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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2021-00678

DENISE FOLEY

vs.

MASSHEALTH & others[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

The plaintiff, Denise Foley, brings this action against her former employer, MassHealth, and three MassHealth employees, Amanda Cassel Kraft, Daniel Tsai, and Sonia Bryan (collectively with MassHealth, "Defendants"), alleging that they violated her federal and state constitutional rights and wrongfully terminated her in violation of public policy. The matter is now before the Court on Defendants' motion to dismiss all claims pursuant to Massachusetts Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the following reasons, Defendants' motion is **ALLOWED IN PART** and **DENIED IN PART**.

BACKGROUND

The following facts are taken from Foley's Complaint.

On December 8, 2019, Foley began working for MassHealth as the Director of Internal and External Training and Communication. Her responsibilities were to communicate policy and procedural updates to MassHealth employees and external partners that work with people in the community to help them apply for MassHealth or other health insurance coverage through Massachusetts Health Connector. She received a "glowing performance review" by her

[1] Amanda Cassel Kraft, in her official capacity as Acting Assistant Secretary for MassHealth; Daniel Tsai, in his individual capacity; and Sonia Bryan, in her official capacity as HR Representative, Director of Diversity and Civil Rights of MassHealth, and in her individual capacity.

supervisor in August 2020, noting that "she hit the ground running" and was "a true example of leadership and professionalism." See Complaint at par. 43. She also received the "2020 Citation for Outstanding Performance" which was signed by the Governor. *Id.*

In December 2020, Foley maintained a personal Facebook account and was a member of the "Milton Neighbors Facebook Group" (the "Milton Facebook Group"). *Id.* at par. 15. The Milton Facebook Group is for "residents of Milton, Massachusetts, for the purpose of referrals, school info, town info, helpful hints, and helping one another in a variety of capacities, including constructive discussion about town issues." *Id.* It is a private group, meaning only its approximately 12,000 members can view and comment on posts from other members.

On December 3, 2020, a member of the Milton Facebook Group, posted on the group page about the mask requirement issued during the COVID-19 pandemic.[2] He wrote: "Anybody hear of the 'Milton Betterment League'? Got a notice stuffed in my mailbox today from that group. Used the phrase 'see something, say something' about turning in neighbors who aren't [*sic*] wearing masks. Seems a little crazy to call the cops on someone not wearing a mask." *Id.* at par. 16. Foley posted a reply to that posting stating that turning in someone for not wearing a mask "[s]ounds like what the Nazis did in Germany." *Id.* at par. 17. Subsequent commentators criticized Foley's statement. She responded to those commentators by posting:

> Wow! In my opinion, calling the authorities on your neighbors for not wearing a mask is the same as calling the authorities to tell them your neighbor is a Jew. It's bad enough that I see in the police reports people calling in to report their neighbors are having parties and that a group of kids is gathering. Now there are those encouraging people to call on people not wearing masks?! Don't

[2] On November 6, 2020, the Massachusetts Governor issued COVID-19 Order No. 55 requiring "all persons in Massachusetts over the age of 5 years old . . . to wear a mask or cloth face covering over their mouth and nose when in a public location, whether indoors or outdoors." The Order further provided that its violation "may result in a civil fine of up to $300 per violation . . ." See *Rosenberg* v. *JPMorgan Chase & Co.*, 487 Mass. 403, 408 (2021) ("[M]atters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint . . . may be taken into account" on a motion to dismiss.) (citation omitted).

> you get it? Don't you see what people are encouraging?! How dare anyone try to take away my rights! I have the right NOT to wear a mask if I don't want to. I have the right to gather with friends and family if I want to. If that's a problem for you or anyone else, report me!

Id. at par. 18. After Foley received more criticism from other commentators, she posted another reply stating: "And there are lawsuits challenging the constitutionality of these mandates. I wear a mask when I have to. That's not the issue. The issue is people turning in their neighbors for not wearing them." *Id.* at par. 19. In response, another member of the group wrote: "Can you at least admit that your comparison to Hitler is flawed in many ways, including the penalty? You might at worst be fined $300, and probably will just be told to put a mask on. . . ." *Id.* at par. 20. Foley responded:

> No, I won't. Do you believe the concentration camps were the first step in Hitler's mad plan? Of course not. He was a master manipulator who turned neighbor against neighbor. Just as those suggesting we do with those not wearing masks. And not that it should have any bearing but for your information, I am of German Jewish decent. I feel very strongly about how a madman was able to manipulate an entire population into believing Jews were the problem. I feel equally so about the people telling me what I can and cannot do or how I should feel. I believe Covid is serious. But I also believe it is being used to manipulate people. In this country, at least for now, I am entitled to my opinion and my right to vocalize that opinion.

Id. at par. 21. Shortly thereafter, an unknown individual reported the comments that Foley had made to MassHealth.

On December 21, 2020, Defendant Sonia Bryan, a human resources representative and the Director of Diversity and Civil Rights at MassHealth; Patricia Grant, the Chief Operating Officer; and Kim Marie Mercure, the Deputy Chief Operating Officer at MassHealth, met with Foley via a video conference to ask her about the Facebook comments. Foley acknowledged that she made the postings. Foley was told that her Facebook posts were being investigated and that

she was being placed on administrative leave. She received a letter via email from Grant that same day notifying her that "until further notice, you will be placed on administrative leave with pay pending an investigation into your ability to perform your job responsibilities, specifically matters related to your social media activities." *Id.* at par. 26. Foley responded that she should be entitled to know what is in the complaint about her. The following day, Grant responded that she would "defer to Sonia [Bryan] as the HR contact on this case to either respond to your inquiry or forward it to the appropriate person for a response." *Id.* at par. 28.

On January 7, 2021, Foley emailed Bryan and Grant, requesting an explanation of the process, an estimated timeline, and the details of the complaint against her. Bryan responded that the matter was under review and Foley would be notified shortly. Foley never received a copy of the complaint against her.

On January 27, 2021, Daniel Tsai, the Assistant Secretary at MassHealth, and Bryan met with Foley via video conference. With respect to the complaint, Bryan told her, "We received an anonymous complaint and we shared the Facebook messages associated with that complaint. At this time, that's the only thing we are at liberty to share with you." *Id.* at par. 30. Tsai took the position that because Foley listed on her Facebook profile that she worked at MassHealth, her comments about masks could be taken at the agency's position. He stated, "This is less about the post. You have been the Director of Training and Communication. It's about the discussions about masks. Because your position is listed on your Facebook profile, your words speak on behalf of this agency in the midst of the pandemic." *Id.* at par. 31. Tsai also told Foley that her postings "are substantially at odds with what we are trying to accomplish across Health and Human Services in the pandemic response" and that the investigation "is less around the specifics of the complaint and more around your capacity." *Id.*

Foley told Tsai that she had removed the reference to her job at MassHealth from her Facebook page, but Tsai responded that it was there at the time of the postings at issue. He told Foley, "In the midst of the pandemic, when it comes to masks, we have to say we don't have confidence in your ability to be in that role as the Director of Internal and External Training and Communication." *Id.* at par. 33. He said he was "specifically referencing . . . the masks and the public health component of that." *Id.* Tsai informed Foley that he was terminating her employment at MassHealth. Foley stated that her post "did not encourage people not to wear masks. . . . My issue was people encouraging others to turn in neighbors for not wearing masks." *Id.* at par. 34. Nevertheless, Tsai said because her title and position was listed on her Facebook profile, it could be assumed she was speaking on behalf of the agency." *Id.* at par. 35. When Foley countered that she was speaking as a private citizen, Bryan told her that her "behavior was essentially counterproductive to the efficiency and advancement of MassHealth's mission during the pandemic." *Id.* at par. 37. Foley's termination letter stated: "Following an investigation, the Executive Office of Health and Human Services has determined that it no longer has confidence in your ability to perform your duties effective as MassHealth's Director of Internal and External Training and Communication. You are hereby discharged from your employment with MassHealth effective immediately, January 27, 2021." *Id.* at par. 38.

Foley's duties as the Director of Internal and External Training and Communication did not require her to communicate with the general public and did not include anything related to masks or messaging around public health during the pandemic. Her only duties related to the pandemic were to communicate the availability of Medicaid coverage for people who lost their jobs during the shutdown and the procedures related to the relaxed requirements for obtaining or maintaining MassHealth coverage. MassHealth never put her on notice that she could be

terminated for posting about masks, lockdowns, or her political views generally on her Facebook page. Nor did Defendants explain their evidence against Foley so that she had an opportunity to present her side. The termination of her employment has caused Foley to experience high levels of stress and anxiety.

DISCUSSION

When evaluating the sufficiency of a complaint under Rule 12(b)(6), the Court must determine whether the complaint states a claim upon which relief may be granted. "While a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Iannacchino*, 451 Mass. at 636, quoting *Bell Atl. Corp.*, 550 U.S. at 555. The Court, however, does not accept "legal conclusions [in the complaint] cast in the form of factual allegations." *Schaer* v. *Brandeis University*, 432 Mass. 474, 477 (2000). Therefore, "[w]hat is required at the pleading stage are factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief." *Iannacchino*, 451 Mass. at 636, quoting *Bell Atl. Corp.*, 550 U.S. at 573.

Similarly, a court presented with a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), accepts as true the allegations in the complaint as well as any favorable inferences reasonably drawn from them. See *Bevilacqua* v. *Rodriguez*, 460 Mass. 762, 764 (2011), citing *Ginther* v. *Commissioner of Ins.*, 427 Mass. 319, 322 (1998). On a Rule 12(b)(1) motion, the plaintiff bears the burden of establishing the existence of subject matter

jurisdiction. See *Wooten* v. *Crayton*, 66 Mass. App. Ct. 187, 190 n.6 (2006), citing *Callahan* v. *First Congregational Church of Haverhill*, 441 Mass. 669, 710-711 (2004) ("[P]laintiff bears the burden of proving jurisdictional facts to support each of the plaintiff's claims.").

Defendants move to dismiss all five claims in Foley's Complaint. The Court considers each of Defendants' arguments in turn.

I. Violation of the First Amendment against Kraft in her official capacity, Tsai in his individual capacity, and Bryan in both her official and individual capacity (Count I)

Count I of Foley's Complaint asserts a claim for violation of Foley's First Amendment rights under the United States Constitution and 42 U.S.C. § 1983 against Kraft in her official capacity as Acting Assistant Secretary for MassHealth, Tsai in his individual capacity, and Bryan in both her official capacity as HR Representative and in her individual capacity. Defendants assert three arguments for dismissal of this claim: (1) Foley cannot maintain her claim against Kraft and Bryan in their official capacities because they are not "persons" subject to suit under 42 U.S.C. § 1983; (2) Foley cannot maintain her claim as to Tsai and Bryan in their individual capacities because her speech was not protected under the First Amendment; and (3) Tsai and Bryan in their individual capacities are entitled to qualified immunity. The Court concludes that Count I survives against Kraft and Bryan in their official capacities to the extent it seeks declaratory and injunctive relief but that Count I must be dismissed to the extent it seeks compensatory damages from Kraft and Bryan in their official capacities, and to the extent it is asserted against Tsai and Bryan in her individual capacity under the doctrine qualified immunity.

1. Violation of the First Amendment against Kraft and Bryan in their Official Capacities

As noted, Defendants argue that Foley cannot maintain her claim against Kraft and Bryan in their official capacities because they are not "persons" subject to suit under 42 U.S.C. § 1983. Section 1983 provides in relevant part:

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

(emphasis supplied). "State officials sued for damages in their official capacity are not 'persons' under § 1983 because the law treats the action as [one] against the official's office and hence against the State." *O'Malley* v. *Sheriff of Worcester County*, 415 Mass. 132, 141 n. 13 (1993). However, under *Ex Parte Young*, 209 U.S. 123, 159-160 (1908), suits against state officers in their official capacities are permitted to proceed in order to compel the officials to comply with federal law. "Such suits, however, may only seek prospective injunctive or declaratory relief; they may not seek retroactive monetary damages or equitable restitution." *Vaqueria Tres Monjitas, Inc.* v. *Irizarry*, 587 F.3d 464, 478 (1st Cir. 2009), citing *Edelman* v. *Jordan*, 415 U.S. 651, 664–665 (1974).

Here, Foley seeks three types of relief. She seeks a declaration that Kraft and Bryan violated the First Amendment, "an award of injunctive relief . . . [compelling] Kraft and Bryan to reinstate her to her former position and to remove any adverse employment records from her personnel file," and she seeks compensatory damages including backpay, and mental pain and suffering. See Complaint at 20, Prayers for Relief, A, B, and C.

To the extent as she seeks monetary damages from Kraft and Bryan in their official capacities, the claim is clearly barred. See *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986) ("Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred . . ."); *Whalen* v. *Massachusetts Trial Ct.*, 397 F.3d 19, 29 (1st Cir. 2005) (remedy of restoration of pension and retirement credit would serve to compensate the plaintiff for a past violation of federal law and was therefore not

permitted against state officials acting in official capacity). However, insofar as Foley seeks a declaration that Kraft and Bryan violated the First Amendment and injunctive relief requiring Defendants to reinstate her to former position and remove her adverse employment records, her claim is permitted under the *Ex Parte Young* doctrine. See *id.* at 30 (reinstatement seeks to end a continuing violation of federal law); *Elliott* v. *Hinds*, 786 F.2d 298, 302 (7th Cir. 1986) ("The goal of reinstatement and the removal of damaging information from the plaintiff's work record is not compensatory; rather, it is to compel the state official to cease her actions in violation of federal law and to comply with constitutional requirements.").

Accordingly, Foley may assert her claim under Section 1983 for declaratory and injunctive relief against Kraft and Bryan in their official capacities.[3]

2. Tsai's and Bryan's Claim of Qualified Immunity

Defendants argue that Foley's claim should be dismissed as to Tsai and Bryan in their individual capacities because they are entitled to qualified immunity. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009), quoting *Harlow* v. *Fitzgerald,* 457 U.S. 800, 818 (1982). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties

[3] With respect to Count II, Defendants similarly argue that Foley's claim under the Massachusetts Civil Rights Act against Kraft and Bryan in their official capacities must be dismissed because individuals sued in their official capacities are not persons subject to suit under the Massachusetts Civil Rights Act. See *Orekoya* v. *Sex Offender Registry Bd.*, 100 Mass. App. Ct. 1131, 2022 WL 1010067 at *1 (2022) (Rule 23.0). However, the *Ex Parte Young* doctrine extends to state constitutional claims. See *Doe* v. *Sex Offender Registry Bd.*, 94 Mass. App. Ct. 52, 63–64 (2018), citing *Lane* v. *Commonwealth*, 401 Mass. 549, 552 (1988) and *Ex Parte Young*, 209 U.S. at 159-160. Accordingly, Foley may assert her claim under the Massachusetts Civil Rights Act for declaratory and injunctive relief against Kraft and Bryan in their official capacities.

reasonably." *Pearson*, 555 U.S. at 231. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Id.*, quoting *Groh* v. *Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting). "When properly applied, [the doctrine of qualified] 'immunity protects all but the plainly incompetent or those who knowingly violate the law.'" *Morse* v. *Cloutier*, 869 F.3d 16, 23 (1st Cir. 2017), quoting *White* v. *Pauly*, 580 U.S. 73 (2017) (citation omitted).

The Court follows a "two-prong analysis for determining whether defendants are entitled to qualified immunity, asking '(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was 'clearly established' at the time of the defendant's alleged violation.'" *Diaz-Bigio* v. *Santini*, 652 F.3d 45, 50 (1st Cir. 2011), citing *Pearson*, 555 U.S. at 269.

A. Constitutional Violation

As to the first prong, Foley asserts that Defendants have violated her right to free speech protected under the First Amendment. A public employee alleging a First Amendment claim must meet three requirements.

> First, the employee must have been speaking "as a citizen on a matter of public concern." *Garcetti* v. *Ceballos,* 547 U.S. 410, 418 (2006) . . . Second, under the balancing test of *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968), the employee's First Amendment interests in the speech must "outweigh the government's interests as an employer in avoiding disruption in the workplace." *Rivera–Jiménez,* 362 F.3d at 94. . . . Third, the employee must meet the "burden of producing sufficient direct or circumstantial evidence from which a jury reasonably may infer that his constitutionally protected conduct . . . was a 'substantial' or 'motivating' factor behind his dismissal." *Acevedo–Diaz* v. *Aponte*, 1 F.3d 62, 67 (1st Cir.1993); see also *Guilloty Perez* v. *Pierluisi*, 339 F.3d 43, 56 (1st Cir. 2003).

Diaz-Bigio, 652 F.3d at 51–52. Defendants argue that Foley's claim must fail because she cannot satisfy the second prong of the test—the "*Pickering* balancing test."[4]

"The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick* v. *Myers*, 461 U.S. 138, 150 (1983). The Court must "arrive at a balance between the interests of [the employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. See *Lane* v. *Franks*, 573 U.S. 228, 242 (2014), quoting *Garcetti*, 547 U.S. at 418. (the "question is whether the government had 'an adequate justification for treating the employee differently from any other member of the public' based on the government's needs as an employer"). In defining the Defendants' interest, relevant considerations include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin* v. *McPherson*, 483 U.S. 378, 388 (1987).

In evaluating this balance, the content of Foley's speech is relevant. *Guilloty*, 339 F.3d at 53. "[T]he greater the value of the subject of the speech to the public, the more the balance tilts towards permitting the employee to express [her]self." *Id.* "[P]rimarily political speech about the proper role of the government . . . is among the most highly protected speech in our constitutional order." *Davi* v. *Roberts*, 523 F.Supp.3d 295, 309 (E.D.N.Y. Mar. 3, 2021), citing *Snyder* v. *Phelps*, 562 U.S. 443, 451–452 (2011).

[4] Although Defendants assert this argument as to Tsai and Bryan in their individual capacities, it is equally relevant to the viability of the claim against Kraft and Bryan in their official capacities.

Defendants argue that the nature and content of Foley's comments entitle them to little weight "if any." See Memorandum in Support of Defendants' Motion at 8. They characterize her statements as "vile and deplorable falsehoods" which "compared the Governor's COVID-19 orders to the Nazi's extermination of the Jews during the Holocaust." *Id.* However, even accepting Defendants' characterization as accurate, the First Amendment protections may extend to false statements, see *Pickering*, 391 U.S. at 570-571, as well as hyperbole, a category into which some of Foley's statements plausibly fit. See *Milkovich* v. *Lorain J. Co.*, 497 U.S. 1, 20 (1990).

Viewing Foley's comments in a light most favorable to her, her speech could be interpreted as an expression of an opinion as to the extent to which citizens should be participating in the government's enforcement of the mandate by reporting neighbors who failed to comply rather than a critique of the mandate itself. Indeed, the catalyst of the conversation was a notice from the Milton Betterment League regarding reporting neighbors, not the issuance of the mask mandate of which Foley suggests she complies with when she states "I wear a mask when I have to." Complaint at par. 19. Her statements, therefore, expressed a political view about whether it is potential government overreach for it to encourage neighbors to report on neighbors. Such speech is highly protected and Defendants must, therefore, demonstrate a corresponding risk of disruption to the government to outweigh her First Amendment right.

Defendants assert that Foley's interest is speech is outweighed by MassHealth's interest as a public employer in avoiding disruption in the workplace. Where the claims here are being evaluated under a Rule 12(b)(6) standard, there is no evidence yet before the Court to support Defendant's argument. The Court must therefore "assess whether the employer could reasonably predict that the employee speech would cause disruption, . . . in light of the manner, time, and

place the speech was uttered, as well as the context in which the dispute arose." *Gillis* v. *Miller*, 845 F.3d 677, 687 (6th Cir. 2017), citing *Rankin*, 483 U.S. at 389 (additional citations omitted). "[S]ubstantial weight has been given 'to government employers' reasonable predictions of disruption.'" *Diaz-Bigio*, 652 F.3d at 53–54, quoting *Waters* v. *Churchill*, 511 U.S. 661, 673 (1994).

Defendants argue that Foley's Facebook comments undermined the efforts of MassHealth and other public health departments to respond to the COVID-19 pandemic. Defendants also assert that Foley's comments irreparably damaged their confidence in her ability to fulfill her duties as the Director of Internal and External Training and Communications at MassHealth. Even if Foley's comments could be interpreted as expressing a viewpoint that was at odds with MassHealth's stance as a public health organization on masks and the importance of taking precautionary measures during the COVID-19 pandemic, the allegations in the Complaint suggest that there was a minimal risk that her comments would cause disruption in the workplace.

The Complaint alleges that Foley made the statements at issue through her personal Facebook account, in a private group, on her personal device, and outside of work premises. See Complaint at pars. 15, 53. Cf. *Connick*, 461 U.S. at 153 (where plaintiff "exercise[ed] her rights to speech at the office" it supported her employer's "fears that the functioning of his office was endangered"). They were not directed at any of her coworkers or immediate supervisors. See *Pickering*, 391 U.S. at 569–570 (where plaintiff's statements were not directed at anyone he would normally be in contact with during his daily work and had no effect on the issue being proposed by his employer, his statements were not disruptive to work relationships or harmful to the operation of his employer). Nor were they the type of comments that so obviously impact a

work environment. See *Curren* v. *Cousins*, 509 F.3d 36, 49-50 (1st Cir. 2007) (where employee's statements "directly went to impairing discipline by supervisors, disrupting harmony and creating friction in working relationships, undermining confidence in the administration, invoking oppositional personal loyalties, and interfering with the regular operation of the enterprise," there was "little question" that they employer's "concerns about disruption were reasonable").

Moreover, the Complaint alleges that "Foley's duties did not require her to communicate with the general public." See Complaint at par. 39. Nor did her duties "include anything related to masks or messaging around public health during the pandemic. *Id.* at 40. Rather, she alleges that "[h]er only duties related to the pandemic were to communicate [to other MassHealth employees and its external partners] the availability of Medicaid coverage for people who lost their jobs during the shutdown . . . [a]nd the procedures related to the relaxed requirements for obtaining or maintaining MassHealth coverage." *Id.* Accepting these allegations as true, as the Court must on a Rule 12(b)(6) motion, it is not readily apparent how Foley's comments would disrupt the day-to-day operations of MassHealth or impair her ability to complete her job duties. See *Rankin*, 483 U.S. at 390–391 ("Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal.").

Accordingly, when considering only the facts alleged in the Complaint, the *Pickering* scale tips in Foley's favor. Thus, she has stated a violation of the First Amendment.

B. Clearly Established Right

As noted, in the second prong of the qualified immunity analysis, the Court considers whether Foley's First Amendment right was "'clearly established' at the time of the defendant's

alleged violation." *Diaz-Bigio*, 652 F.3d at 50. "The 'clearly established' step comprises two subparts: first, whether 'the contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right,' and second, 'whether in the specific context of the case, a reasonable defendant would have understood that his conduct violated the plaintiffs' constitutional rights.'" *Decotiis* v. *Whittemore*, 635 F.3d 22, 36 (1st Cir. 2011) (citation omitted). "The salient question is whether the state of the law at the time gave a defendant "clear notice that what he was doing was unconstitutional." *Diaz-Bigio*, 652 F.3d at 50, quoting *Decotiis*, 635 F.3d at 37.

"The purpose of [the clearly established] requirement is to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." *Fabiano* v. *Hopkins*, 352 F.3d 447, 457–458 (1st Cir. 2003) (citation and internal quotation omitted). "[I]f the existence of a right or the degree of protection it warrants in a particular context is subject to a balancing test, the right can rarely be considered 'clearly established,' at least in the absence of closely corresponding factual and legal precedent." *Frazier* v. *Bailey*, 957 F.2d 920, 931 (1st Cir. 1992) (citation omitted). See *Fabiano*, 352 F.3d at 457 ("Because *Pickering*'s constitutional rule turns upon a fact-intensive balancing test, it can rarely be considered 'clearly established' for purposes of qualified immunity.") (citation omitted).

The outcome of the *Pickering* balancing test here "was not so clear as to put all reasonable officials on notice that firing [Foley] would violate the [Constitution]." *Diaz–Bigio*, 652 F.3d at 52. As explained in the Complaint, from their investigation into Foley's Facebook comments, Defendants learned that Foley listed MassHealth as her employer and listed her title at the agency on her Facebook profile, and they took the position that her comments about masks could be taken as the agency's position. Defendants were reasonably concerned

about the perception of those viewing Foley's comments which made what some may consider an offensive analogy to the Nazis in Germany. Nothing in the Complaint detracts from Defendants' assertion that they considered Foley's comments to be "substantially at odds with what [they were] trying to accomplish across Health and Human Services in the pandemic response," even if MassHealth's role in the public health system did not specifically concern the enforcement of the mask mandate. Defendants had an interest "in promoting the efficiency of the public services [MassHealth] performs through its employees," see *Pickering*, 391 U.S. at 568, and regardless of whether the decision to terminate her was misguided, the Court cannot say that a reasonable person in Defendants' "shoes would have understood that his conduct violated the Plaintiff['s] constitutional rights." *Raiche* v. *Pietroski*, 623 F.3d 30, 36 (1st Cir. 2010) (citation omitted).

Foley argues that *Pickering* should have put Defendants on notice that to terminate her based on her comments would violate a clearly established right. In *Pickering*, a school district dismissed a teacher after she sent a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way the school board and superintendent had handled past proposals to raise revenue for the schools. 391 U.S. at 564. The Supreme Court engaged in a highly fact-intensive analysis weighing the interests of both sides and placing significance on issues such as the plaintiff's contribution, as a teacher with unique insight into how funds allotted to the operations of a school should be spent, to the "decision-making by the electorate." *Id.* at 571-572. Given this fact specific analysis considering issues materially different than here, *Pickering* could not provide Defendants "fair warning" that their actions were unconstitutional. See *Diaz-Bigio*, 652 F.3d at 53 (the *Picking* balancing test is "subtle, yet difficult to apply, and not yet well defined, . . . consequently, only in the extraordinary case will

it have been clearly established that a public employee's speech merited constitutional protection").

Relying on *Mihos* v. *Swift*, 358 F.3d 91 (1st Cir. 2004), Foley contends that it is premature for the Court to determine whether Tsai and Bryan have qualified immunity and there must be "evidence in the record for MassHealth to support its proffered reasons for terminating Foley" before qualified immunity can be determined. See Plaintiff's Memorandum Opposing Defendant's Motion to Dismiss ("Plaintiff's Opposition") at 15. *Mihos*, however, is inapposite to the circumstances here.

In *Mihos*, a former state turnpike commissioner claimed that the acting governor, Swift, terminated him in retaliation for a vote he made contrary to the governor's position. 358 F.3d at 95. Mihos alleged in his complaint that he exercised his best judgment in casting his vote and that the proffered reasons for his termination were categorically false. *Id.* at 107. He stated that Swift was "enraged" that as a result of his vote, the Massachusetts Turnpike Authority failed to approve a toll increase she supported and she took action against him "in direct retaliation" for his vote. *Id.* In concluding that Swift violated a clearly established right (the First Amendment right of a public official to vote on a matter of public concern without suffering from retaliation), the First Circuit stated that Mihos provided "closely corresponding factual and legal precedents" involving "votes by public officials on matters of public concern and their subsequent removal based on those votes." *Id.* at 109. It further noted that because it must accept allegations that Swift's motivation was retaliation, Swift was unable to substantiate any claim that she terminated Mihos for a legitimate reason. *Id.* at 109-110.

Here, Defendants decided to terminate Foley based on various comments she made in a Facebook group. Speech, by its very nature, presents a much more complicated issue than a

vote. Unlike in *Mihos,* matters of content and interpretation factored into Defendants' decision to terminate Foley. The difficulty posed in balancing a public employer's interest in efficiently performing its public services and an employee's interest in free speech is exemplified in the numerous cases cited by the parties considering the limits of a public employee's right to free speech. Thus, there lacks "closely corresponding factual and legal precedent" that in the specific context of this case should have provided Defendants fair warning that their actions were unconstitutional.

Based on the allegations in the Complaint and the existing precedent," this is not a case in which reasonable officers, in light of clearly established law, '*must* have known that [they were] acting unconstitutionally.'" *Wagner* v. *Holyoke*, 404 F.3d 504, 509 (1st Cir. 2005), quoting *Dirrane v. Brookline Police Dep't,* 315 F.3d 65, 71 (1st Cir. 2002). The granting of qualified immunity is therefore appropriate at this stage of the litigation. See *Pearson*, 555 U.S. at 232 (immunity questions should be resolved "at the earliest possible stage in litigation").

II. Violation of Article XVI of Massachusetts Constitution against Kraft in her official capacity, Tsai in his individual capacity, and Bryan in both her official and individual capacity (Count II)

In Count II of the Complaint Foley alleges that the individual Defendants violated the Massachusetts Civil Rights Act ("MCRA"), G. L. c. 12, §§ 11H and 11I, by interfering with her freedom of speech under Article XVI of the Massachusetts Constitution. The MCRA provides a remedy for persons whose rights under state or federal law have been interfered with through threats, intimidation, or coercion by "any person or persons whether or not acting under the color of law." G. L. c. 12, §§ 11H. To establish a claim under the MCRA, Foley must demonstrate: "(1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered

with, or attempted to be interfered with; and (3) such interference was by threats, intimidation, or coercion." *Currier* v. *National Bd. of Med. Examiners*, 462 Mass. 1, 12 (2012).

Defendants assert that Foley's MCRA claim fails under Rule 12(b)(6) because she has not alleged that Defendants interfered with her speech through threats, intimidation, or coercion.[5] In the context of the MCRA, "a 'threat' consists of 'the intentional exertion of pressure to make another fearful or apprehensive of injury or harm'; 'intimidation' involves 'putting in fear for the purpose of compelling or deterring conduct'; and 'coercion' is 'the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done.'" *Glovsky* v. *Roche Bros. Supermarkets*, 469 Mass. 752, 763 (2014), quoting *Haufler* v. *Zotos*, 446 Mass. 489, 505 (2006). "A direct violation of a person's rights does not by itself involve threats, intimidation, or coercion and thus does not implicate the [MCRA]." *Longval* v. *Commissioner of Correction*, 404 Mass. 325, 333 (1989).

The Complaint asserts that the Defendants' investigation, suspension, and termination of Foley constitutes threats, intimidation, or coercion that interfered with her right to freedom of speech. However, none of the allegations related to these measures taken by Defendants arise to the level of threats, intimidation, or coercion as defined above.[6] Although terminating an employee with an employment agreement for exercising free speech rights may rise to the level of threats, intimidation, and coercion for the purpose of the MCRA, see *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 95 (1987), terminating an at-will employee "falls outside the scope of what we recognize as 'threats, intimidation or coercion' required to state a claim under the Act." *Willitts* v. *Roman Cath. Archbishop of Bos.*, 411 Mass. 202, 210–211

[5] Because this argument goes to the viability of Count II, the Court considers it as to Kraft and Bryan in their official capacities as well as Tsai and Bryan in their individual capacities.

[6] Foley has not directed the Court to any specific facts in her Complaint where she alleges any of the three individual defendants engaged in conduct which amounted to threats, intimidation, or coercion.

(1991). See *Webster* v. *Motorola, Inc.*, 418 Mass. 425, 430 (1994) (rejecting plaintiffs' argument that defendant attempted to interfere with their rights by threatening the loss of their "at-will" positions); *Delmonte* v. *Laidlaw Envtl. Servs., Inc.*, 46 F. Sup.2d 89, 93 (D. Mass. 1999) ("[A]t-will employees are not entitled to their employment, and therefore do not, when threatened with its loss, reasonably suffer coercion or intimidation.").[7] There are no allegations in the Complaint that Foley had an employment contract with MassHealth, and Foley acknowledges that she was an at-will employee.[8] See Complaint at par. 66; Plaintiff's Opposition at 18. Her claim under the MCRA is, therefore, not viable.

III. Wrongful termination in violation of Public Policy against Kraft in her official capacity, Tsai in his individual capacity, and Bryan in both her official and individual capacity, and against MassHealth (Count III)

In Count III, Foley alleges that Defendants wrongfully terminated her for a reason contrary to public policy. Such a claim is an exception to the general rule that "an at-will employee may be terminated at any time for any reason or for no reason at all." See *Upton v. JWP Businessland*, 425 Mass. 756, 757 (1997). The exception "is narrowly construed." *Parker* v. *Town of Brookfield*, 68 Mass. App. Ct. 235, 242 (2007). See *Smith–Pfeffer* v. *Superintendent of the Walter E. Fernald State Sch.*, 404 Mass. 145, 150 (1989) (cautioning against converting the general rule "into a rule that requires just cause to terminate an at-will employee"). "Redress is available for employees who are terminated for asserting a legally guaranteed right (e.g., filing workers' compensation claim), for doing what the law requires (e.g., serving on a jury), or for refusing to do that which the law forbids (e.g., committing perjury)." *Id.* at 149-150.

[7] To the extent that Foley contends that "free speech is one of the highest values within our society, [and therefore] the MCRA should be interpreted as protecting an employee that finds herself in Foley's circumstances," she has directed this Court to no authority supporting that position.

[8] For the reasons articulated in Section IV, the Court rejects Foley's argument that she had an implied contract with MassHealth.

Foley's claim for wrongful termination asserts that she was terminated for asserting a legally guaranteed right, namely engaging in free speech. Citing *King* v. *Driscoll*, 418 Mass. 576, 584–585 (1994), Defendants argue that Foley cannot assert a claim for wrongful termination in violation of public policy based on this right because it did not arise out of her employment.[9] In *King*, the Supreme Judicial Court held that "[f]or the exercise of a *statutory* right to be worthy of protection in this area . . . the *statutory* right must relate to or arise from the employee's status as an employee." *Id.* at 584. (emphasis added). Where Foley's claim is based on her engaging in a constitutional right as opposed to a statutory right, *King* sheds no light on whether Foley may maintain her claim.

Defendants' reliance on *Smith-Pfeffer* is similarly misplaced. In *Smith-Pfeffer*, the defendant terminated the plaintiff after the plaintiff expressed her disagreement with the defendant on the job regarding a work-related matter. 404 Mass. at 149. The Supreme Judicial Court rejected the plaintiff's argument that she was engaging in a "socially desirable dut[y]" and therefore wrongfully discharged in violation of public policy. *Id.* at 150. Rather, the Court held that "internal matters, including internal policies, could not be the basis of a public policy exception to the at-will rule." 404 Mass. at 151. Defendants have conceded for the purposes of this motion the Foley spoke as a citizen on a "matter of public concern." Her comments, therefore, are not analogous to those in *Smith-Pfeffer*.

As support for her argument that she can maintain her claim, Foley points to *Korb* v. *Raytheon Corp.*, 410 Mass. 581 (1991). *Korb* offers some insight into whether a claim for wrongful termination in violation of public policy extends to a free speech claim. In *Korb*, the defendant, a defense contractor, terminated the plaintiff, a lobbyist, after he publicly advocated

[9] Defendants also argue that Foley's claim must fail because her speech was not protected under the federal or state constitutions. However, the Court has concluded that Foley's Complaint states a claim under the First Amendment.

for a reduction in defense spending. *Id.* at 582-583. He brought a claim for wrongful discharge in violation of public policy premised on his assertion of his right to free speech under art. 16 of the Massachusetts Declaration of Rights. *Id.* at 584. The Supreme Judicial Court dismissed Korb's claim concluding that his comments, which were adverse to the financial interests of his employer, could not be the basis of his claim because "[t]here was no public policy prohibiting an employer from discharging an ineffective at-will employee." *Id.* The Supreme Judicial Court noted that "[Korb's] situation is not that of an employee who is fired for speaking out on issues in which his employer has no interest, financial or otherwise." *Id.* In doing so, the Court at least suggested that protected speech by a citizen outside of his employment may fall within the public policy exception.

Here, at this stage, it is not clear the extent to which Foley's comments concerned the interests of her employer, MassHealth. As noted, her comments can fairly be interpreted as pertaining only to whether neighbors should be turning in each other for failing to comply with the mask mandate which Foley asserts is unrelated to interests of MassHealth. Based on *Korb*, at this stage, such allegations are enough to state a claim for wrongful termination in violation of public policy. Accordingly, the Court will not dismiss Foley's claim for wrongful discharge in violation of public policy.

IV. Violation of Procedural Due Process under the Fourteenth Amendment and G. L. c. 12, § 11I against Kraft in her official capacity, Tsai in his individual capacity, and Bryan in both her official and individual capacity (Counts IV and V)

In Counts IV and V, Foley alleges that Defendants violated her procedural due process rights guaranteed under the federal and state constitutions. "Under both the United States Constitution and the Massachusetts Declaration of Rights, '[t]he threshold issue in a procedural due process action is whether the plaintiff had a constitutionally protected

property interest at stake.'" *Hall-Brewster* v. *Boston. Police Dep't*, 96 Mass. App. Ct. 12, 20 (2019), quoting *Perullo* v. *Advisory Comm. on Personnel Standards*, 476 Mass. 829, 840 (2017). "A property interest in the employment context can only arise by statute or contract." *Knox* v. *Civil Serv. Comm'n*, 63 Mass. App. Ct. 904, 906 (2005).

Foley has not alleged that she had a property interest by virtue of a statute or contract. Rather, as noted, Foley was an at-will employee of MassHealth. See *Ayala-Rodriguez* v. *Rullan*, 511 F.3d 232, 238 (1st Cir. 2007) ("Procedural rights would attach under the due process clause only if [plaintiff] had some kind of property interest in [continued employment]."); *Gomez* v. *Rivera Rodriguez*, 344 F.3d 103, 111 (1st Cir. 2003) ("Under ordinary circumstances, an at-will employee lacks a reasonable expectation of continued employment (and, thus, has no property interest in her job)."). Nevertheless, Foley asserts that she had a property interest in continued employment at MassHealth by virtue of a "limited contract right implied at law to continued employment." See Plaintiff's Opposition at 19. Relying on *DeRose* v. *Putnam Mgmt. Co.*, 398 Mass. 205 (1986), she argues that because she has stated a claim for wrongful discharge in violation of public policy and in *DeRose*, the Supreme Judicial Court concluded that such a claim sounded in contract, then she had a contact implied at law. There is no merit to this argument.

In *DeRose*, the Supreme Judicial Court considered the damages awarded for a wrongful discharge in a public policy claim where "the plaintiff tried his case on a breach of contract theory." *Id.* at 212. The Court rejected plaintiff's argument that suggested a tort measure of damages noting that "[t]he theory of law on which *by assent* a case is tried cannot be disregarded when the case comes before an appellate court for review of the acts of the trial judge." *Id.* (emphasis added). It would take more than a strained reading of *DeRose* to find that it concludes an employee who states a claim for wrongful discharge in violation of public policy has an

implied employment contract at law and thus a property interest for the purposes of a procedural due process claim. Moreover, there have been several cases since *DeRose* suggesting a public policy claim sounds in tort rather than contract. See, e.g., *King* v. *Driscoll*, 424 Mass. 1, 8 (1996); *Flesner* v. *Technical Communications Corp.*, 410 Mass. 805, 813 n.8 (1991); *Hobson* v. *McLean Hosp. Corp.*, 402 Mass. 413, 417 n.3 (1988); *O'Kelly* v. *BASF Magnetics Corp.*, 13 Mass. L. Rptr. 167, 168 (Mass. Super. 2001) (Fabricant, J.).

Foley's Complaint does not plausibly state a property interest in continued employment.[10] Therefore, no process was due prior to her termination, and Counts IV or V will be dismissed.

ORDER

For the foregoing reasons, Defendants' motion to dismiss is **ALLOWED** as to Count I insofar as it asserts a claim against Tsai and Bryan in their individual capacities. Defendants' motion to dismiss is also **ALLOWED** as to Counts II, IV, and V.

The motion is **DENIED** as to Count I insofar as it asserts a claim for declaratory and injunctive relief against Kraft and Bryan in their official capacities, and it is **DENIED** as to Count III.

Date: June 24, 2022

Sharon E. Donatelle
Justice of the Superior Court

[10] Count V additionally fails because, as discussed herein, Foley has not stated any allegations plausibly suggesting that Defendants interfered with her rights through threats, intimidation, or coercion.