IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BILLY L. SPEARS, Plaintiff, v. STEVEN MCCRAW, DAVID BAKER, JACK WEBSTER, MICHAEL BRADBERRY, AUDRA LIVINGSTON, STEPHEN P. MACH, MANNY FLORES, A. CYNTHIA LEON, JASON K. PULLIAM, RANDY WATSON, FAITH JOHNSON, LUIS GONZALEZ, RHONDA FLEMING, LUIS SANCHEZ, K. B. WILKIE, BRANDON NEGRI, JIMMY JACKSON, and MARCUS STOKKE, Defendants.	§ § § § § § § § § § § § § § § § § § § §	1:17-CV-1105-RP

ORDER

Before the Court are three motions to dismiss: one filed by Defendants Stephen P. Mach, Manny Flores, Cynthia Leon, Jason K. Pulliam, Faith Johnson, and Randy Watson (collectively, the "Commissioner Defendants"), (Dkt. 27), another filed by Defendants Steven McCraw, David Baker, Jack Webster, Michael Bradberry, Audra Livingston, Luis Gonzalez, Rhonda Fleming, K.B. Wilkie, Brandon Negri, Jimmy Jackson, and Marcus Stokke[1] (collectively, the "DPS Defendants"), (Dkt. 28), and a third filed by Defendants Willie Drabble and Michael Sparks (together, the "Supervisor Defendants"), (Dkt. 37).[2] Now before the Court is the report and recommendation of United States Magistrate Judge Andrew Austin recommending that the Court grant all three motions. (R. & R., Dkt. 42, at 19). Plaintiff Billy L. Spears ("Spears") timely filed objections. (Objs., Dkt. 46).

[1] Stokke is a sergeant with the Texas Alcoholic Beverage Commission, not the Department of Public Safety; the Court will include him with the DPS Defendants for clarity and convenience.

[2] Throughout this order, "Defendants" refers collectively to the DPS Defendants, the Commissioner Defendants, and the Supervisor Defendants.

I. BACKGROUND

Spears is a senior trooper with the Texas Highway Patrol, a division of the Texas Department of Public Safety ("DPS"). (2d Am. Compl., Dkt. 25, ¶ 5). On April 29, 2015, Spears sued eleven defendants: (1) the DPS; (2) DPS Director Steven McCraw; (3) DPS Assistant Director David Baker; (4) DPS Highway Patrol Division ("HPD") Chief Luis Gonzalez; (5) DPS Inspector General Rhonda Fleming; (6) DPS HPD Major Michael Bradberry; (7) DPS Office of Inspector General ("OIG") Captain Luis Sanchez; (8) DPS Highway Patrol Captain K.B. Wilkie; (9) DPS OIG Lieutenant Brandon Negri; (10) DPS Highway Patrol Lieutenant Jimmy Jackson; and (11) Texas Alcoholic Beverage Commission ("TABC") Sergeant Marcus Stokke. *See Spears v. Tex. Dep't of Public Safety, et al.*, No. 1:15-CV-511-RP, 2018 WL 1463711 (W.D. Tex. Mar. 23, 2018) (*Spears I*).[3]

In *Spears I*, Spears alleged that the defendants retaliated against him for filing grievances in violation of his First Amendment rights and that Stokke violated his Fourth Amendment right to be free from unreasonable searches and seizures. (*See Spears I* Compl., Dkt. 25, at 21). Spears's claims in that case were based on an interaction at a concert on May 10, 2014, where Stokke detained Spears after he attempted to take an alcoholic beverage into a public area. (*See id.* at 22). Spears also alleged that defendants reprimanded him for a photograph he took while in uniform with Calvin Broadus, a/k/a "Snoop Dogg," and posted to the social network Instagram. (*See id.* at 24–25; 2d Am. Compl., Dkt. 25, ¶ 25). Spears filed a complaint against Stokke and alleged that DPS responded by filing disciplinary complaints against him. (*Spears I* Compl., Dkt. 25, at 26). Spears alleged that he was disciplined in retaliation for exercising his First Amendment rights and denied due process and equal

[3] Spears attaches a copy of his original petition in *Spears I* to his complaint in the instant case and wishes to incorporate that complaint by reference. (*See* 2d Am. Compl., Dkt. 25, ¶ 1). In resolving a motion to dismiss, the Court considers "documents incorporated into the complaint by reference." *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008). The Court may also take judicial notice of matters of public record. *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011). As explained below, the Court considers the *Spears I* complaint to the extent that it provides the necessary foundation for Spears's claims in this action. *See infra* Part III.A.

protection of the laws. (*Id.*). This Court ultimately granted the *Spears I* defendants' motion for summary judgment on Spears's constitutional claims. *Spears I*, 2018 WL 1463711, at *8.

While the defendants' motion for summary judgment was pending in *Spears I*, Spears filed this action seeking damages and injunctive relief against eighteen defendants[4] for violations of his constitutional rights. (Compl., Dkt. 1). This action stems from a separate series of events that began when Spears aggravated an existing knee injury while on duty. (2d Am. Compl., Dkt. 25, ¶ 26). Spears requested a medical waiver from the DPS's semiannual physical fitness test as a result of the injury. (*Id.* ¶¶ 26–31). Spears thought that the medical waiver had been granted, but it had in fact been denied. (*Id.* ¶¶ 31–33). As a result, Spears was classified as noncompliant with DPS policy for failing to take the physical fitness test and placed on a performance improvement plan ("PIP"). (*Id.* ¶ 32). Three days later, Spears took and passed the physical fitness test, and he was released from the PIP. (*Id.* ¶¶ 33–34).

Spears brought a civil rights action under 42 U.S.C. § 1983 against eighteen defendants: (1) DPS Director Steven McCraw; (2) DPS Deputy Director David Baker; (3) DPS Regional Commander Jack Webster; (4) Texas Highway Patrol Major Michael Bradberry; (5) Texas Highway Patrol Captain Audra Livingston; (6) Texas Public Safety Commission Chairman Stephen P. Mach; (7) Texas Public Safety Commissioner Manny Flores; (8) Texas Public Safety Commissioner Cynthia Leon; (9) Texas Public Safety Commissioner Jason K. Pulliam; (10) Texas Public Safety Commissioner Randy Watson; (11) former Texas Public Safety Commissioner Faith Johnson; (12) DPS Assistant Director Luis Gonzalez; (13) DPS Inspector General Rhonda Fleming; (14) DPS OIG Captain Luis Sanchez; (15) Texas Highway Patrol Captain K. B. Wilkie; (16) DPS OIG Lieutenant Brandon Negri; (17) Texas Highway Patrol Lieutenant Jimmy Jackson; and (18) TABC Sergeant Marcus Stokke. (Compl., Dkt. 1 ¶¶ 5–22). Spears alleged that these defendants participated

[4] Ten of the eighteen defendants in this action were named defendants in *Spears I*.

in a conspiracy to violate his civil rights, retaliated against him for exercising his First Amendment rights or failed to supervise those who retaliated. (Am. Compl., Dkt. 12, ¶¶ 43–44). Spears sought injunctive relief against Defendants in their official capacities and damages against Defendants in their individual capacities. (*Id.* ¶ 45). In essence, Spears alleges that the denial of his medical waiver and placement on a PIP was in retaliation for filing *Spears I*. (*See id.* ¶¶ 1, 32, 42). Spears alleges that the defendants participated in a "campaign of retaliation" that continued from the events described in *Spears I* through the denial of Spears's medical waiver, his placement on a PIP, and the filing of this case. (*Id.*).

The Court granted the Defendants' motion to dismiss Spears's claims, but the Court concluded that Spears had not yet pleaded his best case, so it allowed him to amend his complaint. (Order, Dkt. 22, at 14–15). Spears amended his complaint, adding additional factual allegations, abandoning his official capacity claims against Defendants, (2d Am. Compl., Dkt. 25, ¶ 57), abandoning his claims against Defendant Luis Sanchez, (*id.* ¶ 43), adding Defendants Willie Drabble and Michael Sparks, both sergeants with the Texas Highway Patrol and Spears's former supervisors, (*id.* ¶¶ 23–24), and adding deprivation of due process and equal protection claims, (*id.* ¶¶ 55–56). Defendants again moved to dismiss. (Dkts. 27, 28, and 37).

II. LEGAL STANDARD

The Federal Rules of Civil Procedure authorize magistrate judges to make findings and recommendations for dispositive motions. Fed. R. Civ. P. 72(b)(1). For dispositive motions, parties are entitled to *de novo* review of any part of a magistrate judge's report and recommendation that has been properly objected to. *Id.* at (b)(3). Even when no objections are made, the district judge has the discretion to "accept, reject, or modify the recommended disposition." *Id.*; *see also Thomas v. Arn*, 474 U.S. 140, 154 (1985) ("[W]hile [28 U.S.C. § 636(b)(1)(c)] does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua*

sponte or at the request of a party, under a *de novo* or any other standard"). Spears has timely objected to certain portions of Judge Austin's report and recommendation. Accordingly, the Court reviews those portions of the report and recommendation *de novo*.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a 12(b)(6) motion, a "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the [plaintiffs'] grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Dorsey v. Portfolio Equities, Inc.,* 540 F.3d 333, 338 (5th Cir. 2008). "[A] motion to dismiss under 12(b)(6) 'is viewed with disfavor and is rarely granted.'" *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (quoting *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009)).

III. DISCUSSION

Spears objects to five conclusions in the report and recommendation.[5] First, he says that the report and recommendation erred by refusing to consider pleadings from cases that he incorporated by reference in his Second Amended Complaint. (Objs., Dkt. 46, at 2–4). Next, he disputes that he failed to state a First Amendment retaliation claim. (*Id.* at 5–9). Spears also objects to the conclusion that he failed to state a due process claim, (*id.* at 9–12), and a failure-to-supervise claim, (*id.* at 13). Finally, Spears maintains that he has properly stated a conspiracy claim. (*Id.* at 12–13).

A. Incorporation of Complaints by Reference

The report and recommendation found Spears's attempt to incorporate two pleadings from other cases improper. (R. & R., Dkt. 42, at 8–9). In his amended complaint, Spears attaches two pleadings from separate actions:[6] *Spears v. Tex. Dep't of Public Safety, et al.*, No. 1:15-CV-511-RP, and *Lubbe v. Milanovich, et al.*, No. 1:18-CV-1011-RP. (*See* 2d Am. Compl., Dkt. 25, at 19–27 (*Spears I* Complaint); Dkt. 25, at 29–52 (*Lubbe* Complaint)). Spears seeks to incorporate the pleadings in these cases by reference into his complaint in this action.

The report and recommendation found that persuasive authority cautions against adopting pleadings from wholly separate actions, (R. & R., Dkt. 42, at 8–9 (citing 11 Charles Alan Wright, et al., Fed. Prac. & Proc. § 1326, at 429 (2d ed. 2012)), but regardless, Spears's attempt to incorporate the pleadings by reference fails because it does not explicitly identify which portions of the pleadings he is adopting by reference as required by Rule 8, (*id.* at 9). Spears says that the Court's earlier order recognized that the Court could consider documents incorporated into a complaint by reference, (Objs., Dkt. 46, at 2–3 (citing Order, Dkt. 22, at 2 n.3)), and it would be unfair to permit him to

[5] Spears did not object to the report and recommendation's conclusion that his equal protection claim fails as a matter of law. (*See* R. & R., Dkt. 42, at 16–18). The Court thus reviews that analysis for clear error. Having done so and found none, the Court adopts this portion of the report and recommendation as its own order.

[6] Both *Spears I* and *Lubbe* were filed before this Court. The Court granted the defendants' motion for summary judgment on the constitutional claims in *Spears I*. 2018 WL 1463711, at *8. *Lubbe* remains pending before this Court, but the defendants moved to dismiss on February 15 and April 5, 2019. *See Lubbe*, No. 1:18-CV-1011-RP (Dkts. 4, 9).

incorporate documents into an earlier complaint by reference but deny him permission to do so in a subsequent amended complaint.[7] (*Id.*).

In this action, Spears alleges that his medical waiver was denied and he was placed on a PIP because he filed *Spears I*. Thus, the Court must necessarily consider *Spears I* to the extent that it forms the basis of the claims asserted here. It would be improper, however, to consider the substance of the allegations in that complaint for the reasons provided in the report and recommendation. Not to mention, the Court granted summary judgment in favor of the defendants based on the allegations *Spears I*; Spears cannot relitigate those claims here. *See Spears I*, 2018 WL 463711, at *7–8. The Fifth Circuit has been reluctant to incorporate pleadings from other cases by reference when a plaintiff attempted to incorporate claims from complaints, rather than allegations. *See Muttathottil v. Gordon H. Mansfield*, 381 F. App'x 454, 456–58 (5th Cir. 2010); *Tex. Water Supply Corp. v. R.F.C.*, 204 F.2d 190, 197 (5th Cir. 1953). But given that reluctance, courts in the Fifth Circuit have rejected requests to incorporate allegations from a complaint in another action by reference. *See, e.g.*, *Kerr v. Exobox Tech. Corp.*, No. H-10-4221, 2012 WL 201872, at *10 (S.D. Tex. Jan. 23, 2012). The same logic applies to Spears's attempt to incorporate the *Lubbe* complaint by reference. Although *Lubbe* similarly involves First Amendment retaliation and conspiracy claims by DPS officials, it is brought by a separate plaintiff alleging unrelated facts under different circumstances.

Spears says that he is not attempting to incorporate any claims asserted in either complaint—he cites those complaints for the purpose of establishing underlying facts relevant to this case. (Objs., Dkt. 46, at 2 n.1). But *Spears I* is relevant insofar that it was filed, thus forming the object of any retaliation alleged in this case. *Lubbe* is less relevant; it does not speak to any constitutional injury

[7] Spears also argues that Defendants failed to object to the incorporated pleadings until their reply, thus waiving the issue. (*See* Pl.'s Obj. to Reply, Dkt. 38). But the Supervisor Defendants objected to the incorporated pleadings in their motion to dismiss. (*See* Supervisor Defs.' Mot. Dismiss, Dkt. 37, at 1–4).

Spears alleges he suffered. The Court thus takes notice that these complaints were filed, but it does not consider the substance of the allegations. For that, the Court looks to Spears's complaint.

B. First Amendment Retaliation Claim

The report and recommendation concluded that Spears failed to assert an adverse action for his First Amendment Retaliation claim. (*See* R. & R., Dkt. 42, at 11–13). The report considered and rejected three proposed adverse employment actions: the denial of Spears's medical waiver, Spears's placement on a PIP, and Spears's voluntary transfer.[8] (*Id.* at 11). With respect to Spears's placement on a PIP, the report concluded that Spears failed to plead any tangible harm he suffered related to his placement on a PIP, so his temporary placement on a PIP does not qualify as an adverse action. (*Id.* at 12–13).

Spears says that he properly stated a First Amendment claim because a PIP is an adverse action. (Objs., Dkt. 46, at 5–9). According to Spears, he suffers an ongoing harm from the PIP. (*Id.* at 5–6; *see also* 2d Am. Compl., Dkt. 25, ¶ 32 ("Within DPS, a PIP is a form of discipline insofar as it remains in an employee's permanent file and weighs against promotion or advancement, regardless of whether the employee successfully completes the PIP.")). Spears alleges that although he was released from the PIP, "the PIP remains in his file as a disciplinary incident, and as a result the Plaintiff is less likely to be promoted or advanced."[9] (2d Am. Compl., Dkt. 25, ¶ 34).

The Court agrees that a PIP can be an adverse action. The Fifth Circuit has noted that "written warnings and unfavorable performance reviews are not adverse employment actions where colorable grounds exist for disciplinary action or where the employee continues to engage in

[8] Spears did not object to the report and recommendation's conclusion that the denial of a medical waiver or voluntary transfer do not qualify as adverse actions (*See* R. & R., Dkt. 42, at 11; Objs., Dkt. 46, at 5–9). Accordingly, the Court reviews that portion of the report and recommendation for clear error. Having done so and found none, the Court adopts this portion of the report and recommendation as its own order.

[9] Spears also objects to the conclusion that he failed to identify the denial of any opportunity for promotion or advancement because of the PIP. (Objs., Dkt. 46, at 6). Spears says that he intends to apply for a vacant position in the next few months and requests permission to file a supplemental complaint to reflect that fact. (*Id.* at 6 n.2). The Court declines to consider such intent, however, as any potential injury is entirely speculative and would thus render this Court's opinion advisory.

protected activity." *Jackson v. Honeywell Int'l, Inc.*, 601 F. App'x 280, 286 (5th Cir. 2015). The Court looks to determine whether a challenged action is "materially adverse;" in other words, whether the action is "harmful to the point that [it] could well dissuade a reasonable worker from making or supporting" a retaliation claim. *Porter v. Houma Terrebone Hous. Auth. Bd. of Comm'rs*, 810 F.3d 940, 945 (5th Cir. 2015) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006)). But courts in the Fifth Circuit have repeatedly found that being placed on a PIP is an adverse action for purposes of a retaliation claim. *See, e.g.*, *Ray v. Tandem Computs., Inc.*, 63 F.3d 429, 435 (5th Cir. 1995) (holding that PIP and termination of employment were adverse actions); *Armstrong Marathon Petroleum Co., LP*, No. 3:16-CV-00115, 2018 WL 2976732, at *9 (S.D. Tex. May 1, 2018), *report and recommendation adopted by* 2018 WL 2967327 (S.D. Tex. June 13, 2018) (finding that a PIP can be considered an adverse employment action for summary judgment purposes and citing cases); *Al-habash v. Raytheon Co.*, No. 4:15-CV-450, 2016 WL 6155601, at *9 (E.D. Tex. Oct. 24, 2016) (noting that a "PIP can support retaliation as a matter of law"); *Pollak v. Lew*, No. H-11-2550, 2013 WL 1194848, at *9 (S.D. Tex. Mar. 22, 2013), *aff'd*, 542 F. App'x 304 (5th Cir. 2013) (finding that a PIP could dissuade protected activity). Accordingly, placement on a PIP is sufficient to allege an adverse employment action.

But that is not to say that Spears has successfully stated a First Amendment retaliation claim here. In order to allege retaliation under the First Amendment based on protected speech, Spears must establish that (1) he suffered an adverse employment action; (2) his speech involved a matter of public concern; (3) his interest in speaking outweighed the government's interest in promotion efficiency; and (4) his protected speech motivated the defendant's conduct. *Culbertson v. Lykos*, 790 F.3d 608, 617 (5th Cir. 2015). If a plaintiff cannot allege facts that, if true, would directly establish that the defendant possessed a retaliatory motive, causation may be shown by either a close temporal proximity between the protected activity and the adverse employment action or "a chronology of

events from which retaliation may plausibly be inferred." *Mooney v. Lafayette Cty. Sch. Dist.*, 538 F. App'x 447, 454 (5th Cir. 2013). Additionally, liability under § 1983 is limited to individuals who were personally involved in violating a plaintiff's constitutional rights. *Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005).

The Court once again finds that Spears has "not alleged sufficient facts to show . . . that his protected speech was a 'motivating factor' in the public employer's decision to discipline the employee." (Order, Dkt. 22, at 11). In ruling on the Defendants' initial motions to dismiss, the Court found that Spears failed to state an adverse action or show that his protected activity was a motivating factor in that adverse action. (*See id.*). The problem was that "Spears . . . [did] not allege who placed him on a PIP, nor . . . plead[] any facts beyond conclusory allegations to support an inference that *Spears I* was a motivating factor for the denial of his medical waiver and PIP." (*Id.*) Spears fixed the Court's first concern—he now alleges that "[t]he PIP was signed and served on the Plaintiff by Defendant Sparks at the direction of Defendant Bradberry." (2d Am. Compl., Dkt. 25, ¶ 32). But the second concern remains—Spears has not alleged any facts beyond conclusory allegations to support an inference that *Spears I* was a motivating factor in placing him on a PIP.

The Court originally dismissed Spears's claims against the Commissioner Defendants and Defendants Gonzalez, Fleming, Sanchez, Wilkie, Negri, Stokke, Jackson, and McCraw because they were not personally involved in placing Spears on a PIP or denying his medical waiver. (Order, Dkt. 22, at 10). Spears attempted to remedy this issue in his Second Amended Complaint by including new allegations against Gonzalez, Wilkie, Negri, and Stokke. (*See* 2d Am. Compl., Dkt. 25, ¶ 42). But these new allegations are conclusory. Spears has not explained what role Gonzalez, Wilkie, Negri, or Stokke played in placing him on a PIP aside from "trying to get him fired." (*Id.*). With respect to Fleming, the Second Amended Complaint contains new, superfluous details about her romantic life and her role in the events described in the *Lubbe* case, but it still does not connect Fleming to the

decision to place Spears on a PIP. (*See id.* ¶¶ 44, 48, 51). And there are no new allegations against Jackson; the Second Amended Complaint only alleges that Jackson "said the Plaintiff would need a medical evaluation before he could continue working." (*Id.* ¶ 29). The Court already found this allegation insufficient. (Order, Dkt. 22, at 10). Thus, Spears fails to state a retaliation claim against Defendants Gonzalez, Fleming, Sanchez, Wilkie, Negri, Stokke, and Jackson.

With respect to McCraw and the Commissioner Defendants, Spears has not alleged facts to demonstrate how they personally participated in placing him on a PIP. Instead, Spears argues, as he did before his Second Amended Complaint, that these defendants failed to supervise "other Defendants who kept retaliating against the Plaintiff." (2d Am. Compl., Dkt. 25, ¶¶ 51–52). Here too, Spears fails to state a First Amendment retaliation claim against these defendants. The Court analyzes Spears's failure-to-supervise claim below against these defendants below. *See infra* Part III.D.

Ultimately, Spears's Second Amended Complaint limits the defendants personally involved in an alleged retaliatory act to six: Livingston, Bradberry, Webster, Baker, Drabble, and Sparks. But the complaint largely focuses on the denial of Spears's medical waiver rather than his placement on a PIP. According to the Second Amended Complaint, Drabble recommended that Spears complete a medical waiver form for the physical fitness test, (*id.* ¶ 28), and Livingston, Bradberry, Webster, and Baker denied his medical waiver in retaliation for *Spears I* with the "ultimate purpose of putting the Plaintiff on a PIP and getting him fired." (*Id.* ¶¶ 40–41). As the report concluded, the denial of a medical waiver is insufficient to support an adverse action. (R. & R., Dkt. 42, at 12). Spears has not otherwise explained how Livingston, Webster, Baker, or Drabble were involved in the decision to place Spears on a PIP, and thus fails to state a claim against them.

Only two defendants are named in the PIP decision: "The PIP was signed and served on the Plaintiff by Defendants Sparks at the direction of Defendant Bradberry." (2d Am. Compl., Dkt. 25,

¶ 32). The Second Amended Complaint further alleges that Bradberry altered and forged Spears's memo and medical waiver request to support the PIP. (*Id.* ¶¶ 37). But once again, Spears has not pleaded any facts beyond conclusory allegations to support an inference that the *Spears I* complaint was a motivating factor for the denial of his medical waiver and subsequent PIP.[10] Spears only mentions Sparks once more in the complaint to note that Spears asked him for copies of all documents denying his waiver request. (*Id.* ¶ 33). And the only allegation regarding the Defendants' underlying motive is that "[t]hey refused to make a reasonable medical accommodation in 2016, however, because they were retaliating for the events outlined in *Spears I*, the filing of *Spears I*, and the resultant negative media attention." (*Id.* ¶ 40). The Second Amended Complaint also suggests that Bradberry's motivation to deny the waiver was not based on any protected First Amendment activity, but based on Spears's deficient performance on an earlier fitness test. (*Id.* ¶¶ 37, 40). Because the Second Amended Complaint fails to show that *Spears I* was a motivating factor for placing Spears on a PIP, it fails to state a First Amendment retaliation claim.

C. Due Process Claim

The report concluded that Spears failed to allege a constitutional violation to support his due process claim. (R. & R., Dkt. 42, at 13–16). The report found that Spears failed to allege the particular state rule, regulation, law, or understanding between the parties that give rise to a protected property interest in his employment in his complaint. (*Id.* at 15 (quoting *Brown v. Tex. A&M Univ.*, 804 F.2d 327, 334 (5th Cir. 1986)). Even assuming Spears could identify the foundation for his property interest in employment, the report concluded that Spears failed to allege a deprivation of that interest because he is still employed with DPS. (*Id.*). Spears objected to both

[10] The Second Amended Complaint explains that this denial is contrary to DPS policy, but there are no non-conclusory allegations to suggest that *Spears I* was a motivating factor for the PIP decision. (*See* 2d Am. Compl., Dkt. 25, ¶ 32).

conclusions.[11] According to Spears, Texas law provides that DPS employees may only be fired for "just cause." (Objs., Dkt. 46, at 10 (citing Tex. Gov't Code § 411.007(c)). Spears requests leave to amend his complaint to add this fact, if necessary. (*Id.*). He also says that "it does not matter that Mr. Spears has yet to be denied a promotion because of the PIP; he suffered a constitutional injury when the PIP was imposed on him without due process." (*Id.* at 12).

Even assuming that Spears has identified a provision of Texas law that provides a property interest in his employment, he fails to allege a deprivation of that interest. To state a § 1983 claim for violation of the Fourteenth Amendment right to procedural due process, a plaintiff must allege "(1) [he] has a property interest in [his] employment sufficient to entitle [him] to due process protection, and (2) [he] was terminated without receiving the due process protections to which [he] was entitled." *LeBeouf v. Manning*, 575 F. App'x 374, 376 (5th Cir. 2014) (citing *McDonald v. City of Corinth, Tex.*, 102 F.3d 152, 155–56 (5th Cir. 1996)). Although Spears did not specifically cite the basis for his property right in his complaint, that problem could be easily resolved by amendment. *See Brown*, 804 F.2d at 334. Any amendment, however, could not overcome the second deficiency in Spears's pleading: Spears has not shown that he was deprived of a property interest in employment because he was not terminated.

The statutory basis for Spears's property interest, Texas Government Code § 411.007(e),[12] provides that "[a]n officer or employee of the department may not be discharged without just cause." Tex. Gov't Code § 411.007(e). The plain language of the statute limits *discharge* to just cause. But here, Spears has not been discharged—he is still employed by DPS. And in order to state a

[11] Spears did not, however, object to the report and recommendation's characterization of his due process claim as raising a procedural due process claim based on a property interest in employment, rather than a liberty interest or a substantive due process violation. (*See* R. & R., Dkt. 42, at 13 n.5, 16 n.6). Accordingly, the Court reviews that portion of the report and recommendation for clear error. Having done so and found none, the Court adopts this portion of the report and recommendation as its own order.

[12] Spears cites Texas Government Code § 411.007(c), but that subsection does not set a standard for terminating DPS employees. Section 411.007(e), however, limits termination to just cause. The Court assumes that Spears intended to cite section 411.007(e).

§ 1983 claim based on termination of employment without procedural due process, Spears must show that he was terminated without receiving the appropriate due process protections. *LeBeouf*, 575 F. App'x at 376. Accordingly, Spears's procedural due process claim fails because he has not alleged a deprivation of any property interest in his employment.

Ignoring the plain language of the statue, Spears says that "[t]he Fifth Circuit, however, has long held that a government employee need not be terminated in order to state a due process violation." (Objs., Dkt. 46, at 10–11 (citing *Winkler v. DeKalb Cty.*, 648 F.2d 411, 414 (5th Cir. 1981))). And according to Spears, "[t]here is no post-deprivation remedy for a PIP, and the PIP remains in Mr. Spears's permanent file to this day." (*Id.* at 11 (citing Dkt. 25, ¶ 32)). Thus, Spears contends that the deprivation of due process in itself violated his constitutional rights.

Spears's argument misses the mark. The Fifth Circuit has sometimes first considered whether a deprivation of a property right occurred at all before turning to whether a plaintiff was entitled to due process for that deprivation. *See Bowlby v. City of Aberdeen, Miss.*, 681 F.3d 215, 220–21 (5th Cir. 2012). As the Supreme Court has stated, however, for procedural due process claims, the deprivation of a protected life, liberty, or property interest is not itself the wrong—it is the deprivation of that interest without due process of law. *See Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Due process is not an end unto itself, but a means to protect interests in life, liberty, and property from mistaken or unjustified deprivation. *Carey v. Piphus*, 435 U.S. 247, 259 (1978). The denial of due process must still be coupled with *some deprivation* to be actionable. *See, e.g.*, *LeBeouf*, 575 F. App'x at 376. Without any deprivation, Spears's due process claim rings hollow.

Absent termination, Spears is left with the PIP to support his due process claim. But the PIP alone is insufficient to allege deprivation of a property interest under § 411.007(e) to support a due process claim. Spears's allegations are more consistent with reputational damage that does not amount to a due process violation. *See Thomas v. Kippermann*, 846 F.2d 1009, 1010 (5th Cir. 1988)

("Damage to one's reputation alone, apart from some tangible interest such as employment, does not implicate any "property" or "liberty" interest sufficient to invoke the due process clause."). Accordingly, the Court will dismiss Spears's due process claim.

D. Failure-to-Supervise Claim

The report concluded that because Spears had not pleaded a violation of his constitutional rights, Defendants were entitled to qualified immunity on his failure-to-supervise claim. (R. & R., Dkt. 42, at 19). Spears, however, argues that he properly stated a failure-to-supervise claim. (Objs., Dtk. 46, at 13). According to Spears, he has identified and pleaded violations of his First and Fourteenth Amendment rights and explained in detail how the Defendants knew about ongoing retaliation yet did nothing to stop it. (*Id.* (citing 2d Am. Compl., Dkt. 25, ¶¶ 41–52)).

"A supervisory official may be held liable under § 1983 only if (1) he affirmatively participates in the acts that cause the constitutional deprivation, or (2) he implements unconstitutional policies that causally result in the constitutional injury." *Gates v. Tex. Dep't of Protective & Reg. Servs.*, 537 F.3d 404, 435 (5th Cir. 2008). To plead supervisor liability based on a failure to supervise, a plaintiff must show "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Id.* (quoting *Estate of Davis*, 406 F.3d at 381). As explained above, the Court finds that Spears has not alleged any underlying constitutional deprivation or violation of his rights under either the First or Fourteenth Amendments. Thus, the Court agrees with the report and recommendation that Spears has not alleged a failure-to-supervise claim.

E. Conspiracy Claim

Finally, the report concluded that Spears's conspiracy claim fails to state a claim because Spears has not alleged a violation of his constitutional rights and the only allegations in support of

his conspiracy claim are bald allegations that the parties entered into a wide-ranging conspiracy to retaliate against him for filing *Spears I*. (R. & R., Dkt. 42, at 19). Spears objects, arguing that he properly stated a conspiracy claim. (Objs., Dkt. 46, at 12–13 (citing 2d Am. Compl., Dkt. 25, ¶¶ 32–42, 51–52)).

The Court agrees with the report and recommendation. A conspiracy claim is not actionable without an actual violation of section 1983. *Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995). And "Plaintiffs who assert conspiracy claims under civil rights statutes must plead the operative facts upon which their claim is based. Bald allegations that a conspiracy existed are insufficient." *Knatt v. Hosp. Serv. Dist. No. 1 of E. Baton Rouge Par.*, 289 F. App'x 22, 33 (5th Cir. 2008) (quoting *Lynch v. Cannatella*, 810 F.2d 1363, 1369–70 (5th Cir. 1987)). Here, there is no underlying constitutional violation to support a conspiracy claim. But even if there were, Spears has not alleged facts beyond conclusory allegations to suggest an agreement between the parties to commit an illegal act. *See Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994).

IV. CONCLUSION

For the reasons given above, **IT IS ORDERED** that the report and recommendation of United States Magistrate Judge Andrew Austin, (Dkt. 42), is **ADOPTED IN PART**. Defendants' Motions to Dismiss, (Dkts. 27, 28, 37), are **GRANTED**. Spears's claims against Defendants are **DISMISSED**.

SIGNED on August 30, 2019.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE