No. ----

In The

Supreme Court of the United States

RANDY HENRY,

Petitioner,

v.

J. BRET JOHNSON, *et al.*

Respondents

On Petition for A Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 18-3298

Randy Henry

Plaintiff - Appellant

v.

J. Bret Johnson, in his individual capacity; Corey Schoeneberg, in his individual capacity; Stacey Mosher, in her individual capacity; Ronald K. Replogle, in his individual capacity; Luke Vislay, in his individual capacity; Sarah Eberhard, in her individual capacity; Gregory D. Kindle, in his individual capacity; Sandra K. Karsten, in her individual capacity; Gregory K. Smith, in his individual capacity; Malik A. Henderson, in his individual capacity; Kemp A. Shoun, in his individual capacity

Defendants - Appellees

Appeal from United States District Court
for the Western District of Missouri - Jefferson City

Submitted: November 13, 2019
Filed: February 20, 2020

Before SHEPHERD, GRASZ, and KOBES, Circuit Judges.

GRASZ, Circuit Judge.

Sergeant Randy Henry sued eleven members or former members of the Missouri State Highway Patrol ("MSHP") after adverse employment actions were allegedly taken against him in retaliation for protected First Amendment speech. The district court[1] granted summary judgment to each of the eleven defendants on all seven claims. Henry appeals the grant of summary judgment for three of these claims. We affirm.

I. Background

This suit arises out of the May 2014 drowning of twenty-year-old Brandon Ellingson while he was in MSHP custody on the Lake of the Ozarks. Ellingson's death resulted in a series of civil and criminal cases and internal MSHP investigations of the drowning. While these investigations were occurring, MSHP Sergeant Randy Henry spoke out several times about MSHP's role in the drowning.

In October 2014, Henry testified twice before a special committee of the Missouri legislature organized to look into a 2011 merger of the Missouri Highway Patrol with the Missouri Water Patrol — the combined entity now known as MSHP. Henry first testified in his official capacity as an MSHP member, and later testified in plain clothes as a private citizen. In June 2015, Henry also gave deposition testimony for a civil lawsuit concerning the Ellingson case. These instances make up what will be referred to as Henry's "testimonial speech."

Henry also spoke numerous times to a member of the press and members of the Ellingson family about what he claimed was an internal MSHP cover-up of the drowning. Henry also raised the possibility of internal MSHP corruption during the

[1] The Honorable Willie J. Epps, Jr., United States Magistrate Judge for the Western District of Missouri, to whom the case was referred for final disposition by consent of the parties pursuant to 28 U.S.C. § 636(c).

investigation of the Ellingson drowning by insinuating the special prosecutor in the case may have been involved in a quid pro quo with MSHP to exonerate her son in a rape investigation. Henry posted this allegation on a Facebook page dedicated to Ellingson. The social media post outlined how the son was cleared of the rape allegation after a DNA analysis was undertaken by MSHP, and suggested the special prosecutor had a conflict of interest because of this DNA test.

The special prosecutor interviewed Henry as a part of her MSHP investigation and during the interview he admitted to spreading information about her son. After her interview with Henry, she recused herself from the Ellingson investigation. This caused both a prolonged delay in the investigation and increased costs.

In February 2015, Henry was ordered to attend a mandatory counseling evaluation through the Employee Assistance Program ("EAP"). The mandatory counseling evaluation arose after at least two individuals expressed concern about how Henry was coping with the Ellingson matter.

In March 2015, the special prosecutor filed a complaint against Henry which was investigated by Appellee Corey Schoeneberg. Schoeneberg determined Henry had violated three MSHP General Orders, which led to two prosecutors asserting they would no longer prosecute charges brought by Henry due to concerns about his trustworthiness and integrity.

In June 2015, Henry's direct commander submitted a Betterment of the Patrol Transfer Request for Henry to be transferred out of Troop F. This request was approved by Appellee J. Bret Johnson, who was the superintendent at the time. Formal charges and an offer of discipline were served on Henry later that month. This offer of discipline was a reduction in rank from sergeant to corporal. Henry rejected this offer, pursued an appeal, requested three continuances, and then retired before a hearing could take place.

A later investigation of MSHP by a second special prosecutor regarding the Ellingson drowning concluded Henry's allegations of MSHP misconduct were unsubstantiated.

Henry ultimately filed a seven count complaint against eleven defendants including Count One, a 42 U.S.C. § 1983 claim for retaliation for protected First Amendment speech activity; Count Three, a conspiracy to violate Henry's civil rights; and Count Four, a § 1983 failure to supervise claim. The district court granted the defendants' motion for summary judgment on all seven claims against all eleven defendants. Henry now appeals this grant of summary judgment regarding Counts One, Three, and Four.

II. Analysis

A. Standard of Review

We review de novo a grant of summary judgment.[2] *Atkinson v. City of Mountain View*, 709 F.3d 1201, 1207 (8th Cir. 2013). In a § 1983 action, we will reverse an award of summary judgment in favor of a public official in his or her individual capacity only if a reasonable jury could find the official's actions performed under the color of state law "violated 'a right secured by the Constitution and laws of the United States.'" *Id.* (quoting *Cook v. City of Bella Villa*, 582 F.3d 840, 848 (8th Cir. 2009)). We must view all evidence and reasonable inferences in the light most favorable to the non-moving party. *Id.*

[2]On appeal Henry argues the district court misapplied the summary judgment standard by relying on facts he asserts are in dispute. We disagree. The district court properly applied both the local and federal summary judgment standards by finding there were no genuinely disputed facts, and by relying on such undisputed facts in the order.

B. Unconstitutional Retaliation for Protected Speech Activity

Henry alleges unlawful retaliation by MSHP for protected speech, in violation of the First Amendment. In response, the appellees claim they are entitled to summary judgment based on qualified immunity. As with every qualified immunity analysis, we are tasked with a two-part inquiry to determine whether (1) a constitutional violation occurred, and (2) whether the right in question was clearly established at the time of the violation. *Nord v. Walsh Cty.*, 757 F.3d 734, 738 (8th Cir. 2014). The district court reasoned Henry failed to demonstrate a First Amendment violation, and therefore the eleven defendants were entitled to qualified immunity. We agree.

Our first inquiry is whether Henry has established a First Amendment violation. "To establish a prima-facie case of unlawful retaliation for protected speech," Henry must prove three elements. *Davenport v. Univ. of Ark. Bd. of Trs.*, 553 F.3d 1110, 1113 (8th Cir. 2009). First, Henry must prove "he engaged in an activity protected by the First Amendment." *Id.* Second, Henry must prove MSHP "took an adverse employment action against him." *Id.* And third, Henry must prove the "protected speech was a substantial or motivating factor in [MSHP's] decision to take the adverse employment action." *Id.* We address each element in turn.

1. Constitutionally Protected Speech

Henry alleges, and the appellees do not contest on appeal, that Henry's testimonial speech is protected speech activity. As such the testimonial statements satisfy element one. However, Henry also argues his remaining speech activity — speaking to news reporters, directly to the Ellingson family, and on social media — that is, his non-testimonial speech, addressed a public concern. In our view, however, he fails to show the remaining speech was constitutionally protected.

Under Eighth Circuit precedent, we must proceed through a multi-step analysis to determine if Henry's non-testimonial speech is entitled to First Amendment protection. First, we must "determin[e] whether the employee spoke as a citizen on a matter of public concern." *Hemminghaus v. Missouri*, 756 F.3d 1100, 1110 (8th Cir. 2014) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)). "If the answer is yes, then the possibility of a First Amendment claim arises." *Id.* at 1111 (quoting same).

Next, once the possibility of a First Amendment claim arises, "we must ask whether [MSHP] has produced evidence to indicate the speech had an adverse impact on the efficiency of the [employer's] operations." *Id.* (second alteration in original) (quoting *Lindsey v. City of Orrick*, 491 F.3d 892, 900 (8th Cir. 2007)). "Where there is no evidence of disruption, resort to the *Pickering* factors is unnecessary because there are no government interests in efficiency to weigh against First Amendment interests."[3] *Id.* (quoting *Belk v. City of Eldon*, 228 F.3d 872, 881 (8th Cir. 2000)).

Finally, "if such an adverse impact is found, the court engages in the *Pickering* balancing inquiry." *Id.* at 1111. This analysis helps to determine "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418. The *Pickering* test strives to help courts arrive at a balance between the interests of the employee as a citizen commenting on public matters and the interests of the governmental employer in promoting the efficiency of its public services through such employees. *Kincade v. City of Blue Springs*, 64 F.3d 389, 395 (8th Cir. 1995).

[3] *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

a. Speaking on a Matter of Public Concern

Here, it is undisputed that Henry spoke as a private citizen, not an employee, while making his non-testimonial statements. Therefore, to proceed we must determine if Henry's non-testimonial speech was on a matter of public concern. When the speech in question "involves a matter of political, social or other concern to the community [it] is of public concern." *Calvit v. Minneapolis Pub. Sch.*, 122 F.3d 1112, 1117 (8th Cir. 1997). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement." *Connick v. Myers*, 461 U.S. 138, 147–48 (1983). The form and content help us to determine whether the employee speaks as "a concerned citizen informing the public" or "merely as an employee speaking about internal practices relevant only to fellow employees." *Calvit*, 122 F.3d at 1117.

In this case, Henry's speech, taken in the light most favorable to him, was of public concern. The statements on social media, to the Ellingson family, and to the newspaper all concerned the integrity of MSHP and the judicial system. Henry also spoke critically of the internal investigation, suggesting purported corruption in the prosecutor's office. Such statements are related to the integrity of the highway patrol and prosecutorial division of MSHP — both important governmental functions. We therefore conclude his non-testimonial speech addressed matters of public concern.

Because Henry spoke as a citizen on matters of public concern the possibility of a First Amendment claim arises and we must proceed to ask whether MSHP has produced evidence of an adverse impact on the efficiency of its operations.

b. Adverse Impact on Governmental Efficiency

Next, a public employer must "with specificity, demonstrate the speech at issue created workplace disharmony, impeded the plaintiff's performance, or impaired

working relationships." *Lindsey*, 491 F.3d at 900. However, it is not necessary to show actual disruption. An employer need not "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 U.S. at 152. Courts will give "substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern." *Waters v. Churchill*, 511 U.S. 661, 673 (1994). Our precedent has noted how "[l]aw enforcement agencies, more than other public employers, have special organizational needs that permit greater restrictions on employee speech." *Morgan v. Robinson*, 920 F.3d 521, 526 (8th Cir. 2019) (en banc) (quoting *Buzek v. Cty. of Saunders*, 972 F.2d 992, 995 (8th Cir. 1992)).

Here, MSHP has shown sufficient evidence of disruption to the efficiency of its operations. The undisputed facts demonstrate that two prosecutors refused to take Henry's cases citing to a lack of trust and integrity issues with Henry. If prosecutors will no longer press charges from a particular police officer, this would seriously impede the agency's ability to perform its function. Further, the investigation by Appellee Schoeneberg concluded Henry violated three MSHP General Orders, two relating to workplace disruption and inefficiency. Specifically, Schoeneberg's investigation concluded Henry's behavior violated a General Order prohibiting the spread of "malicious rumors or lies, disrupt the workplace, or destructively criticize or maliciously ridicule the Patrol . . . ." When, as here, a government employer relies substantially on the working relationships among its members, trust and morale are of prime importance. This reality is only heightened for law enforcement officers who may have to rely on one another in life-threatening circumstances.

Because MSHP demonstrated a deterioration in trust within Henry's troop and that Henry engaged in unprofessional behaviors that violated General Orders, MSHP has demonstrated Henry's speech did in fact create disharmony and impair working relationships. The consequences of Henry's actions were "sufficient evidence of

disruption." *Hemminghaus*, 756 F.3d at 1113 (quoting *Bailey v. Dep't of Elementary & Secondary Educ.*, 451 F.3d 514, 521 (8th Cir. 2006)).

c. *Pickering* Balancing

Under the Supreme Court's precedent in *Pickering*, we must take into account "a number of interrelated factors . . . in balancing the competing interests of government-employer and citizen-employee." *Id.* at 1113. Such factors include:

> (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or would cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.

Id. at 1114. As we have repeatedly recognized, "[m]ore so than the typical government employer, the [Missouri Highway] Patrol has a significant government interest in regulating the speech activities of its officers in order to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution." *Morgan*, 920 F.3d at 526 (second alternation in the original) (quoting *Crain v. Bd. of Police Comm'rs*, 920 F.2d 1402, 1411 (8th Cir. 1990)).

Henry's allegations evoking a high degree of public interest weigh in Henry's favor. The remaining *Pickering* factors, however, favor MSHP. First, the manner and place of Henry's speech weighs heavily in MSHP's favor. Henry spoke directly to the Ellingson family during the internal investigation, and he spread unsubstantiated information by repeatedly speaking to a news reporter and on social media. Second, unlike a legitimate whistleblower, Henry did not substantiate the allegations — especially those involving the special prosecutor and her son — before

spreading the information to the internet. Third, Henry's role as a police officer is closely tied both to the officers in his troop and the prosecutors who brought charges connected to officer arrests. It was essential for Henry to work closely with the appellees. The evidence reveals the accusations Henry shared online and to the family deteriorated relationships with prosecutors, as evidenced by the two who refused to take his cases. Further, the transfer request demonstrates Henry's deteriorating ability to work with his fellow police officers. And finally, the context of this dispute — during a sensitive internal investigation and amid media attention — further tips the scale toward MSHP's interests.

The cumulation of these factors weigh in favor of MSHP's interest in efficiency and indicate Henry's speech activity was more likely than not impeding his ability to perform his job duties as a police officer. As such, we conclude Henry's non-testimonial speech activity was unprotected. Therefore, no First Amendment violation occurred. The defendants are entitled to qualified immunity regarding Henry's speech to the Ellingson family, on social media, and to the news reporter because Henry failed to show a constitutional violation. Our analysis of Henry's claim of retaliation based on constitutionally protected speech ends here regarding the non-testimonial speech.

2. Adverse Employment Action

We now proceed to element two of the prima facie case for unlawful retaliation for protected speech only as to Henry's protected testimonial speech. Henry alleges the adverse employment actions taken against him by MSHP include the mandatory EAP counseling evaluation and his proposed demotion and transfer. The defendants do not contest the initial referral to EAP nor the later demotion and transfer offer arrangement constituted adverse employment actions. Therefore, we conclude the second element of the prima facie case is satisfied.

3. Substantial or Motivating Factor

Finally, we must determine whether Henry's *protected* speech activity — the testimonial speech — was a substantial or motivating factor in MSHP's decision to take the aforementioned adverse employment actions. *Davison v. City of Minneapolis*, 490 F.3d 648, 655 (8th Cir. 2007). While causation is generally a jury question, this court must decide if sufficient evidence exists to create a factual question for the jury. *Morris v. City of Chillicothe*, 512 F.3d 1013, 1018 (8th Cir. 2008). To make this determination we must undertake an additional three-part, burden-shifting inquiry: First, "a public employee must show that he suffered an adverse employment action that was causally connected to his participation in a protected activity." *Id.* at 1018–19. If the employee so demonstrates, "the burden shifts to the employer to show a legitimate, nondiscriminatory reason for his or her actions." *Id.* at 1019. If the employer establishes such a reason, "the burden shifts back to the employee to show that the employer's actions were a pretext for illegal retaliation." *Id.*

Because Henry and the appellees agree Henry suffered an adverse employment action, we will assume without deciding Henry met his initial burden, even though the causation question is not without doubt. The burden thus shifts to MSHP to show a legitimate, nondiscriminatory reason for these adverse employment actions.

Because Henry's non-testimonial speech was unprotected by the First Amendment, such speech may serve as a legitimate ground for an adverse employment action. The facts show Henry repeatedly discussed serious and unverified allegations of corruption within MSHP, was less than candid with the special prosecutor, and disseminated unverified allegations of corruption. Each of these unprotected speech activities *could* constitute a legitimate, nondiscriminatory reason for MSHP to take an adverse employment action against Henry. Additionally, the mandatory EAP counseling appointment occurred as a response to two individuals

expressing concern about Henry's mental health — a legitimate reason for such an assignment.[4] As such, we determine MSHP met its burden to show a legitimate reason for the actions taken against Henry. As a result, the burden shifts back to Henry to show pretext.

For Henry to prevail then, he must establish a factual question exists as to whether MSHP's reasons were mere pretext, a difficult burden to prove "because evidence of pretext and discrimination is viewed in the light of the employer's justifications." *Id.* at 1019. Such a pretext typically may be shown by offering evidence the employer's explanation lacked basis in fact, evidence the employee recently received favorable reviews, evidence the employer's proffered reason for its employment decision changed over time, or with evidence the employer treated similarly situated employees who engaged in the protected activity more favorably. *Ebersole v. Novo Nordisk, Inc.*, 758 F.3d 917, 935 (8th Cir. 2014).

Here, MSHP's disciplinary actions were based in fact: they specifically related to Henry's posting to social media, speaking to the news reporter, and conversing with the Ellingson family. These occurrences are established and undisputed. And although Henry did receive a generally positive review on January 24, 2015, this review was given before the full extent of Henry's conduct became known to MSHP. And, even in this favorable review it noted, "there always seems to be someone [Henry] is upset with or that is upset with him." There is no evidence to support an inference that MSHP's reasons for the adverse action changed over time.

Henry argues three other MSHP members were retaliated against for speaking out against MSHP. But Henry has failed to show that these three individuals were similarly situated to himself other than asserting they are MSHP members. To satisfy

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[4]This court also assumes, without deciding, the referral of an employee to a mandatory mental health evaluation constitutes an adverse employment action.

this prong, "comparators 'must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.'" *Id.* at 925. Henry presented no evidence these other individuals met any of these criteria.

In summary, the appellees are entitled to qualified immunity with regard to Count One because Henry has failed as a matter of law to show a constitutional violation. Much of Henry's speech is unprotected because it fails the *Pickering* balancing test as MSHP's interests in efficiency and harmony overrides the public's interest in the information. The remaining testimonial speech was not a substantial or motivating factor in the adverse employment actions against Henry.

C. Conspiracy and Inadequate Supervision

Our conclusion regarding Henry's First Amendment claim dictates the result as to his conspiracy and inadequate supervision claims. Under our precedent, Henry is "required to prove a deprivation of a constitutional right or privilege in order to prevail on a § 1983 civil conspiracy claim." *Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir. 1999). Similarly, a failure to supervise claim brought under § 1983 will "automatically fail for lack of an underlying constitutional violation." *Mendoza v. U.S. Immigration & Customs Enf't*, 849 F.3d 408, 419–20 (8th Cir. 2017). We therefore hold Henry's civil conspiracy and failure to supervise claims fail as a matter of law.

III. Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

RANDY HENRY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 16-4249-CV-C-WJE
	)	
	)	
J. BRET JOHNSON, ET AL.,	)	
	)	
Defendants.	)	

ORDER

Pending before the Court is Defendants' Motion for Summary Judgment (Doc. 130), and suggestions in support thereof (Docs. 131 and 132). Plaintiff Randy Henry has filed suggestions in opposition (Docs. 151 and 152), to which Defendants have filed a reply with suggestions (Docs. 157 and 158). On September 24, 2018, the Court held a hearing on the motion (Doc. 160), and the issues are now ripe and ready to be ruled upon. For the reasons that follow, Defendants' motion shall be granted.

I. Factual Background

This action arises out of Plaintiff's employment with the Missouri State Highway Patrol (MSHP). Plaintiff, a retired sergeant, claims he was forced to resign his position in 2015 because he was subjected to retaliation and denied his civil rights for speaking out against the MSHP's handling of an incident wherein a man died while in MSHP custody. Plaintiff claims he was retaliated against by Defendants, as part of a conspiracy, when he was ordered to be psychologically evaluated twice, transferred, and demoted as a result of his exercise of his First Amendment rights to speak about MSHP's alleged cover-up of the death of a 20 year-old college student while in MSHP custody, and MSHP's malfeasance and maladministration in government. This action is brought pursuant to 42 U.S.C. § 1983, the First and Fourteenth Amendments to the United States Constitution, and Missouri tort law.

The following facts are undisputed. Plaintiff was a member of the Missouri Water Patrol (MWP), which later merged with the MSHP. (Doc. 158, ¶ 1). He brings suit against both current

and former members of the MSHP: J. Bret Johnson, Corey Schoeneberg, Stacey Mosher, Ronald Replogle, Luke Vislay, Sarah Eberhard, Gregory Kindle, Sandra Karsten, Gregory Smith, Malik Henderson, and Kemp Shoun. (Doc. 158, ¶¶ 2-12).

This suit originates in part from the drowning of Brandon Ellingson on May 31, 2014, while he was in the custody of the MSHP. (Doc. 158, ¶ 20). For additional background on this matter, see *Ellingson v. Piercy*, Case No. 2:14-CV-04316-NKL.

A. Plaintiff's Speech

In October 2014, after the drowning of Mr. Ellingson, Plaintiff testified twice before a Missouri legislature special committee. (Doc. 158, ¶¶ 27-28). He spoke on issues surrounding Mr. Ellingson's drowning and the merger of the MWP and the MSHP. *Id.* Plaintiff also gave deposition testimony concerning the Ellingson matter in a lawsuit. (Doc. 152, Ex. 12).

Plaintiff's speech went beyond legislative and deposition testimony. Plaintiff spoke to a member of the press and other individuals, including members of the Ellingson family, about a supposed cover-up of Mr. Ellingson's drowning. (Doc. 158, ¶¶ 203-04). Plaintiff further disseminated allegations of corruption in the Ellingson matter involving prosecutor Amanda Grellner and the MSHP. (Doc. 158, ¶¶ 45-47). In one instance he used Facebook to post these allegations on a page dedicated to Mr. Ellingson. (Doc. 158, ¶ 47). Plaintiff outlined how, before Mr. Ellingson's drowning, the MSHP performed a DNA test that had cleared Ms. Grellner's son as a suspect in a rape investigation. *Id.* He went on to imply that because Ms. Grellner's son was cleared of wrongdoing, she in turn would not implicate the MSHP in any wrongdoing regarding Mr. Ellingson's death. Plaintiff further stated it was "a conflict of interest for her to be involved." *Id.*

Ms. Grellner subsequently interviewed Plaintiff during the course of her investigation. (Doc. 158, ¶44). He admitted to spreading information about Ms. Grellner's son, but misrepresented to her the number of individuals he told. (Doc. 158, ¶¶ 45, 50). Plaintiff also pressured another individual to lie to Ms. Grellner regarding how many people Plaintiff had told about the alleged misconduct. (Doc. 88, ¶ 89); (Doc. 158, ¶¶ 52-53). Ms. Grellner later recused herself from the Ellingson investigation due to the perception of impropriety. (Doc. 158, ¶ 54).

B. Defendants' Alleged Retaliation

Plaintiff was ordered to attend mandatory counseling evaluation through the Employee Assistance Program (EAP) on February 27, 2015. (Doc. 158, ¶ 39). At least two individuals reported concerns about Plaintiff's mental well-being to the MSHP. (Doc. 158, ¶¶ 31, 33). Representative Diane Franklin, a member of the Missouri House of Representatives, stated she spoke with Plaintiff numerous times regarding the Ellingson matter. (Doc. 131, Ex. 19). Rep. Franklin said that during one call Plaintiff sounded "somewhat stressed," and that she reached out to Defendant Shoun "to see if the MSHP offered [an EAP] to their officers and if Sgt. Henry was aware of it." *Id.* Similarly, MSHP member Matt Cody–who spent at least some time with Plaintiff socially–reported concerns about how Plaintiff was coping with the Ellingson matter. (Doc. 158, ¶¶ 30-32).

In March of 2015, Ms. Grellner filed a complaint against Plaintiff that was investigated by Defendant Schoeneberg. (Doc. 131, Ex. 27); (Doc. 158, ¶ 43). The investigation found that Plaintiff violated three of the MSHP's General Orders, including that MSHP members will:

> [1] abide by their oath of office throughout the course of their employment . . . [2] not engage in conduct that is unbecoming an employee . . . includ[ing] that which has a tendency to adversely affect, lower, or destroy public respect or confidence in the Patrol, brings the Patrol or any Patrol component or employee into disrepute, brings discredit upon the employee, adversely affects or impairs the operation, efficiency, or morale of the Patrol, or adversely affects the working performance of the employee . . . [and] [3] not spread malicious rumors or lies, disrupt the workplace, or destructively criticize or maliciously ridicule the Patrol, its policies, programs, actions, or employees.

(Doc. 131, Ex. 27); (Doc. 158, ¶ 57). Plaintiff's conduct led Ms. Grellner and another prosecutor to no longer prosecute charges brought by Plaintiff due to trust and integrity concerns. (Doc. 158, ¶ 66). Moreover, a subsequent investigation of the Ellingson matter by a special prosecutor, William C. Seay, concluded that Plaintiff's allegations against the MSHP were unsubstantiated. (Doc. 158, ¶ 93); (Doc. 131, Ex. 57).

Then-superintendent Defendant Johnson ordered formal charges and an offer of discipline against Plaintiff, and also transferred him to another location. (Doc. 158, ¶¶ 66, 71, 74). Plaintiff was offered a reduction in rank from sergeant to corporal within the MSHP. (Doc. 158, ¶ 71). Plaintiff rejected this offer and decided to pursue an appeal, which entitled him to a procedural hearing. (Doc. 158, ¶¶ 71-73). Plaintiff requested and was granted three continuances of this hearing, but retired from the MSHP before the hearing took place. (Doc. 158, ¶¶ 83, 86). On

December 1, 2015, the day of his retirement, Plaintiff sent disparaging emails to four other MSHP members, stating in one email that he had retired on his own terms. (Doc. 158, ¶ 89). Between his initial rejection of recommended discipline and ultimate retirement, Plaintiff became involved in multiple written complaints with other MSHP members. (Doc. 158, ¶¶ 79-82, 84-85). In the end, due to Plaintiff's resignation, the MSHP did not demote him. (Doc. 158, ¶ 88). Plaintiff retired as a sergeant. *Id.*

II. Standard of Review

"Summary judgment is proper if the moving party 'shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Dryer v. NFL*, 814 F.3d 938, 941 (8th Cir. 2016) (quoting Fed. R. Civ. P. 56(a)). "A court considering a motion for summary judgment must view the evidence and inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party." *Id.* at 941–42. Material facts are those "that might affect the outcome of the suit under the governing law," and a genuine dispute over a material fact is one "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Once the moving party has made and supported their motion, the nonmoving party must proffer admissible evidence demonstrating a genuine dispute as to a material fact." *Holden v. Hirner*, 663 F.3d 336, 340 (8th Cir. 2011) (citation omitted). "A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials, but must set forth specific facts in the record showing that there is a genuine issue for trial." *Dryer*, 814 F.3d at 942, (citing *Anderson*, 477 U.S. at 256). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Rohr v. Reliance Bank*, 826 F.3d 1046, 1052 (8th Cir. 2016) (quoting *Anderson*, 477 U.S. at 252).

III. Analysis

In this case, Plaintiff, through his First Amended Complaint (Doc. 63), asserts seven claims against eleven Defendants in their individual capacities. Count I alleges Violation of Plaintiff's First Amendment Rights to Speech. Count II alleges Violation of Fourteenth Amendment Rights to Substantive Due Process. Count III asserts Conspiracy to Violate Civil Rights. Count IV claims

Failure to Supervise against Defendants Johnson and Replogle. Count V claims Tortious Interference with a Business Expectancy. Count VI is a claim for Prima Facie Tort. Count VII alleges Civil Conspiracy. Defendants have moved for summary judgment on all seven counts. Furthermore, Defendants argue they are entitled to qualified immunity related to Plaintiff's federal claims (Counts I-IV) and state law immunity on alleged violations of Missouri law (Counts V-VII).

A. First Amendment Rights to Speech (Count I)

Plaintiff contends that Defendants violated his First Amendment right by retaliating against his constitutionally protected speech. In response, Defendants claim they are entitled to qualified immunity for Plaintiff's federal claims. For the reasons below, the Court finds that Defendants are entitled to qualified immunity for each of Plaintiff's federal law claims (Counts I-IV).

When analyzing qualified immunity at the summary judgment stage, the Court uses a two-pronged test to determine: (1) "whether the facts, taken in the light most favorable to the party asserting the injury . . . show the officer's conduct violated a federal right" and (2) "whether the right in question was clearly established at the time of the violation." *Tolan v. Cotton*, 134 S. Ct. 1861, 1865–66 (2014) (alteration in original) (citations and quotations omitted); *see Grantham v. Trickey*, 21 F.3d 289, 292, 296 (8th Cir. 1994) (finding qualified immunity attached to defendants who were sued in their individual capacities when plaintiff's First Amendment rights were not "clearly established").

The Court begins by examining whether Plaintiff has proven he engaged in a constitutionally protected activity. *Hamer v. Brown*, 831 F.2d 1398, 1401 (8th Cir. 1987) (citing *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Illinois*, 391 U.S. 563, 569–72 (1968). If so, the Court will then analyze whether Plaintiff has shown "that the protected activity was a substantial or a motivating factor in the action taken against him or her . . . . " *Id.* (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–87 (1977).

The Court first determines whether Plaintiff engaged in a protected activity, namely, protected speech. "[T]he 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) (citation omitted). The level of constitutional protections afforded to a government employee's speech requires the Court to determine whether the employee's speech

was of a public concern. *Id.* at 418 (citation omitted). "If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises." *Id.* (citation omitted).

Once the possibility of a First Amendment claim has arisen, the Court "must ask whether . . . [the employer] has produced evidence to indicate the speech had an adverse impact on the efficiency of the . . . [employer's] operations." *Lindsey v. City of Orrick, Mo.*, 491 F.3d 892, 900 (8th Cir. 2007) (citations omitted). "Where there is no evidence of disruption, resort[ing] to the *Pickering* factors is unnecessary because there are no government interests in efficiency to weigh against First Amendment interests." *Belk v. City of Eldon*, 228 F.3d 872, 881 (8th Cir. 2000).

Finally, a finding of sufficient adverse disruption allows the Court to use the *Pickering* balancing test: "[t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Hemminghaus v. Missouri*, 756 F.3d 1100, 1111 (8th Cir. 2014) (citing *Garcetti*, 547 U.S. at 418). "The problem in any case is to 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. "These questions 'are matters of law for the court to resolve.'" *Hemminghaus*, 756 F.3d at 1111 (quoting *Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 395 (8th Cir. 1995)).

1) Protected Activity

Defendants concede that Plaintiff's testimony–in legislative hearings and a deposition involving the Ellingson matter–amounted to protected activity. However, although Plaintiff correctly argues his other speech addressed a matter of public concern, he cannot show this remaining speech amounted to protected activity.

i. *Plaintiff's Speech Was of Public Concern*.

The Court must examine the content, form, and context of the speech in question to determine whether it "addresses a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 147–48 (1983) (footnote omitted). "Speech that involves a matter of political, social or other concern to the community is of public concern." *Calvit v. Minneapolis Pub. Sch.*, 122 F.3d 1112, 1117 (8th Cir. 1997) (citation omitted). The Court examines the form and context "to determine whether the public employee speaks as a concerned citizen informing the public that the government is not properly discharging its duties, or merely as an employee speaking about

internal practices relevant only to fellow employees." *Id.* (citation omitted). Moreover, false statements that are made knowingly or recklessly may not enjoy First Amendment protection. *McGee v. S. Pemiscot Sch. Dist. R-V*, 712 F.2d 339, 342 (8th Cir. 1983); *see Pickering*, 391 U.S. at 574.

Here, it is undisputed that Plaintiff spoke as a private citizen. Taken in the light most favorable to the non-moving party, Plaintiff's speech constituted a matter of public concern. Plaintiff's statements concerned the integrity of both the MSHP and judicial system. Specifically, Plaintiff discussed concerns of a cover-up to the press, other individuals, and members of the Ellingson family. Plaintiff further spoke critically of potential corruption in the prosecutor's office, based in part on a short discussion with another MSHP member. His statements related to the integrity of important government functions, and therefore addressed matters of public concern.

While Plaintiff should have taken additional steps to verify much of the information he spread, based on the summary judgment record his speech did not rise to the level of knowingly or recklessly making false statements. *McGee*, 712 F.2d at 342; *see Pickering*, 391 U.S. at 574. Accordingly, Plaintiff's statements on a MSHP cover-up, along with misconduct between the MSHP and prosecution, amounted to speech regarding a public concern.

ii. *Defendants Have Shown an Adverse Effect on MSHP Operations*.

Defendants "bear[] the burden under the *Pickering* balancing test of establishing permissible grounds" for actions taken against Plaintiff. *Kincade*, 64 F.3d at 397. But courts "do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 U.S. at 152 (footnote omitted). The United States Supreme Court has "consistently given 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." *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion). A government employer's "reasonable prediction of disruption" is given "substantial weight . . . even when the speech involved is on a matter of public concern . . . . " *Id.* Accordingly, a government employer need not show "evidence of actual disruption" in every case. *Bailey v. Dep't of Elementary & Secondary Educ.*, 451 F.3d 514, 521 (8th Cir. 2006) (finding a heated exchange, "an ultimatum to behave or be fired," and a subsequent confrontation at a conference were sufficient evidence of disruption) (citation omitted).

Here, the Defendants have shown sufficient evidence of disruption. Plaintiff's conduct impaired various working relationships and his ability to function as a MSHP member. The MSHP investigation conducted by Defendant Schoeneberg found that Plaintiff violated three MSHP General Orders, two of which dealt directly with workplace disruption and inefficiency, morale, job performance, spreading rumors or lies, and destructive criticism. Moreover, this investigation led to formal charges against Plaintiff, which stated in part that his "conduct was unbecoming [of] an employee of the [MSHP], adversely affected [MSHP] operations, brought discredit upon [Plaintiff] as an employee, and interfered with the functions of a prosecuting attorney." (Doc. 152, Ex. 44).

Defendants point to other disruptive behavior as well. Plaintiff's relationships with two prosecutors deteriorated to the point where they refused to accept cases from Plaintiff. Plaintiff was also involved in numerous complaints with other MSHP members after the Ellingson incident. Lastly, on the date of his retirement, Plaintiff sent several heated emails to his co-workers. While Plaintiff sent the emails after he was transferred and on the day he resigned, they nonetheless shed light on the contentious and disrupted work environment that existed up to that point. The MSHP is a government employer that relies substantially on working relationships among its members, other law enforcement agencies, prosecutors' offices, and the judicial branch. Trust, confidence, and morale are expressly required in the MSHP, in no small part because its members must sometimes rely on one another in life-threatening circumstances. The undisputed facts from the summary judgment record, coupled with reasonable predictions of future disruption, provide sufficient evidence of disruption and damage to morale in the workplace.

iii. *Defendants' Interest Outweighs Plaintiff's Interest under the Pickering Balancing Test*.

Lastly, the *Pickering* test balances the interests of the government against the employee through an analysis of six factors:

> (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or would cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.

Bailey, 451 F.3d at 521–22; *Belk*, 228 F.3d at 880–81. "At least five circuits have concluded that, because *Pickering's* constitutional rule turns upon a fact-intensive balancing test, [a constitutional right] can rarely be considered 'clearly established' for purposes of . . . qualified immunity . . . . " *Bartlett v. Fisher*, 972 F.2d 911, 916 (8th Cir. 1992).

The MSHP, even more so than other government employers, "has a significant government interest in regulating the speech activities of its officers in order 'to promote efficiency, foster loyalty and obedience to superior officers, maintain morale, and instill public confidence in the law enforcement institution.'" *Hughes v. Whitmer*, 714 F.2d 1407, 1419 (8th Cir. 1983) (quoting *Gasparinetti v. Kerr*, 568 F.2d 311, 315–16 (3rd Cir. 1977), *cert. denied*, 436 U.S. 903 (1978)). The MSHP should therefore "be accorded much wider latitude than the normal government employer in dealing with dissension within its ranks." *Id.* (citations omitted). Particularly, the MSHP is entitled to "considerable deference" for a "discretionary decision to reassign or discipline an officer whose speech-related conduct has contributed to dissension." *Bartlett*, 972 F.2d at 918 (citation omitted).

An employee's First Amendment interest in speech is heightened if Plaintiff can show he blew the whistle on government malfeasance and exposed government corruption. *Hughes*, 714 F.2d at 1423. On the other hand, "[e]mployee acts of insubordination may tip the balancing process in favor of the employer's interests . . . . " *Barnard v. Jackson Cnty., Mo.*, 43 F.3d 1218, 1224 (8th Cir. 1995) (citation omitted).

As an initial matter, Plaintiff did not act as a whistle-blower. Even viewing the summary judgment record in the light most favorable to Plaintiff, his allegations were largely unsupported by facts, and exposed no government corruption. Plaintiff's implication that the prosecutor in the Ellingson matter was corrupt appears to have come primarily from one brief, uncorroborated conversation with a fellow officer. Plaintiff's claims of a cover-up similarly fall flat, as they lack supporting evidence in the record. His interest therefore gains no weight.

Here, as noted above, Defendants concede that Plaintiff's legislative and deposition testimony amounted to protected activity under the First Amendment. His remaining speech does not outweigh the interests of the MSHP, and is therefore not protected.

On the surface, Plaintiff's speech regarding the MSHP and prosecutorial corruption appears to evoke high public interest. However, such concerns are lessened by the lack of supporting facts, inappropriate manner of conveyance, and insubordinate behavior. Plaintiff used

Facebook to further an unsubstantiated theory of corruption based on a brief discussion with another MSHP member. Plaintiff later misrepresented to Ms. Grellner the number of people he had contacted regarding these claims. At the very least, Plaintiff likewise pressured another individual to lie to Ms. Grellner. Plaintiff also thoroughly discussed a supposed cover-up of the Ellingson matter: to the press (as an anonymous source), to Ellingson family members, and to other individuals. But the record does not bear a foundation for Plaintiff's extensive allegations of a cover-up. Indeed, other than well-documented issues surrounding Mr. Piercy, the investigation conducted by Mr. Seay found no evidence of wrongdoing by the MSHP, except for Plaintiff's unlawful statements. (Doc. 131, Ex. 57).

The MSHP necessitates harmony and trust in the workplace, and, as discussed above, Plaintiff ruptured both. Due to Plaintiff's actions two prosecutors refused to take cases from him. And Plaintiff became involved in complaints against numerous other MSHP members. Plaintiff's speech, and the manner in which it was effectuated, hurt working relationships, negatively impacted morale, disturbed the MSHP's operations and efficiencies, and impeded his ability to perform his job.

Thus, the MSHP's significant government interest in maintaining morale, discipline, and efficiency outweigh those of Plaintiff's speech on a matter of public concern, namely, the alleged MSHP and prosecutorial corruption, and a cover-up. Thus Plaintiff has not shown he engaged in a protected activity for this speech.

Because Defendants concede that Plaintiff's legislative and deposition testimony were protected activities, the Court moves to the "substantial or motivating factor" analysis for this speech.

2) Substantial or Motivating Factor

The Court next considers whether Plaintiff's protected activities were a substantial or motivating factor in his mandatory EAP attendance, and subsequent demotion and transfer. "Whether the protected conduct was a substantial or motivating factor in an employment decision is a question of fact," but the Court must decide if sufficient evidence exists to create a factual question for the jury. *Strinni v. Mehlville Fire Prot. Dist.*, 681 F. Supp. 2d 1052, 1073–74 (E.D. Mo. 2010) (citing *Morris v. City of Chillicothe*, 512 F.3d 1013, 1018 (8th Cir. 2008)). "[W]hile causation is generally a jury question, it can provide the basis for summary judgment when the

question is so free from doubt as to justify taking it from the jury." *Id.* (quoting *Naucke v. City of Park Hills*, 284 F.3d 923, 928 (8th Cir. 2002) (internal marks omitted)).

The First Amendment guards a government employee's protected speech by restraining the government from retaliation. *Morris*, 512 F.3d at 1018 (citing *Hughes*, 714 F.2d at 1418). An analysis of retaliation based on protected activity is a three-step process. *Id.* Plaintiff "must show that he suffered an adverse employment action that was causally connected to his participation in a protected activity." *Id.* at 1018–19 (citing *Duffy v. McPhillips*, 276 F.3d 988, 991 (8th Cir. 2002)). The burden then shifts to Defendants to prove a legitimate, nondiscriminatory reason for his or her actions. *Id.* (citation omitted). Lastly, if proven, then the burden shifts back to Plaintiff to show that Defendants' actions were pretext for unconstitutional retaliation. *Id.* (citation omitted).

The last step of this analysis is more difficult to prove than step one because "evidence of pretext and discrimination are viewed in the light of the employer's justification." *Id.* at 1019 (citing *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 834 (8th Cir. 2002)). Plaintiff may prove pretext with evidence that the MSHP offered a reason for its actions with no basis in fact, recent favorable reviews of Plaintiff, or that the MSHP's reasons for discipline have "changed substantially over time." *Id.* (citation omitted).

Pretext may also be shown with evidence of employees who were similarly situated to Plaintiff that were treated differently. *Ebersole v. Novo Nordisk, Inc.*, 758 F.3d 917, 925 (8th Cir. 2014) (citation omitted); *see also Kmak v. Am. Century Co.s, Inc.*, No. 12-1111-CV-W-BP, 2015 WL 11234171, at *3 (W.D. Mo. Nov. 23, 2015), *aff'd*, 873 F.3d 1030 (8th Cir. 2017) (noting that different types of federal retaliation claims use the same burden-shifting analysis). Such "comparators 'must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.'" *Ebersole*, 758 F.3d at 925 (quoting *Burton v. Ark. Sec'y of State*, 737 F.3d 1219, 1229 (8th Cir. 2013)). "The comparators need not have committed the exact same offense but must have engaged in conduct of comparable seriousness." *Id.* (quotations and citations omitted).

Here, the Court assumes, without deciding, that Plaintiff met his initial burden, because Plaintiff cannot succeed at step three and summary judgment is nonetheless appropriate. It is uncontested that Plaintiff suffered an adverse employment action. Plaintiff seems to contend his notice of demotion is causally connected to his participation in protected activity. The notice states that his demotion was due in part to "unduly criticizing the [MSHP] and its employees." (Doc.

151 at 14). Plaintiff did in fact criticize Mr. Piercy in his deposition testimony for the Ellingson matter, which Defendants concede was protected activity under the First Amendment. However, upon closer scrutiny Plaintiff would need to specify how his demotion was causally connected to his deposition testimony, because Plaintiff also levied constitutionally unprotected criticism towards MSHP members outside of his deposition. Moreover, while Plaintiff further argues that Defendants unconstitutionally retaliated against his other speech–regarding misconduct between the MSHP and Ms. Grellner, and a cover-up–the Court has found such speech was not constitutionally protected. Nonetheless, the Court assumes this step satisfied, and next considers whether Defendants have proven a legitimate nondiscriminatory reason for their actions.

For step two, Defendants have met their burden. Defendants point to several facts to support their disciplinary action. Plaintiff discussed serious, unverified allegations of corruption between the MSHP and prosecution. He was later dishonest with Ms. Grellner, and pressured another individual to lie. He also disseminated information about a cover-up of the Ellingson matter. Defendants have articulated legitimate and nondiscriminatory reasons for both demoting and transferring Plaintiff. Moreover, Defendants have shown non-disciplinary justification for the mandatory EAP counseling session. Rep. Franklin contacted Defendant Shoun, the legislative liaison, out of concern for Plaintiff's mental health. And Mr. Cody reached out with concerns about Plaintiff's behavior. Defendants have accordingly met their burden at step two.

Lastly, at step three, Plaintiff has not shown Defendants' actions were unconstitutional pretext. Defendants' actions had a basis in fact, as Plaintiff admitted to much, if not all, of the conduct for which he was disciplined. Similarly, Defendants' nondiscriminatory reasons for disciplining Plaintiff have not changed. While Plaintiff did receive a favorable review, it occurred on January 24, 2015, before the extent of his conduct became known. (Doc. 152, Ex. 51).

Plaintiff attempts to demonstrate his mandatory EAP attendance was disciplinary and thus retaliatory, and offers three different written versions of the EAP referral generated by Mr. Cody's concerns as proof. The record, however, does not support this claim. While two previous versions of the referral focus more on Plaintiff's alleged misconduct than the final version, they all nonetheless include concerns about Plaintiff's mental health. (Doc. 158, ¶ 31). The document contained the same substantive information in all three versions and is not a basis for pretext. *Id.* Similarly, Plaintiff argues he was ordered to attend two EAP sessions, which shows retaliation. But from the record it appears that Plaintiff's attorney asked for a follow-up EAP session, and that

Plaintiff was not ordered to attend two sessions by Defendants. (Doc. 158, ¶ 41). Moreover, there is no genuine dispute that at least two individuals expressed concerns about Plaintiff's mental health after the Ellingson drowning. Plaintiff's allegations cannot support a showing of pretext based on the mandatory EAP referral.

Plaintiff further contends that similarly situated individuals were disciplined less severely, which therefore confirms that Defendants' disciplinary acts were pretext for retaliation. However, Plaintiff has not adequately shown how these individuals were in similar situations to his own. In the most favorable light to the non-movant, the fact that other MSHP members were not disciplined for lying–to different individuals, in different contexts, about different issues than Plaintiff–is insufficient to show they were in similar situations to Plaintiff's own conduct.

Additionally, Plaintiff argues that Defendants established a pattern of pretextual discipline. The record contains three affidavits by other MSHP members who state they spoke out against the MSHP-MWP merger and were retaliated against for doing so. (Doc. 158, ¶¶ 320-22). Even taken as true, Plaintiff has again failed to show how these individuals are substantially similar to his position. These individuals were allegedly transferred for negative comments about the merger. Plaintiff is unable to show he was demoted and transferred for his participation in protected activities, and not instead for his other, non-protected behavior. His non-protected behavior included spreading unverified conspiracy theories, being untruthful about it, and pressuring another individual to lie about it. Indeed, in his brief Plaintiff admits that this non-protected behavior (which he argues was protected) at least partly motivated Defendants to demote and transfer him. (Doc. 151 at 14). As a result, Plaintiff has not carried his burden at step three.

Accordingly, Plaintiff has not shown his participation in a protected activity was a motivating or substantial factor in Defendants' actions. Plaintiff consequently cannot prove he had a clearly established constitutional right that was violated in the instant case. The Court therefore dismisses Count I.

B. Violation of Fourteenth Amendment Rights to Substantive Due Process (Count II)

Plaintiff has not responded to Defendants' Motion for Summary Judgment on Count II, Violation of Fourteenth Amendment Rights to Substantive Due Process. A non-movant who fails to respond in a summary judgment motion abandons the undefended claim. *Thomas v. United Steelworkers Local 1938*, 743 F.3d 1134, 1141 (8th Cir. 2014) (footnote omitted) (citing *Satcher*

v. Univ. of Arkansas at Pine Bluff Bd. of Trs., 558 F.3d 731, 734–35 (8th Cir. 2009)); *Saghir v. Schenker Logistics, Inc.*, 501 F. App'x 609, 610 (8th Cir. 2013); *Helmig v. Fowler*, No. 2:11-CV-04364-NKL, 2014 WL 4659381, at *6 (W.D. Mo. Sept. 17, 2014), *aff'd*, 828 F.3d 755 (8th Cir. 2016). He has therefore abandoned this claim. Thus, Count II is dismissed.

C. Conspiracy to Violate Civil Rights (Count III)

Plaintiff alleges a § 1983 conspiracy among Defendants to violate his First Amendment rights with retaliatory behavior. To advance past the summary judgment stage, Plaintiff must "allege with particularity and specifically demonstrate with material facts that [D]efendants reached an agreement. [Plaintiff] can satisfy this burden by 'pointing to at least some facts which would suggest [Defendants] reached an understanding to violate [his] rights.'" *Bonenberger v. St. Louis Metro. Police Dep't*, 810 F.3d 1103, 1109 (8th Cir. 2016) (quoting *City of Omaha Emps. Betterment Ass'n v. City of Omaha*, 883 F.2d 650, 652 (8th Cir. 1989)).

"[Plaintiff] must show that [Defendants] conspired with others to deprive him or her of a constitutional right; that at least one of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy; and that the overt act injured [Plaintiff]." *Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir. 1999) (citation omitted). In addition, Plaintiff is "required to prove a deprivation of a constitutional right or privilege in order to prevail on a § 1983 civil conspiracy claim." *Id.* (citing *Villanueva v. McInnis*, 723 F.2d 414, 416 (5th Cir. 1984) (alteration in original) ("it remains necessary to prove an actual deprivation of a constitutional right; a conspiracy to deprive is insufficient . . . without a deprivation of a constitutional right or privilege, [Defendant] has no liability under § 1983")).

Here, Plaintiff's claim must fail. Plaintiff argues that Defendants violated his constitutional right by conspiring to "retaliate against Plaintiff for his First Amendment whistleblowing activities to expose" the alleged cover-up of the Ellingson drowning. (Doc. 151 at 18). However, Plaintiff has not proven a deprivation of any clearly established First Amendment right. The Court therefore must dismiss Count III.

D. Failure to Supervise against Defendants Johnson and Replogle (Count IV)

Plaintiff next claims that Defendants Johnson and Replogle failed to supervise their subordinates who retaliated against Plaintiff's speech. Specifically, Plaintiff argues subordinates

of Defendants Johnson and Replogle violated Plaintiff's constitutional rights by effectuating his demotion and transfer. To state a claim for failure to supervise, Plaintiff must show facts indicating that Defendants Johnson and Replogle: "(1) [r]eceived notice of a pattern of unconstitutional acts committed by subordinates; (2) demonstrated deliberate indifference to or tacit authorization of the offensive acts; (3) failed to take sufficient remedial action; and (4) that such failure proximately caused injury to [Plaintiff]." *Parrish v. Ball*, 594 F.3d 993, 1002 (8th Cir. 2010) (citation omitted); *Otey v. Marshall*, 121 F.3d 1150, 1155 (8th Cir. 1997). A "single incident, or series of isolated incidents, usually provides an insufficient basis upon which to assign supervisor liability." *Lenz v. Wade*, 490 F.3d 991, 995–96 (8th Cir. 2007) (citation omitted). Moreover, if a subordinate did not violate a plaintiff's constitutional rights, then a supervisor liability claim cannot succeed. *Mendoza v. U.S. Immigration & Customs Enf't*, 849 F.3d 408, 419–20 (8th Cir. 2017) (finding failure to supervise "claims against [the defendants] automatically fail for lack of an underlying constitutional violation") (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 798–99 (1986).

Here, viewing the record in the light most favorable to the Plaintiff, the Court finds this claim without merit. Plaintiff asserts that Defendants Replogle and Johnson "had knowledge of and participated [with their subordinates] in retaliation against other employees for their speech." (Doc. 151 at 27). In support of this claim, Plaintiff alleges three other members of the MSHP spoke critically of the MSHP and were subsequently transferred by subordinates of Defendants Replogle and Johnson. Even if the Court assumed this information satisfied elements one through three of the claim, Plaintiff still cannot succeed. As previously discussed, Plaintiff has not shown a violation of a clearly established First Amendment right in the instant case. Plaintiff is consequently unable to prove a failure to supervise based on unconstitutional retaliation. Count IV is therefore dismissed.

E. Tortious Interference with a Business Expectancy (Count V)

Plaintiff has not responded to Defendants' Motion for Summary Judgment on Count V, Tortious Interference with a Business Expectancy. A non-movant who fails to respond in a summary judgment motion abandons the undefended claim. *Thomas*, 743 F.3d at 1141; *Satcher*, 558 F.3d at 734–35; *Saghir*, 501 F. App'x at 610 (8th Cir. 2013); *Helmig*, 2014 WL 4659381, at *6. Plaintiff has therefore abandoned this claim. Accordingly, Count V shall be dismissed.

F. Prima Facie Tort (Count VI)

Plaintiff argues that his transfer and demotion amounted to a prima facie tort committed by Defendants. Defendants respond by claiming state law immunity for all state claims. Missouri law governs these issues. *Tamko Roofing Prod., Inc. v. Smith Eng'g Co.*, 450 F.3d 822, 830 (8th Cir. 2006) (citation omitted); Mo. Rev. Stat. § 537.600 (2005).

1) State Law Immunity

Under Missouri law, a public entity is protected from tort liability unless the case involves (1) injuries arising out of a public employee's operation of motor vehicle; or (2) injuries caused by the dangerous condition of a public entity's property. Mo. Rev. Stat. § 537.600. Public entities may also waive their sovereign immunity for governmental functions to the extent that they are covered by liability insurance. *Southers v. City of Farmington*, 263 S.W.3d 603, 609 (Mo. 2008), *as modified on denial of reh'g* (Sept. 30, 2008). "A suit against a government officer in his official capacity is functionally equivalent to a suit against the employing governmental entity." *Veatch v. Bartels Lutheran Home*, 627 F.3d 1254, 1257 (8th Cir. 2010) (citation omitted). Therefore, sovereign immunity also applies against governmental officials sued in their official capacity. *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985).

However, sovereign immunity is unavailable to government employees sued in their individual capacities, which is the case here. *B.A.B., Jr. v. Bd. of Educ. of City of St. Louis*, 698 F.3d 1037, 1041 (8th Cir. 2012). As a consequence, Defendants are left with only two potential doctrinal immunity defenses for state law claims: official immunity and public duty. *Id.* Both official immunity and the public duty doctrine provide protection to individual government employees for certain negligent acts, but do not apply to intentionally tortious acts. *See id.* at 1041–42.

A detailed analysis of these doctrines is unnecessary because they are inapplicable to the instant case. Plaintiff alleges that Defendants, in their respective individual capacities, committed intentional torts. He has not brought claims of negligence. Accordingly, sovereign immunity, official immunity, and the public duty doctrine are all unavailable as shields for Defendants. Nonetheless, for the reasons discussed herein, each of Plaintiff's state law claims (Counts V-VII) must fail.

2) Prima Facie Tort

Plaintiff is unable to show Defendants committed a prima facie tort under Missouri law. "Prima facie tort is not a catchall remedy of last resort for claims that are not otherwise salvageable under traditional causes of action." *Tamko Roofing*, 450 F.3d at 830–31 (citation omitted). Instead, "it is a particular and limited theory of recovery whose elements include: (1) an intentional lawful act by defendant; (2) defendant's intent to injure the plaintiff; (3) injury to the plaintiff; and (4) absence of or insufficient justification for defendant's act." *Id.* (quoting *Nazeri v. Missouri Valley Coll.*, 860 S.W.2d 303, 315 (Mo. banc 1993)) (alterations in original); *see also Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 67 n. 4 (Mo. banc 2000) ("It is difficult to find reported cases where a plaintiff actually has recovered on a *prima facie* tort theory.").

A "mere awareness that [one's] conduct would cause harm is insufficient to prove an actual intent to injure." *Tamko Roofing*, 450 F.3d at 831 (citing *Thomas v. Special Olympics of Mo., Inc.*, 31 S.W.3d 442, 450 (Mo. Ct. App. 2000)). Rather, Plaintiff must show that Defendants acted "with specific, clear-cut, express malicious intent to injure; mere intent to do the act which results in injury is not sufficient." *Id.*; *Woolsey v. Bank of Versailles*, 951 S.W.2d 662, 669 (Mo. Ct. App. 1997) (citations omitted) ("The plaintiff's burden to submit evidence on this element is a heavy one.").

Here, the summary judgment record does not support Plaintiff's claim of prima facie tort. Plaintiff does not address the fourth element of this claim, namely, whether there was an "absence of or insufficient justification for [Command Staff Defendants'] act[s]." *Tamko Roofing*, 450 F.3d at 831. Even if Plaintiff had argued this essential element, as previously discussed, Command Staff Defendants had justification to demote and transfer him. At a minimum, no genuine dispute exists that Plaintiff was untruthful with Ms. Grellner; pressured another individual to lie to Ms. Grellner; spread harmful information about Ms. Grellner and the MSHP that was supported by one vague statement from another MSHP officer; and made various other statements critical of MSHP cover-ups that are unsupported by the record.

Moreover, other than Plaintiff's allegations, the record does not show the malicious intent required to sustain this claim. Liberally construed, Plaintiff's only offered fact that hints at malicious intent is Command Staff Defendants' decision to demote and transfer only him, and no other "similarly situated" employees. (Doc. 151 at 28). However, the record shows Plaintiff's behavior in the aggregate was significantly dissimilar to his contemporaries. Plaintiff is unable to

satisfy the heavy burden to show Defendants acted with the requisite intent. *Cf. Woolsey*, 951 S.W.2d at 669. Accordingly, Count VI is dismissed.

G. Civil Conspiracy Under State Law (Count VII)

Next, the Court examines Plaintiff's state civil conspiracy claim against Defendants. Missouri law controls this claim, and Plaintiff must therefore prove the following elements that include:

> (1) two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) one or more unlawful overt acts, and (5) resulting damages. The essence of a civil conspiracy is an *unlawful* act agreed upon by two or more persons.

Rosemann v. St. Louis Bank, 858 F.3d 488, 500 (8th Cir. 2017) (citation omitted)

"A claim of conspiracy alone is not actionable absent an underlying tort or wrongful act.'" *EnviroPAK Corp. v. Zenfinity Capital, LLC*, No. 4:14-CV-00754-ERW, 2015 WL 331807, at *12 (E.D. Mo. Jan. 23, 2015) (quoting *Wiles v. Capitol Indemnity Corp*., 280 F.3d 868, 870 (8th Cir. 2002) (internal marks omitted). Without "an underlying tort or wrongful act, a claim for civil conspiracy must fail." *Id.* (quoting *Borders v. Trinity Marine Prods., Inc.*, No. 1:10-CV-00146-HEA, 2011 WL 1045560, at *4 (E.D. Mo. Mar. 17, 2011) (internal marks omitted). Similarly, "if tortious acts alleged as elements of a civil conspiracy claim fail to state a cause of action, then the conspiracy claim fails as well." *Rice v. Hodapp*, 919 S.W.2d 240, 245 (Mo. banc 1996) (citations omitted).

Plaintiff's claim for civil conspiracy must be dismissed. Plaintiff "incorporate[s] by reference" his § 1983 civil conspiracy claim arguments in support of his state civil conspiracy claim. (Doc. 151 at 29). He therefore argues that Defendants conspired to deprive him of his First Amendment rights. For an underlying wrongful act, Plaintiff points to Defendants' alleged retaliatory demotion and transfer that punished his First Amendment speech. But, as previously discussed, Plaintiff failed to prove a violation of a clearly established First Amendment right. As Plaintiff points to no other wrongful act to support this specific claim, the Court accordingly dismisses Count VII.

IV. Conclusion

Defendants' Motion for Summary Judgment (Doc. 130) is GRANTED as set forth herein.

IT IS, THEREFORE, ORDERED.

Dated this 26th day of September, 2018, at Jefferson City, Missouri.

Willie J. Epps, Jr.
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3298

Randy Henry

Appellant

v.

J. Bret Johnson, in his individual capacity, et al.

Appellees

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:16-cv-04249-WJE)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 09, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans