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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2182CV00678

DENISE FOLEY

vs.

MASSHEALTH & others[1]

MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The plaintiff, Denise Foley ("Plaintiff" or "Foley"), brings this action against her former employer, MassHealth, and three MassHealth employees, Michael Levine, Daniel Tsai, and Sonia Bryan (collectively with MassHealth, "Defendants"), alleging that they violated her First Amendment rights under the United States Constitution (Count I) and wrongfully terminated her in violation of public policy (Count III).[2] The matter is now before the court on cross motions for summary judgment.[3] For the following reasons, Plaintiff's Motion for Summary Judgment is **DENIED** and Defendants' Motion for Summary Judgment is **ALLOWED**.

BACKGROUND

The following facts are undisputed. Certain facts are reserved for discussion below.

MassHealth is a program under the Executive Office of Health and Human ("EOHHS") that administers medical care benefits funded by the Commonwealth. MassHealth's mission is

[1] Michael Levine, in his official capacity as Acting Assistant Secretary for MassHealth; Daniel Tsai, in his individual capacity; and Sonia Bryan, in her official capacity as Human Resources Representative, Director of Diversity and Civil Rights of MassHealth, and in her individual capacity.

[2] This court (Donatelle, J.) previously dismissed Count I insofar as it was brought against Tsai and Bryan in their individual capacities, and Counts II, IV, and V.

[3] Defendants have also moved to strike several of Plaintiff's responses to their statements of undisputed facts. That motion is **denied**. The court has carefully reviewed the consolidated statement of undisputed facts and deemed unresponsive or unsupported answers admitted in accordance with Superior Court Rule 9A(b)(5)(iii)(A).

to cover as many eligible individuals as possible, to improve their health, and secure the best health outcomes attainable.

On December 8, 2019, MassHealth hired Foley as the Director of Internal and External Training and Communications, an at-will managerial position. Foley supervised two direct reports: an internal training manager and an external training manager. In her role as a director, Foley was a member of the leadership team at MassHealth. Internally, Foley was responsible for "training the member services employees . . . who would assist people who were applying for MassHealth." Joint Appendix ("J.A."), Ex. 1, Foley Tr. at 27. Externally, she "work[ed] with the certified application counselors and navigators who partnered with MassHealth and the Health Connector to assist people in the community for filling out applications to apply either for MassHealth or some other kind of coverage through the Health Connector." *Id.* A typical day for Foley at MassHealth involved meetings with internal and external partners to address policy changes and updates. Her job did not require or include communicating directly with members of the public.

During her tenure at MassHealth, Foley consistently received positive performance evaluations from her direct supervisors, including, most recently, on August 19, 2020. Foley's performance as the Director of Internal and External Training and Communication was also recognized by the Office of Governor Charles Baker, which presented her with the 2020 Citation for Outstanding Performance.

In December 2020, a state of emergency existed due to the COVID-19 pandemic. To combat the spread of the virus, Governor Baker and other public officials had issued guidance regarding mask-wearing and the risks of gathering with other people during the pandemic. Governor Baker had also issued an emergency order in November 2020 required people to wear

face coverings when gathering in indoor and outdoor public places ("November COVID Order"). On December 13, 2020, new statewide restrictions regarding capacity reductions and mask-wearing were implemented.

During the pandemic, MassHealth worked to communicate important public health information to providers, members, and laypeople as clearly as possible in light of the evolving understanding of COVID-19. MassHealth issued guidance on pandemic response, including how providers should respond, how people could access personal protective equipment, and how to follow infection control protocols. Foley's team at MassHealth held trainings and information sessions to ensure smooth implementation of COVID-19 protections.

In 2020, Foley maintained a personal Facebook account. Her Facebook profile listed her MassHealth job title on the "Intro" portion of her Facebook page and was visible to anyone who viewed her profile. Foley was a member of the "Milton Neighbors Facebook group," which had about 12,000 members and was intended to allow residents of Milton, Massachusetts to exchange referrals, school information, town information, helpful hints, and to assist one another in a variety of capacities, including constructive discussion about town issues. The group is private, such that only members can view posts and see who else is in the group.

On December 3, 2020, a member of the Milton Neighbors group, Tommy Walsh, posted on the group page: "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 arent [*sic*] wearing masks. Seems a little crazy to call the cops on someone not wearing a mask." See Docket No. 34.9, Exh. 1, FOLEY00752. Using her personal device, Foley responded to the comment writing, "[s]ounds like what the Nazis did in Germany." *Id.*; J.A. Exh. 8 at 2. Another member in the group then commented on Foley's post, taking

objection to her comparison. Foley responded to that comment:

> 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 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!

J.A. Ex. 8 at 2.[4] It is possible that Foley made the posts in the Milton Neighbors page on a break during a workday. Ex. 1, Foley Tr. 105.

On or about December 9, 2020, MassHealth received an anonymous complaint from "A Concerned Citizen" regarding Foley's Facebook activity. J.A. Exh. 8 at 1. The letter attached a screenshot of Foley's initial comment regarding Nazi Germany and her response to the objection to that comparison. The anonymous letter stated, "there are many things wrong with your Director of Internal and External Training and Communication's public comment, shown on the attached . . ." *Id.* The letter described Foley's comments as "exceedingly vile." *Id.* It further stated, "Publicly denying the legality the Commonwealth's mask mandates, crowd restrictions, and other pandemic-fighting public health measures is an odd position for a person charged with public health-related communications for a division of the Commonwealth. *Id.*

On December 21, 2020, Plaintiff had a virtual meeting with Patricia Grant, Sonia Bryan and KimMarie Mercure ("December Meeting"). At that time, Bryan was the Director of Diversity and Civil Rights and a Human Resources Business Partner at EOHHS, Grant was the Chief Operating Officer at MassHealth, and Mercure was Plaintiff's supervisor. The meeting

[4] The court notes that Defendants have included in the record several other posts Foley made denying the legality of the November COVID Order and analogizing the government's response to Nazi Germany. However, because there is no evidence that Defendants were aware of those posts before Foley's termination, they are not material to the motions before the court.

was led by Grant who informed Foley that MassHealth had received a complaint letter regarding her social media activity and showed Foley excerpts of the Facebook posts attached to the letter. Foley acknowledged that she wrote the Facebook posts. At the conclusion of the December meeting, Grant informed Foley that she was being investigated for her Facebook comments and was being placed on paid administrative leave. No individual at the December Meeting informed Foley of any policy that she violated.

At that time, Daniel Tsai was the Assistant Secretary/Director for MassHealth. While Plaintiff was on administrative leave, Tsai discussed next steps with MassHealth's legal counsel and human resources department. Tsai felt that Plaintiff's Facebook activity showed a concerning lack of judgment that caused him to lose confidence in her as a manager. He believed her comments were contrary to the COVID-19 pandemic response guidance that MassHealth was communicating. Because Foley's job title was displayed on her Facebook page, Tsai thought there was a risk that a layperson might not distinguish her personal opinions from MassHealth's position regarding COVID-19 response measures.

On January 27, 2021, Foley attended a virtual meeting with Bryan and Tsai where they discussed what transpired with the Facebook post. During the meeting, Tsai told Foley:

> "This is less about the post. You have been Director of Training and Communications. It's about the discussion 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. Those pieces are substantially at odds with what we are trying to accomplish across Health and Human Services in the pandemic response. The investigation triggers a review of things but is less around the specifics of the complaint and more around your capacity."

J.A. Exh. 13. Plaintiff acknowledged that it was a mistake to list her employment information on Facebook and that she had taken it down. Tsai went on to explain, "This discussion is because you did reference that position" and "[i]n 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 Director of Internal and External Training and Communications." *Id.* Tsai then told Foley that her employment was terminated. She responded that her post "did not encourage people not to wear masks" and her "issue was people encouraging others to turn in neighbors for not wearing masks." *Id.* Tsai told Foley, "[w]hen you speak on behalf of the agency, people take words at face value." *Id.* Foley maintained she was speaking as a private citizen, not on behalf of MassHealth. Bryan added that Plaintiff's "behavior was essentially counterproductive to the efficiency and advancement of MassHealth's mission during the pandemic." *Id.*

Tsai made the decision to terminate Foley. Thereafter, Foley filed the instant action seeking reinstatement to her position at MassHealth. She no longer seeks reinstatement but seeks a declaratory judgment that she was wrongfully terminated for exercising her First Amendment right.

DISCUSSION

"Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Helfman* v. *Northeastern Univ.*, 485 Mass. 308, 314 (2020), quoting *Godfrey* v. *Globe Newspaper Co.*, 457 Mass. 113, 118-119 (2010). "The moving party bears the burden of demonstrating the absence of a triable issue of fact on every relevant issue." *Scholz* v. *Delp*, 473 Mass. 242, 249 (2015). Once the moving party establishes the absence of a triable issue, "the nonmoving party must respond and make specific allegations sufficient to establish a genuine issue of material fact." *Barron Chiropractic & Rehab., P.C.* v. *Norfolk & Dedham Grp.*, 469 Mass. 800, 804 (2014). "In deciding whether summary judgment is appropriate, a judge considers evidence presented in the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits." *O'Connor* v. *Redstone*, 452 Mass. 537, 550 (2008), citing Mass. R. Civ. P. 56(c). The evidence is viewed in

the light most favorable to the nonmoving party. *Albahari* v. *Zoning Bd. of Appeals*, 76 Mass. App. Ct. 245, 248 n.4 (2010).

Defendants and Foley cross move for summary judgment on the two remaining claims of the Complaint for violation of the First Amendment and wrongful termination in violation of public policy. Applying the standard articulated above, the court concludes that Defendants are entitled to summary judgment on these claims.

I. Violation of the First Amendment

"In general, government officials may not subject an individual to retaliatory actions . . . for speaking out" (quotation and citation omitted). *Gilbert* v. *Chicopee*, 915 F.3d 74, 81 (1st Cir. 2019). "[P]ublic employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti* v. *Ceballos*, 547 U.S. 410, 417 (2006). However, "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Id.* at 418. Thus, a citizen who accepts public employment "must accept certain limitations on his or her freedom." *Id.* See *Curran* v. *Cousins*, 509 F.3d 36, 44 (1st Cir. 2007) ("Public employees do not lose their First Amendment rights to speak on matters of public concern simply because they are public employees . . . [s]till, those rights are not absolute.").

When a public employee alleges that he/she was terminated for engaging in protected speech, the court analyzes the claimed First Amendment violation under a three-part test. First, the court determines whether the employee spoke "as a citizen upon matters of public concern." *Garcetti*, 547 U.S. at 418. Second, under the balancing test articulated in *Pickering* v. *Board of*

Education, 391 U.S. 563, 568 (1968), the court balances "the interests [of the employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees" (citation omitted). Third, the employee must "show that the protected expression was a substantial or motivating factor in the adverse employment decision." *Id.* at 29, quoting *Curran*, 509 F.3d at 45. Defendants here do not dispute that Foley spoke as a citizen on a matter of public concern or that her statements were a substantial or motivating factor in her termination. Therefore, Foley's claim depends on the outcome of the *Pickering* balancing test.

"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"). The balancing of interests of the employee and the public employer is a question of law, and therefore is appropriately determined on summary judgment. See *Antonellis* v. *Department of Elder Affs.*, 98 Mass. App. Ct. 251, 260 (2020). See also *MacRae* v. *Mattos*, 106 F.4th 122, 136 (1st Cir. 2024) ("While the *Pickering* balancing inquiry is a matter of law for the court to decide, it is also a fact-intensive inquiry, demanding a hard look at the facts of the case, including the nature of the employment and the context in which the employee spoke" [citations and quotations omitted]).

The court first considers the interests of Foley in commenting upon matters of public concern involving the enforcement of the government's COVID-19 orders. Read in the light most favorable to Foley, her speech at its core was critical of perceived government overreach in imposing mask restrictions and limiting certain gatherings, and the prospect of private citizens reporting on their neighbors who failed to comply. Such debates about the scope, extent, and necessity of the government's responses to the COVID-19 pandemic were ubiquitous and hotly contested, and plainly pertained to a matter of public concern. See *Connick*, 461 U.S. at 145 ("speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection" [quotation and citation omitted]). Thus, the government must make a strong showing that its actions were justified based on its own interest in the efficient administration of public services. See *Curran*, 509 F.3d at 48 (the stronger the First Amendment interests in the speech, the stronger the justification the employer must have).

The court must balance the "value of [Foley's] speech against [MassHealth's] legitimate government interest in preventing unnecessary disruptions and inefficiencies in carrying out its public service mission." *MacRae*, 106 F.4th at 136. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418. Because public employees "often occupy trusted positions in society[,][w]hen they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Id.* However, "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.* In determining whether MassHealth "had an adequate justification" for terminating Foley, *id.* at 410, the court considers

"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). See also *Antonellis*, 98 Mass. App. Ct. at 261.

At the time of Foley's comments, "COVID-19 ha[d] taken a devastating toll on the Commonwealth, the United States, and the world." *Desrosiers* v. *Governor*, 486 Mass. 369, 371 (2020). Within months of Governor Baker's declaration of a state of emergency in March 2020, the number of COVID-19 infections and deaths "increased at a grim rate." *Id.* at 373. Defendants have put forth undisputed that in support of efforts to combat the pandemic, MassHealth was "communicating to providers that they had to be compliant with federal and state public health guidance which required healthcare providers to mask." J.A. Exh. 2 (Tsai Depo.) at 73. MassHealth issued guidance on pandemic response, including how providers should respond, how people could access personal protective equipment and follow infection control protocols. MassHealth also explicitly advocated for masking, including providing masks to home health workers and requiring providers to social distance and wear masks. MassHealth considered Foley's comments to be "a contradiction to the policies and public health advice [MassHealth was] trying to simply communicate to the very set of constituents and stakeholders that [Foley] would also be accountable for engaging with on a routine basis in her role," *id.* at 75, and that because Foley's job title was displayed on her Facebook page, there was a risk that a layperson might not distinguish her personal point of view from the agency's point of view.

In response, Foley contends that the Commonwealth, not MassHealth, issued the COVID-19 policies which were the subject of her comments, and that MassHealth "did not have

an interest in pushing COVID-19 policies." Pl.'s Opp. (Docket #34.2) at 6. The court does not agree. While it is true that MassHealth is not a policy-making agency, the undisputed evidence in the record demonstrates that during the pandemic, MassHealth was focused on the public health response to COVID-19 to ensure health and safety. MassHealth issued guidance on pandemic response and worked to communicate important public health information to providers, members, and laypeople as clearly as possible in light of the evolving understanding of COVID-19. Although MassHealth's general mission is to administer medical insurance benefits to the public, many MassHealth members became sick or died as result of complications of COVID-19. As an administrator of medical insurance benefits, and as a public health organization under the EOHHS, MassHealth plainly had an interest in communicating to medical providers, MassHealth members, and members of the public policies that were promulgated to mitigate the spread of COVID-19 and the adverse health outcomes associated therewith. This included endorsing masking and social distancing. Foley has not submitted any countervailing evidence suggesting MassHealth did not have this purported interest.

Foley also argues that the record lacks any evidence that her comments caused any disruptions with the operations of MassHealth. However, "[a]n employer need not show an actual adverse effect in order to terminate an employee[.]" *Curran*, 509 F.3d at 49. Indeed, a "government employer's reasonable prediction of disruption is afforded significant weight in the *Pickering* inquiry, even if the speech at issue is on a matter of public concern." *MacRae*, 106 F.4th at 138. See *Waters* v. *Churchill*, 511 U.S. 661, 673 (1994) (courts consistently give "greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large").

Here, Foley not only contradicted MassHealth's messaging to providers and the public, she also stated that she would willing violate COVID-19 emergency orders and dared anyone to report her. She published her statement to a group of 12,000 members, while self-identifying as a spokesperson for MassHealth, thereby suggesting that MassHealth knows that mask-mandating and social distancing are unnecessary and/or that MassHealth employees may violate such protocols without fear of consequences. This undoubtedly had "some potential to affect [MassHealth's] operations." *Garcetti*, 547 U.S. at 418. MassHealth could not credibly implore its members and providers to abide by the government mandates when its own Director of Internal and External Communications would disregard them. Nor could MassHealth be confident that Foley was consistently communicating MassHealth's message to providers externally or employees internally, when she was opening advocating defiance of such policies.[5]

The court also is not persuaded by Foley's argument that because she did not have a public facing role, her comments could not have disrupted the operation of MassHealth. Foley overlooks the significance of the public perception of her comments and the context in which her statements were made. As noted, MassHealth sought to advance its interest in positive health outcomes by endorsing the Commonwealth's COVID mitigation measures. The efficacy of MassHealth's efforts depended on the public and medical providers buying-in to the measures as legitimate, well-reasoned, and necessary. MassHealth's Director of Internal and External Training and Communication openly criticizing such measures patently undercut MassHealth's

[5] For these reasons, the circumstances here are distinguishable from *Pickering*. In *Pickering*, the Supreme Court concluded that the defendant (the school district) did not show that the plaintiff's (teacher) statements which were critical of the defendant could "presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." 391 U.S. at 572-573. Here, Defendants here have demonstrated that they had reason to believe Foley's contradictory messaging was undermining the public's confidence in their messaging and had caused them to lose faith in her ability to perform her duties.

message. Although Foley may not have been required to interact with the public in her position, her title as displayed on her Facebook profile, indicated that she held a leadership position and was responsible for MassHealth communications within and outside the organization. A reader might logically infer that Foley was privy to information concerning the medical and/or scientific basis for the measures MassHealth was supporting. Thus, it was reasonable for MassHealth to conclude that the public might question the necessity of mask mandates and social distancing where it appeared that MassHealth's own director of communications was arguing that the measures were unjustified and unworthy of compliance. Indeed, the complaint letter received by MassHealth is "objective evidence" that Foley's comments jeopardized public confidence in MassHealth's messaging and that Tsai's concerns were justified. See *Pereira* v. *Commissioner of Soc. Servs.*, 432 Mass. 251, 262–64 (2000) (complaints from clients and community members provided objective evidence that employee's actions had affected perception of employer's integrity and carried potential for undermining professional relationships). The fact that Foley's statements were not specifically directed at MassHealth or its employees does not change this outcome. See *Hussey* v. *Cambridge*, 2024 WL 1075296, at *8-10 (D. Mass. 2024) (accepting police department's assessment that police officer's social media post criticizing House Democrats' introduction of bill named in honor of George Floyd would cause disruption to department by undermining public trust).

Foley argues that her comments were made in private Facebook group through her personal account and on her personal device, and that her direct supervisors and Defendants were the only MassHealth employees with knowledge of her post. However, the court does not agree that under these circumstances, the reach of her statement and its potential damage to MassHealth was so limited, externally or internally. "Writing on Facebook is accurately

compared to writing a letter to a local newspaper and suggests an intent to communicate to the public or to advance a political or social point of view beyond the employment context" (internal quotations and citations omitted). *Id.* at *8. An individual "takes a 'gamble . . . in posting content on the internet' as there is a 'lack of control one has over its further dissemination'" (citation omitted). *Id.* Foley admittedly posted her message to a group of 12,000 members and she cannot say with certainty whether or to whom any of these individuals may have further disseminated her comments. That the post was screenshotted by the author of the complaint letter to MassHealth demonstrates the potential reach of the comments "amplify[ying] the potential consequences to employers." *Id.* In terms of MassHealth's internal operations, as noted, Foley's open hostility to mask mandates and social distancing measures reasonably caused her supervisors to question her willingness to communicate MassHealth's support for such measures in the course of her duties. See *Rankin*, 483 U.S. at 388 (government action justified where speech "impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise").

Accordingly, the court is persuaded that Defendants had a strong interest in communicating clear public health guidance regarding COVID-19 at the time of Foley's Facebook post and that given her directorial position at MassHealth, her comments impeded the performance of her duties or interfered with the regular operation of MassHealth at that time. See *Antonellis*, 98 Mass. App. Ct. at 261 ("In general, government interests outweigh First Amendment rights when employee speech prevents efficient provision of government services or disrupts the workplace" [citation omitted]). The court concludes that Foley's interest in making her Facebook post did not outweigh MassHealth's interest in the potential damage it could have

caused. Therefore, summary judgment is warranted on Foley's claim for violation of the First Amendment.[6]

II. Wrongful Termination in Violation of Public Policy

The parties also each move for summary judgment on Plaintiff's claim for wrongful termination in violation of public policy. This 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. *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 [only] 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.

Foley's claim asserts that she was terminated for asserting a legally guaranteed right, namely engaging in free speech. The court concludes that summary judgment is warranted on her claim as to all Defendants.

First, as to MassHealth and the individual defendants in their official capacities, the claim is barred under the doctrine of sovereign immunity. MassHealth is an agency of the Commonwealth. The general rule of sovereign immunity provides that "[t]he Commonwealth 'cannot be impleaded into its own courts except with its consent, and, when that consent is

[6] The court notes that even if it had reached a different conclusion, summary judgment would have still been awarded in the Defendants' favor as to Bryan. Plaintiff has not pointed to any evidence that Bryan was involved in the decision to terminate her.

granted, it can be impleaded only in the manner and to the extent expressed ... [by] statute.'" *Randall* v. *Haddad*, 468 Mass. 347, 354 (2014). "Consent to suit must be expressed by the terms of a statute, or appear by necessary implication from them." *Ware* v. *Commonwealth*, 409 Mass. 89, 91 (1991). Sovereign immunity extends to suits against a state official in his or her official capacity. See *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) ("suit against a state official in his or her official capacity . . . is a suit against the official's office . . . [and] is no different from a suit against the State itself").

Foley has not pointed to any statutory waiver of sovereign immunity applicable to the common law claim of wrongful termination in violation of public policy. Rather, pointing to several cases, she contends that "courts have allowed public employees to bring [wrongful termination] claims against the government." Pl.'s Opp. (Docket #34.2) at 14. However, these cases do not inform the court on this issue. None of them address whether the Commonwealth has waived sovereign immunity for claims of wrongful termination in violation of public policy as all of them were dismissed on other grounds. See, e.g., *Amato* v. *Division of Info. Tech.*, 76 Mass. App. Ct. 1133, 2010 WL 2035538 at *1 n.2 (2010) ("We recognize that the Commonwealth contends that sovereign immunity has not been waived in these circumstances but, given the result we reach, we decline to address the issue."). Contrary to Foley's contentions, the claim is also not subject to any waiver of sovereign immunity under the limited waiver for negligence claims under the Massachusetts Tort Claims Act.

As to Levine, Bryan, and Tsai in their individual or in their official capacities, the claim is also subject to summary judgment because they were not Foley's employers. A wrongful termination claim is properly directed at the plaintiff's employer, not individual supervisors. See, e.g., *Flynn* v. *Boston*, 59 Mass. App. Ct. 490, 493 (2003) ("Liability may be imposed *upon*

an employer if the employer terminates an at-will employee for a reason that violates clearly established public policy" [emphasis added]).[7]

Even if wrongful termination was a viable cause of action against Defendants, the court would still allow summary judgment for Defendants on the merits of the claim. As discussed in Section I, the First Amendment did not prohibit MassHealth from taking action against Foley. MassHealth had a substantial interest in publicly communicating a clear cohesive message as to the importance of masking and social distancing during the pandemic. Foley's comments undermining that message led MassHealth to lose confidence in her ability to do her job and to determine that its effectiveness would be compromised by Foley's continued employment. It is not a violation of public policy for an employer to terminate an at-will employee who speaks out against the interests of the employer. See *Korb* v. *Raytheon Corp.*, 410 Mass. 581, 584 (1991) ("There was no public policy prohibiting an employer from discharging an ineffective at-will employee"). Accordingly, summary judgment is warranted on the claim.

ORDER

For the foregoing reasons, Defendants' Motion for Summary Judgment is **ALLOWED**. Plaintiff's Motion for Summary Judgment is **DENIED**.

Date: November 5, 2024

Beverly J. Cannone
Justice of the Superior Court

[7] In support of her assertion that Tsai, as the Assistant Secretary of MassHealth, could be considered her "employer," Foley cites only one case, *Smith–Pfeffer*, 404 Mass. at 150, in which a wrongful termination in violation of public policy claim proceeded against a supervisor. However, in that case, the Supreme Judicial Court specifically noted that because the parties "tried the case as if the defendant were the employer," the Supreme Judicial Court would treat the defendant as the employer as well. *Id.* at 145 n.1. Such language only reinforces this court's conclusion that the claim can only be maintained against an employer, not individuals in supervisory roles.