 2014, Governor Deval Patrick dismissed the plaintiff from her position as chair of the Sex Offender Registry Board (SORB), to which he had appointed her some seven years earlier. In statements to the media, Patrick said that he had fired the plaintiff because she had interfered in a sex offender classification proceeding and had attempted inappropriately to influence the hearing examiner. The case involved a question whether a California statute was a "like offense" to a crime in Massachusetts; the petitioner in the proceeding was Patrick's brother-in-law. The plaintiff subsequently filed a complaint against Patrick for defamation and against the Commonwealth for wrongful termination under G. L. c. 149, § 185, the Massachusetts whistleblower act. We ordered the claims against Patrick dismissed on the ground that the plaintiff did not plead sufficient facts to show that Patrick's statements to the media were made with actual malice, see

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Edwards v. Commonwealth, 477 Mass. 254, 255, 76 N.E.3d 248 (2017), and a Superior Court judge subsequently denied the Commonwealth's motion for summary judgment on the remaining whistleblower claim. At issue here is the Commonwealth's interlocutory appeal from that decision. We conclude that the whistleblower act is applicable in these circumstances and that there was no error in the judge's decision to deny the Commonwealth's motion for summary judgment, as genuine issues of material fact remain in dispute.

1. Background. We recite the relevant facts from the summary judgment record, reserving certain details for later discussion. See Edwards, 477 Mass. at 255-259, 76 N.E.3d 248. We view the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," Flesner v. Technical Communications Corp., 410 Mass. 805, 808, 575 N.E.2d 1107 (1991), in the light most favorable to the nonmoving party, here, the plaintiff, see Chambers v. RDI Logistics, Inc., 476 Mass. 95, 99, 65 N.E.3d 1 (2016).

a. Plaintiff's work with SORB. SORB is an administrative agency within the Executive Office of Public Safety and Security (EOPSS); it is responsible for classifying and maintaining a centralized registry of sex offenders under the Massachusetts sex offender registration act, G. L. c. 6, §§ 178C - 178Q (registration act). SORB is led by a chair who "shall be appointed by and serve at the pleasure of the governor ... [to] be the executive and administrative head" of the agency. G. L. c. 6, § 178K (1), second par. The plaintiff served in this role from November of 2007 to September of 2014, after having worked for over thirteen years as an assistant district attorney in Plymouth County.

Before she was hired at SORB, the plaintiff interviewed with EOPSS's Secretary (Secretary) and Undersecretary of Criminal Justice (Undersecretary); she was not interviewed by Patrick, and was never introduced to him. Her appointment letter, dated October 4, 2007, was printed on letterhead from the Commonwealth

and was signed by Patrick as Governor. During her time at SORB, the plaintiff understood her supervisor to be the Undersecretary, with whom she was in contact on at least a weekly basis. The plaintiff received positive annual personnel reviews, which were completed by the Undersecretary.

b. Sigh/Paglia matter. In 1993, Bernard Sigh pleaded guilty in California to the crime of spousal rape, see Cal. Penal Code § 262. He admitted that he had "accomplished an act of sexual intercourse with [his] wife against her will by means of force." After serving a term of incarceration, Sigh moved to Massachusetts, but he did not register as a sex offender. Generally, any person who has been convicted of a sex offense in another State that is a "like offense" to a sex offense that requires registration under Massachusetts law must register with SORB if the individual moves to the Commonwealth. See G. L. c. 6, § 178C (sex offense includes "like violation of the laws of another [S]tate"); G. L. c. 6, § 178E (g) (registration by sex offender is required within two days of moving to Massachusetts). See, e.g., Doe, Sex Offender Registry Bd. No. 151564 v. Sex Offender Registry Bd., 456 Mass. 612, 615–616, 925 N.E.2d 533 (2010) (Maine sex offense was "like violation" because elements were "the same or nearly the same as an offense requiring registration in Massachusetts").

After Sigh's offense and failure to register became a public issue during Patrick's 2006 gubernatorial campaign, SORB undertook an investigation of Sigh's case. SORB made a preliminary recommendation that Sigh be required to register as a low-risk, level one sex offender. At that time, such a classification did not mandate

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public disclosure. Sigh requested a hearing pursuant to G. L. c. 6, § 178L (1) (a), and 803 Code Mass. Regs. § 1.04(3) to challenge the preliminary classification; he also filed a motion seeking relief from the requirement that he register. SORB's general counsel, Daniel Less, asked the parties to brief the issue whether the conviction of "spousal rape" in California was a "like offense" to rape in Massachusetts, and also asked the Attorney General for an opinion on that question.[2] SORB's acting director wanted to wait to hold a hearing on Sigh's motion until the Attorney General had responded.

An assistant general counsel at SORB (who had been told that Sigh was Patrick's brother-in-law) thought that no hearing was necessary because the offense of rape carries a lifetime registration requirement in Massachusetts, and the level one classification order should issue, as no better outcome for Sigh would be possible. He therefore filed a motion for a required finding that Sigh be classified as a level one sex offender. Hearing examiner Attilio Paglia denied that motion and began a three-day hearing on Sigh's motion for classification that same day, August 1, 2017. Paglia had arranged to take the Sigh matter from the hearing officer to whom it originally had been assigned. At the end of the hearing, Paglia made an oral ruling that the crime of spousal rape in California was not equivalent to rape in Massachusetts, but rather to indecent assault and battery, and that Sigh was relieved of the obligation to register as a sex offender.[3] For an oral ruling to be made at a SORB hearing was rare; Paglia testified that he could recall two out of approximately 250 cases he had decided where he made an oral ruling rather than take the matter under advisement at the end of the hearing. On September 14, 2007, Paglia internally submitted his initial written decision absolving Sigh from the requirement of registration.

The plaintiff began her service as chair of SORB several months later, in November of 2007. During her first days in the position, Paglia himself informed her about a particular matter she later learned was the Sigh matter; he told her that he felt others at SORB were upset by the way it had been handled and were calling and sending him e-mail messages about it, and that he was unsure how to handle the decision where others at SORB did not agree with the outcome he had reached. When the plaintiff met with senior SORB staff several days later, they explained their view of the situation to her and

told her of their frustration with the decision and their belief that it was incorrect. The plaintiff reviewed the decision and the recordings of the hearing and determined that Paglia's conclusion that Sigh had not committed an offense that was equivalent to the crime of rape in Massachusetts was erroneous; the plaintiff also believed based on those recordings that the level one determination was incorrect and Sigh's risk of reoffense was higher. The plaintiff and senior staff at SORB and EOPSS accordingly decided to wait for the opinion by the Attorney General before allowing a written decision to be released, and delayed issuance

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of Paglia's written decision. They also contemplated issuing a one-line decision stating simply that, after a hearing, Sigh's motion to be relieved of the obligation to register was allowed.

In May of 2008, the plaintiff again met with Paglia. She explained the elements of rape under Massachusetts law and emphasized that "rape is rape" regardless of the relationship of the parties involved;[4] she did not, however, tell Paglia specifically what to do with the decision in the Sigh matter, and she explicitly declined to answer when he asked her what she wanted him to do, instead directing him to seek advice from another SORB employee if he needed help with the legal analysis. Paglia later told her that he had based his decision on a Superior Court decision he found compelling, and on his belief that the conclusion that the Sigh matter involved a violent offense was "not fair." Shortly thereafter, and following further consultation by the plaintiff with her superiors at EOPSS, SORB issued the Sigh decision as Paglia originally had drafted it.

The plaintiff then implemented a staff-wide training on the elements of every offense over which SORB had jurisdiction, with instruction by a former assistant district attorney, and informed Paglia that he would need to have remedial training on these elements. The plaintiff also promulgated a regulation permitting board-level review of decisions by individual hearing examiners. Prior to that, individual hearing examiners generally could issue decisions without further review within SORB, and SORB staff doubted they had any authority to prevent issuance of a decision by an individual examiner; although a respondent could appeal from a decision of a hearing examiner to the Superior Court, SORB had no such right of appeal. In December of 2008, Paglia resigned from SORB and then filed a complaint in the Superior Court against SORB, the plaintiff, and a number of others under the whistleblower act. The complaint alleged that the plaintiff's actions constituted retaliation against Paglia for his actions in connection with the Sigh matter. In July of 2014, Paglia and the Commonwealth reached a settlement agreement.

c. Plaintiff's dismissal from SORB. On September 15, 2014, more than six years after the decision issued in the Sigh case, and approximately two months after the settlement of Paglia's lawsuit, the plaintiff was invited to a meeting scheduled for the following morning with members of Patrick's staff, at his office.[5] At that meeting, the plaintiff was told that she served "at the Governor's pleasure," that she had done nothing wrong, and that Patrick had decided to replace her as chair of SORB, effective immediately; she was instructed not to attend a regular meeting she had scheduled at the State House for later that day. Patrick had not consulted with the Secretary or the Undersecretary prior to deciding to replace the plaintiff. The Undersecretary, Sandra McCroom, who had been the plaintiff's supervisor, was surprised by the decision when she had learned of it several days before the meeting with the plaintiff. As the meeting was taking place, McCroom had been sent to the offices of SORB to announce to agency staff that the plaintiff was being replaced.

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Later that same day, the plaintiff asked McCroom if she could resign from her position as SORB chair, in order to avoid the stigma of being dismissed from such a high-profile public office. After McCroom consulted with her own

supervisors, she told the plaintiff that she would be allowed to resign if she did so effective that day. On September 17, 2014, the plaintiff submitted a letter dated September 16, 2014, addressed to Patrick as Governor, stating that she was resigning "[i]n anticipation of the appointment of a new Chairperson" of SORB. EOPSS acknowledged her resignation in writing on September 18, 2014.

In a statement to the media on September 22, 2014, Patrick explained his decision to appoint a new chair of SORB as follows:

> "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 kind of productivity we need out of them and then I'd say maybe 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."

On January 2, 2015, Patrick also discussed the plaintiff's dismissal with the media. As the motion judge quoted in his findings of fact, Patrick said,

> "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."

d. Prior proceedings. In December of 2014, the plaintiff filed a complaint in the Superior Court against Patrick for defamation and against the Commonwealth for wrongful termination under the whistleblower act. As to the latter claim, the plaintiff alleged that she had been dismissed because of her objection to Paglia's ruling that spousal rape was not equivalent to rape. After the claims against Patrick were dismissed, see Edwards, 477 Mass. at 255, 76 N.E.3d 248, the Commonwealth filed a motion for summary judgment on the remaining whistleblower act claim; that motion was denied by a Superior Court judge. A single justice of the Appeals Court subsequently allowed the Commonwealth's request for leave to pursue an interlocutory appeal from the denial under G. L. c. 231, § 118. The single justice noted that "most of the issues raised in the summary judgment motion are legal in nature and go to important questions about the contours of the Governor's appointment authority." We then allowed the

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Commonwealth's petition for direct appellate review.

2. Discussion. We review a motion for summary judgment de novo. Psychemedics Corp. v. Boston, 486 Mass. 724, 731, 161 N.E.3d 399 (2021). See Mass. R. Civ. P. 56, 365 Mass. 824

(1974). "Summary judgment is appropriate where there are no genuine issues of material fact and the moving party," in this case the Commonwealth, "is entitled to judgment as a matter of law." Green Mountain Ins. Co. v. Wakelin, 484 Mass. 222, 226, 140 N.E.3d 418 (2020), quoting Boazova v. Safety Ins. Co., 462 Mass. 346, 350, 968 N.E.2d 385 (2012).

Here we first must consider whether, as a matter of statutory interpretation and constitutional principles, the whistleblower act may be invoked by the chair of SORB when she is dismissed by the Governor. Having concluded that it may be, we then turn to consider whether the plaintiff has raised at least a genuine issue of material fact for all of the required elements of a claim under the act. We conclude that she has.

a. The whistleblower act. The whistleblower act was enacted in 1994, see St. 1993, c. 471. The act prohibits an "employer" from "tak[ing] any retaliatory action against an employee" because the employee has engaged in certain protected activities.[6] G. L. c. 149, § 185 (b). These activities include "[o]bject[ing] to, or refus[ing] 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."[7] G. L. c. 149, § 185 (b) (3). The act defines "employer" to mean only "the [C]ommonwealth, 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."[8] G. L. c. 149, § 185 (a) (2). An "employee" is defined as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration." G. L. c. 149, § 185 (a) (1).

The act provides a variety of remedies for a violation: common-law tort remedies, temporary restraining orders or injunctions, reinstatement of the employee to the same or an equivalent position, reinstatement of benefits and seniority rights, treble reimbursement for lost compensation, and payment of reasonable costs and attorney's fees. G. L. c. 149, § 185 (d).

b. Applicability of the act. The Commonwealth argues that, as a matter of law, the whistleblower act does not apply to a situation in which the chair of SORB is dismissed by the Governor. Although the Commonwealth challenged in its brief the

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plaintiff's status as an employee of the Commonwealth, it conceded at oral argument that, for purposes of the whistleblower act, she was employed by the Commonwealth in her position as chair of SORB.[9] The Commonwealth argues, however, that the Governor was not acting as the agent of the Commonwealth when he dismissed the plaintiff, and that his actions thus were not attributable to the Commonwealth as the plaintiff's employer. The Commonwealth also contends that the registration act and the whistleblower act are in conflict with respect to the Governor's appointment of the SORB chair, and that the registration act should prevail. In addition, the Commonwealth argues that the application of the whistleblower act in these circumstances violates the constitutional principle of the separation of powers by intruding on the Governor's executive role.

i. Attribution of Governor's actions to the Commonwealth. We think it clear that the Governor was acting for and on behalf of the Commonwealth when he brought about the departure of the plaintiff from SORB. As a general matter, the Commonwealth, formed by the people of Massachusetts, can act only through specific individuals. See art. 5 of the Massachusetts Declaration of Rights ("All power residing originally in the people, and being derived from them, the several magistrates and officers of government ... are their substitutes and agents ..."); T. Hobbes, Leviathan, pt. II, c. 23 (1651) ("A Publique Minister, is he, that by the Soveraign ... is employed in any affaires, with Authority to represent in that employment, the Person of the Common-wealth"). Just as "authority to manage the business affairs of a corporation is primarily vested in its board of directors," Kelly v. Citizens Fin. Co. of Lowell,

306 Mass. 531, 532, 28 N.E.2d 1005 (1940), the Massachusetts Constitution makes the Governor the "supreme executive magistrate," who, along with the Governor's Council, is charged with "ordering and directing the affairs of the [C]ommonwealth," Part II, c. 2, § 1, arts. 1, 4, of the Constitution of the Commonwealth.

In appointing and removing the SORB chair, moreover, the Governor was not acting in a private, individual capacity; rather, he was exercising a power conferred on his office by the Legislature in the registration act. Given that the plaintiff was employed by the Commonwealth, it also would be nonsensical to view the single person empowered to hire and fire the plaintiff as acting independently of the Commonwealth. On this view, the Commonwealth would lack basic control over its own employee, an absurd result. See

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Bellalta v. Zoning Bd. of Appeals of Brookline, 481 Mass. 372, 378, 116 N.E.3d 17 (2019) ("Ultimately, we must 'avoid any construction of statutory language which leads to an absurd result,' or that otherwise would frustrate the Legislature's intent" [citation omitted]). We therefore discern no merit in the Commonwealth's argument that the Governor acted as "an independent principal ... in exercising his appointment and removal power."

ii. Statutory conflicts. The Commonwealth argues that the ban in the whistleblower act on a public employer dismissing an employee for engaging in a protected activity, see G. L. c. 149, § 185 (b), is in conflict with the provision of the registration act that the chair of SORB "shall be appointed by and serve at the pleasure of the governor," G. L. c. 6, § 178K (1). In support of its view that the whistleblower act must yield to the registration act, the Commonwealth notes that the registration act was adopted two years after the whistleblower act, and deals with a more specific subject matter. We do not agree.

"In the absence of explicit legislative commands to the contrary, we construe statutes to harmonize and not to undercut each other." Ryan v. Mary Ann Morse Healthcare Corp., 483 Mass. 612, 620, 135 N.E.3d 711 (2019), quoting School Comm. of Newton v. Newton Sch. Custodians Ass'n, Local 454, SEIU, 438 Mass. 739, 751, 784 N.E.2d 598 (2003). In other words, we avoid doing precisely what the Commonwealth here urges us to do, namely, "mechanically [to] apply[ ] the concept that the more 'recent' or more 'specific' statute (whichever one that is) trumps the other." Commonwealth v. Harris, 443 Mass. 714, 725, 825 N.E.2d 58 (2005). Rather, we attempt to ensure that "the policies underlying both may be honored." Id. In this case, a reconciliation of the two provisions is readily achieved.

The phrase "at the pleasure of" is "commonly understood to refer to employment at will." Clough v. Mayor & Council of Hurlock, 445 Md. 364, 373, 127 A.3d 554 (2015). The provision of the registration act stating that the SORB chair serves "at the pleasure of" the Governor means that the chair of SORB essentially is analogous to an at-will employee of the Governor. See Regan v. Commissioner of Ins., 343 Mass. 202, 206, 178 N.E.2d 81 (1961) ("In a removal at pleasure no cause need be given ..." [citation omitted]); Bailen v. Assessors of Chelsea, 241 Mass. 411, 414, 135 N.E. 877 (1922) (where "a public officer is appointed during pleasure, or where the power of removal is discretionary, the power may be exercised without notice or hearing"). Generally, "employment at will can be terminated for any reason or for no reason." Harrison v. NetCentric Corp., 433 Mass. 465, 478, 744 N.E.2d 622 (2001). See King v. Driscoll, 418 Mass. 576, 583, 638 N.E.2d 488 (1994), S.C., 424 Mass. 1, 673 N.E.2d 859 (1996). At-will employment for public officials is in contrast with the situation where a subordinate officer can be dismissed only "for cause." See Levy v. Acting Governor, 436 Mass. 736, 749, 767 N.E.2d 66 (2002) (Governor could not dismiss members of Turnpike Authority, independent corporate body, based on "honest dispute over policy"); McSweeney v. Town Manager of Lexington, 379 Mass. 794, 798, 401 N.E.2d 113 (1980) ("for cause" standard in town manager act allowed town manager to exercise discretion to remove untenured officials).

Even for at-will employees, however, certain limitations exist on an employer's ability to terminate their employment. Employers, for example, may not terminate an at-will employee "for a reason that violates a clearly established public policy," which includes termination for refusal to disobey the law.

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Upton v. JWP Businessland, 425 Mass. 756, 757, 682 N.E.2d 1357 (1997), and cases cited. See DeRose v. Putnam Mgt. Co., 398 Mass. 205, 209, 496 N.E.2d 428 (1986). In some circumstances, these limits have been codified by the Legislature. Thus, firing at-will employees out of discriminatory animus is prohibited by G. L. c. 151B, § 4, the antidiscrimination statute. See Jackson v. Action for Boston Community Dev., Inc., 403 Mass. 8, 9, 525 N.E.2d 411 (1988) (listing exceptions to at-will employment rule).

The situation is much the same with respect to the manner in which the SORB chair may be removed. The policies underlying the registration act may be honored by reading it to give the Governor broad discretion in hiring and firing the chair, with the proviso that the chair may not be removed for an illegal reason, for instance because of discriminatory animus or because of an activity protected by the whistleblower act. See Bowditch v. Banuelos, 1 Gray 220, 231–232 (1854) (power to appoint new trustee "at pleasure" is not "an arbitrary power," but "by necessary implication" is limited to appointment of person legally capable of executing trust).

We recognize that an appointee serving at the Governor's pleasure in a policy-making role seeking a remedy of "reinstate[ment] ... to the same position held before the retaliatory action," as provided under G. L. c. 149, § 185 (d), in some circumstances could create a conflict of the sort that the Commonwealth posits here. See Cieri v. Commissioner of Ins., 343 Mass. 181, 185, 178 N.E.2d 77 (1961) (veterans' tenure act did not allow plaintiff to sue for reinstatement as insurance commissioner's representative on board of appeal for motor vehicle liability policies and bonds). The Governor must be able to "enlist aid from appropriate officials within the executive branch in connection with performing the duties conferred" on him or her. See Teamsters Local Union No. 404 v. Secretary of Admin. & Fin., 434 Mass. 651, 656, 751 N.E.2d 399 (2001). The question, however, is not before us, as the plaintiff has not sought reinstatement. Moreover, G. L. c. 149, § 185 (d), also provides for reinstatement "to an equivalent position," as well as for other remedies. See Peterson v. Commissioner of Revenue, 444 Mass. 128, 138, 825 N.E.2d 1029 (2005) (noting preference in favor of severability should part of statute prove to be invalid).

iii. Separation of powers. The Commonwealth maintains that the application of the whistleblower act in this situation violates the constitutional principle of the separation of powers by intruding on the functions reserved to the executive. Article 30 of the Massachusetts Declaration of Rights provides:

> "In the government of this [C]ommonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

The Massachusetts Constitution thus is "more explicit than the Federal Constitution in calling for the separation of the powers of the three branches of government, and we have insisted on scrupulous observance of its limitations." New Bedford Standard-Times Publ. Co. v. Clerk of the Third Dist. Court of Bristol, 377 Mass. 404, 410, 387 N.E.2d 110 (1979). Nonetheless, "an absolute division of the three general types of functions is neither possible nor always desirable," Opinion of the Justices, 365 Mass. 639, 641, 309 N.E.2d 476 (1974), and art. 30 "does not require three 'watertight compartments' within the

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government," Commonwealth v. Gonsalves, 432 Mass. 613, 619, 739 N.E.2d 1100 (2000), quoting Opinions of the Justices, 372 Mass. 883, 892, 363 N.E.2d 652 (1977).

In considering a constitutional challenge to a statute, we have a duty, "[w]here fairly possible," to construe the statutory language "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." Commonwealth v. Kelly, 484 Mass. 53, 62, 138 N.E.3d 364 (2020), quoting Commonwealth v. Fremont Inv. & Loan, 459 Mass. 209, 214, 944 N.E.2d 1019 (2011). See Demetropolos v. Commonwealth, 342 Mass. 658, 660, 175 N.E.2d 259 (1961) ("where a statute may be construed as either constitutional or unconstitutional, a construction will be adopted which avoids an unconstitutional interpretation"). Bearing this duty in mind, we conclude that the limitation in the whistleblower act on the Governor's power to remove the chair of SORB does not violate the constitutional principle of the separation of powers.

The Legislature created the position of the chair of the SORB, using its constitutional authority, and provided that the chair "shall be appointed by and serve at the pleasure of the governor." G. L. c. 6, § 178K (1). See Part II, c. 1, § 1, art. 4, of the Constitution of the Commonwealth. At the same time, as the Massachusetts Constitution authorizes it to do, the Legislature has placed certain general constraints on the manner in which all public employees, including the SORB chair, may be removed. See id. (Legislature has "full power and authority" to make "all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions ... for the good and welfare of this [C]ommonwealth, and for the government and ordering thereof"). This it has done in the whistleblower act, just as in the antidiscrimination statute, G. L. c. 151B, and the State ethics statute, G. L. c. 268A.

The plaintiff argues that her termination was in response to her objection to an activity, policy, or practice that she believed to be in "violation of a law." See G. L. c. 149, § 185 (b) (3). We therefore need not address the second prong of the retaliatory action provision, which protects an employee's objection to an activity, policy, or practice that he or she reasonably believes poses "a risk to public health, safety or the environment," id., although we recognize that, in many routine policy disagreements, any given position might be characterized as creating "a risk to public health, safety or the environment," cf. Chambers v. Department of the Interior, 515 F.3d 1362, 1368 (Fed. Cir. 2008) (any "policy decision related to the allocation or distribution of law enforcement funding ... could potentially be said to create a risk to public safety").

c. Whether genuine issues of material fact remain in dispute. Given that, as a matter of law, the whistleblower act applies to a person serving in the plaintiff's position who has been dismissed by the Governor, we turn to consider whether the plaintiff has demonstrated sufficient disputes of material fact to survive the Commonwealth's motion for summary judgment. "A court must deny a motion for summary judgment if, viewing the evidence in the light most favorable to the nonmoving party, there exist genuine issues of material fact ..." (citation omitted). Maxwell v. AIG Domestic Claims, Inc., 460 Mass. 91, 97, 950 N.E.2d 40 (2011). See Godbout v. Cousens, 396 Mass. 254, 257, 261, 485 N.E.2d 940 (1985) (nonmoving party has burden to show genuine issues of material fact in dispute so as to preclude moving party from meeting "the initial burden under rule 56 [c] of showing

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that there was no dispute as to a material fact").

The elements of a whistleblower claim under G. L. c. 149, § 185, are that (1) the plaintiff-employee engaged in an activity protected by the act; (2) the protected activity was the cause of an adverse employment action, such that the employment action was retaliatory; and (3) the retaliatory action caused the plaintiff damages. See Cristo v. Worcester County Sheriff's Office, 98 Mass. App. Ct. 372, 376, 156 N.E.3d 225 (2020) ; Trychon v. Massachusetts Bay Transp. Auth., 90 Mass. App. Ct. 250, 255, 59 N.E.3d 404 (2016) ; Welch v. Ciampa, 542 F.3d 927, 943 (1st Cir. 2008) ; Taylor v. Freetown, 479 F.

Supp. 2d 227, 241 (D. Mass. 2007). See also Newberne v. Department of Crime Control & Pub. Safety, 359 N.C. 782, 788-789, 618 S.E.2d 201 (2005) (identifying "essential elements of comparable whistleblower provisions in various [S]tate and [F]ederal statutes").

i. Protected activity. The Commonwealth argues that the plaintiff did not engage in an activity protected by the whistleblower act because she did not "[o]bject[ ] to, or refuse[ ] to participate in any activity, policy or practice which [she] reasonably believe[d was] in violation of a law." See G. L. c. 149, § 185 (b) (3). The Commonwealth maintains that the plaintiff did not "object" within the meaning of the whistleblower act because she did not complain about Paglia's decision to any superior, but only responded to it using her ordinary authority over SORB. We disagree. The act does not specify how or to whom an objection must be expressed in order to be considered a protected activity under its terms; in any event, it also covers a "refus[al] to participate." Furthermore, the act enumerates separate protected activities concerning "[d]isclos[ure] ... to a supervisor or to a public body," and "[p]rovid[ing] information to ... any public body conducting an investigation, hearing or inquiry." G. L. c. 149, § 185 (b) (1), (2). This language suggests that "objecting" to a policy need not necessarily involve such steps. See Wolfe v. Gormally, 440 Mass. 699, 704, 802 N.E.2d 64 (2004) (constructions making part of statute superfluous are to be avoided). On this record, viewed, as we must, in the light most favorable to the plaintiff, see Maxwell, 460 Mass. at 97, 950 N.E.2d 40, a fact finder could conclude that the plaintiff communicated her belief that Paglia's decision was legally erroneous to senior SORB staff, attempted to delay the issuance of the decision, and took steps to prevent such mistakes being made in the future.

The Commonwealth also contends that the plaintiff did not object to an "activity, policy or practice" because her intervention related solely to a single isolated decision by Paglia. We discern no reason why even a single event could not constitute an "activity" for purposes of the act. See Quazi v. Barnstable County, 70 Mass. App. Ct. 780, 784, 877 N.E.2d 273 (2007) (employee's objection to superior's request that employee falsely credit overdue account was protected by whistleblower act). Furthermore, the plaintiff has provided some evidence that Paglia's decision could have had precedential value for future SORB classification decisions, and that senior SORB staff were concerned about this eventuality. Among other things, the plaintiff points to a series of electronic mail messages in which a SORB attorney expressed concern that litigants were "sharing decisions," and that the Paglia ruling would "provide counter and conflicting authority" on the issue of like offenses. The plaintiff also points to the delay in issuing Paglia's decision, and the discussions among senior SORB staff about the possibility of releasing a very brief written decision simply

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affirming the determination at the hearing that Sigh was exempt from registration, without offering any specific analysis. A trier of fact thus could find that the plaintiff's objection to Paglia's decision was an objection to a "policy" within the meaning of the act. In addition, whether the plaintiff reasonably believed that Paglia's decision was illegal "is a genuine issue of material fact to be resolved by the trier of fact." See Mailloux v. Littleton, 473 F. Supp. 2d 177, 185 (D. Mass. 2007).

ii. Retaliatory action. The whistleblower act defines a "retaliatory action" as "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 (a) (5). The Commonwealth argues that no such action took place because the plaintiff voluntarily resigned from her position. This argument is unavailing.

There are abundant indications in the record that the plaintiff was fired and that her letter of resignation was merely an attempt to save face professionally after the termination had happened. Before the letter was submitted, according to several depositions, the plaintiff

had been told that she was relieved of her position effective immediately and that her supervisor had been sent to convey the news to SORB staff. She also was told that her replacement had been selected, but the person's name could not be revealed because the individual's background was in the process of being vetted. She additionally was told that, although there had been no wrongdoing, Patrick was choosing to "go in another direction." Tellingly, Patrick later publicly characterized the plaintiff's departure as involuntary; he commented to news media that her actions had been "inappropriate" and that he had "asked for her resignation."

The facts of this case are clearly distinguishable from those in the other cases involving voluntary resignations upon which the Commonwealth relies. Viewed in the light most favorable to the plaintiff, this was not a case where a mere "threat of discharge or discipline" meant that she was confronted with a "difficult choice" about whether to resign. See Spencer v. Civil Serv. Comm'n, 479 Mass. 210, 215, 222, 93 N.E.3d 840 (2018) (no cause of action for plaintiff-employee because "termination of his service" in civil service law did not cover voluntary resignation); Monahan v. Romney, 625 F.3d 42, 47 (1st Cir. 2010), cert. denied, 563 U.S. 976, 131 S.Ct. 2895, 179 L.Ed.2d 1190 (2011) (no deprivation of property interest protected by due process where plaintiff was offered "choice between resignation and termination" and "could have requested more time or demanded to speak to the Governor to argue against" dismissal).

Furthermore, the plaintiffs' claims in those cases did not involve the whistleblower act. Under the act, an involuntary dismissal is not required to state a claim; the definition of "retaliatory action" includes the broad category "other adverse employment action." See G. L. c. 149, § 185 (a) (5). Even if the plaintiff had been offered a genuine choice between resignation and involuntary termination, that would not necessarily foreclose a showing that she had suffered an "adverse employment action." See Yee v. Massachusetts State Police, 481 Mass. 290, 296, 121 N.E.3d 155 (2019) ("adverse employment action" for purposes of antidiscrimination statute includes "effects on working terms, conditions, or privileges" that "have materially disadvantaged an employee" [citation omitted]).

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iii. Causation. The whistleblower act prohibits "tak[ing] any retaliatory action against an employee because the employee" engages in a protected activity (emphasis added). G. L. c. 149, § 185 (b). We consistently have construed similar language in the antidiscrimination statute, G. L. c. 151B, § 4, to require a plaintiff to show that a discriminatory animus was a "determinative" or "but for" cause of an adverse employment action, even if it was not "the only cause." Lipchitz v. Raytheon Co., 434 Mass. 493, 504–505, 506 n.19, 751 N.E.2d 360 (2001). See Psy-Ed Corp. v. Klein, 459 Mass. 697, 707, 947 N.E.2d 520 (2011) (under antidiscrimination statute, "employer's desire to retaliate against the employee must be shown to be a determinative factor in its decision to take adverse action"); Smith v. Winter Place LLC, 447 Mass. 363, 364 n.4, 851 N.E.2d 417 (2006) (claim for retaliation may succeed where underlying claim for discrimination would fail, "so long as the [employee] can prove that he [or she] reasonably and in good faith believed the [employer] was engaged in wrongful discrimination," and that employer's "desire to retaliate against" employee was determinative factor in decision to terminate employment [quotation and citation omitted]). See, e.g., Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 121, 731 N.E.2d 1075 (2000), quoting Tate v. Department of Mental Health, 419 Mass. 356, 364, 645 N.E.2d 1159 (1995) (plaintiff must prove that employer's desire to retaliate against employee was "a determinative factor" in its decision to terminate employment).

In interpreting the whistleblower act, some decisions of the Appeals Court have applied this standard of "determinative cause." See, e.g., Orfaly v. Office of Community Corrections, 83 Mass. App. Ct. 1120, 984 N.E.2d 890 (2013)

(describing "determinative" cause in whistleblower claims as "the decisive factor, the crucial factor, the deciding factor, the conclusive factor"). At the same time, other Appeals Court decisions, and numerous decisions by Federal District Court judges, deciding claims under the Massachusetts whistleblower act, have inquired whether the protected activity "played a substantial or motivating part in the retaliatory action," based upon the Federal standard used in 42 U.S.C. § 1983 actions. See, e.g., Cristo, 98 Mass. App. Ct. at 376, 156 N.E.3d 225, quoting Trychon, 90 Mass. App. Ct. at 255, 59 N.E.3d 404. See also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286–287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

The Appeals Court has discussed these inconsistent standards in some detail, albeit in circumstances where there was no need to resolve the issue:

> "In analyzing § 185 claims, the United States Court of Appeals for the First Circuit applies the causation standard utilized in retaliation and discrimination cases brought under 42 U.S.C. § 1983. See [Mt. Healthy City Sch. Dist. Bd. of Educ., 429 U.S. at 286–287, 97 S.Ct. 568]; Pierce v. Cotuit Fire Dist., 741 F.3d 295, 301–302, 303 (1st Cir. 2014). See also Harris v. Trustees of State Colleges, 405 Mass. 515, 522–523 [542 N.E.2d 261] (1989). Here, the motion judge applied the determinative cause standard. See [Lipchitz, 434 Mass. at 504–506, 751 N.E.2d 360]. Where the issue is not raised, we have no occasion to address the conflict in this appeal."

Trychon, 90 Mass. App. Ct. at 255 n.10, 59 N.E.3d 404. See, e.g., Pierce, 741 F.3d at 303. We clarify here that the determinative cause standard applicable in employment discrimination cases should be used in claims for retaliation brought under the whistleblower act.

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The Commonwealth argues that there is no evidence that Patrick was aware of the Sigh/Paglia matter; that the six-year gap between the issuance of Paglia's decision and the plaintiff's dismissal was too great to infer a connection between the two; and that Patrick had unrelated, proper reasons for dismissing the plaintiff.

Contrary to the Commonwealth's implication, the whistleblower act does not contain any requirement that the retaliating party be aware of the protected activity at the time that the activity occurred, so long as the employer knew of the protected activity before undertaking the retaliatory action. The record before us, viewed in the light most favorable to the plaintiff, indicates that Patrick was aware of her response to Paglia's decision in Sigh's case. According to Patrick's deposition and his statements to news media, he learned of the plaintiff's involvement in the matter in late 2013, when Paglia's lawsuit against the Commonwealth was about to be settled, and he fired the plaintiff in September 2014, shortly after the settlement was made in July of 2014, more than six years after the underlying events.

When "adverse action is taken against a satisfactorily performing employee in the immediate aftermath of the employer's becoming aware of the employee's protected activity, an inference of causation is permissible." Mole v. University of Mass., 442 Mass. 582, 592, 814 N.E.2d 329 (2004). Moreover, the record suggests more than mere temporal proximity of the discovery of the activity to the alleged retaliation; Patrick explained in his statements to news media that the Sigh/Paglia matter, which involved his brother-in-law, was "the final straw" in his concerns about the environment at SORB, and "the reason why [he] asked for [the plaintiff's] resignation."

In his statements to the media, Patrick also did reference several other, potentially nonretaliatory, reasons for dismissing the plaintiff from her position as chair of SORB. Although a "determinative cause" of an adverse employment decision is a "but for" cause, it need not be "the only cause." See Lipchitz, 434 Mass.

at 506 n.19, 751 N.E.2d 360. Whether, but for the protected activity, Patrick would have dismissed the plaintiff is a genuine question of material fact that must be resolved by a fact finder. See Flesner, 410 Mass. at 809, 575 N.E.2d 1107 ("In cases where motive, intent, or other state of mind questions are at issue, summary judgment is often inappropriate").

Order denying motion for summary judgment affirmed.

Notes:

[1] Deval Patrick. Patrick's motion to dismiss was allowed, and he is no longer a party to the case.

[2] The Appeals Court's decision in Commonwealth v. Becker, 71 Mass. App. Ct. 81, 87, 879 N.E.2d 691, cert. denied, 555 U.S. 933, 129 S.Ct. 320, 172 L.Ed.2d 231 (2008), holding that a "like offense" is one that "comports with the essence of the Massachusetts crime," had not been issued when Paglia conducted the Sigh hearing in 2007.

[3] Because indecent assault and battery, unlike rape, is not classified as a sexually violent offense under G. L. c. 6, § 178C, the obligation to register is not for life, and may be terminated after twenty years pursuant to G. L. c. 6, § 178G.

[4] In Commonwealth v. Chretien, 383 Mass. 123, 130, 417 N.E.2d 1203 (1981), this court held that the common-law spousal exclusion to the crime of rape had been abolished by the 1974 revisions to the Commonwealth's rape statute.

[5] Neither the Undersecretary, the Secretary, nor Patrick was present at this meeting, which was conducted by Kendra Foley, Patrick's director of boards and commissions.

[6] We separately have recognized common-law protection for "whistleblowers" as part of the public policy exception to the rule allowing at-will employees to be dismissed for any or no reason. See GTE Prods. Corp. v. Stewart, 421 Mass. 22, 26, 653 N.E.2d 161 (1995). The plaintiff does not raise any argument based on this public policy exception.

[7] Also protected are disclosing, or threatening to disclose, such an activity, policy, or practice to a supervisor or to a public body, and providing information or testimony to a public body conducting an investigation, hearing, or inquiry. G. L. c. 149, § 185 (b) (1)-(2).

[8] The act was amended effective June 24, 2021. See St. 2021, c. 8, §§ 75, 76. The changes modify the definition of "employer" throughout the act to include "public utility employers," a change not relevant to the issues here. All citations in this decision refer to the language effective at the times of the events at issue, as amended in 1997. See St. 1997, c. 19, § 90.

[9] In its brief, the Commonwealth argued that the plaintiff's employer for purposes of the whistleblower act was not the Commonwealth, but, rather, the Undersecretary or possibly the Secretary, because the plaintiff worked under their supervision. That position is unsupported by the statutory language, which defines an "employer" as "the [C]ommonwealth, and its agencies or political subdivisions," and not specific individuals within those entities. See G. L. c. 149, § 185 (a) (2). Indeed, the whistleblower act has been interpreted to preclude bringing a claim against an individual supervisor. See, e.g., Welch v. Ciampa, 542 F.3d 927, 943 n.7 (1st Cir. 2008) ("The Whistleblower statute permits only an ‘employer’ [as defined in the statute] to be sued, not individual supervisors" [citation omitted]). Similarly, in other employment contexts, we have avoided restricting the status of an "employer" to immediate superiors who exercise control over an employee. See, e.g., McNamara v. Honeyman, 406 Mass. 43, 48, 546 N.E.2d 139 (1989) (doctor was "public employee" because he was employed by public medical school); College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 166-167, 508 N.E.2d 587 (1987) (corporation was liable for sexual harassment of subordinates committed by its supervisors).
