APPENDICES

1. Magistrate findings 1983 Tort Claims "Document 41"

Magistrate Judge made findings issuing "general denial" to Petitioner's 14th Amendment Equal Protection Clause not subject to constitutional violation for 1983 Tort Claim against individual / official capacity defendant named within petitioner's complaint having discriminated against him per his mental disability....

2. District Court findings Tort Claims "Document 49 & 50"

District Court supported Magistrate Judge Report per denying petitioner remedy via 1983 Tort Claim against named individuals within his complaint

3. District Court findings Original Summary Judgment "Document 114"

a. District Court denied Petitioners ADA Intentional Discrimination & Failure To Accommodate Claim pursuant to unsatisfactory material facts asserting the petitioner's "ADHD" not being an actual 'disability' under ADA's statute definition....

b. District Court made no findings subject to the petitioner not providing material facts sufficient that :

i. Petitioner was not a "qualified individual" for the job position sought &

ii. Record evidence established that an adverse effect occurred to the petitioner via termination of his ADA Retaliation claim...

4. District Court Reconsideration Proceeding findings "Document 129"

District Court made prima facie findings in favor of petitioner's :

i. ADA Intentional Discrimination Claim &

ii. ADA Retaliation Claim..

The district court granted summary judgment to the Respondent as to the petitioner's presented sufficient evidence not satisfying pretextual cause of underlying Intentional Discrimination & Retaliation Claims.

5. District Court Amended Summary Judgment findings "Document 164" denied petitioners Failure To Accommodate Claim per nonmaterial evidence subject to :

i. not being a "qualified individual" for the job position sought...&

ii. Respondent's providing Petitioner Reasonable Accommodations

6. 5th Cir Ruling No Opinion

The 5th Circuit Court of Appeals made no opinion and found no reversible errors...

7. District Court Denied Petitioner Golden's Rule 52 Federal Rule Of Civil Procedure Motion

Petitioner Requested "Additional Factual Findings & Conclusion Of Law" As To His Equal Protection Claim Violation And Was Denied Subject To Presentment Of Motion Being a Substitute For Untimely Objection & To Rehash Litigation ....

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 9, 2023
Lyle W. Cayce
Clerk

No. 22-40785

KEVIN RASHAAN GOLDEN,

Plaintiff—Appellant,

versus

CITY OF LONGVIEW, *Public Works Division*; ROLIN MCPHEE, *Director, City of Longview Public Works*; CHI PING STEPHEN HA, *Supervisor, Traffic Engineering Department*; KEITH COVINGTON, *Assistant Supervisor, Traffic Engineering Department*; MARY ANN MILLER, *Human Resources Director*; UNKNOWN PARTIES, *Interested parties within Gregg County, Texas*,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:20-CV-620

Before RICHMAN, *Chief Judge*, and HAYNES and DUNCAN, *Circuit Judges*.

PER CURIAM:*

Pro se plaintiff Kevin Rashaan Golden appeals the dismissal of his

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

claims alleging that he was illegally fired on account of his disability. *See Golden v. City of Longview*, No. 6:20-CV-00620-JDK, 2021 WL 3829126, at *10 (E.D. Tex. Aug. 4, 2021) (recommendation to dismiss claims against City employees under Federal Rule of Civil Procedure 12(b)(6) and 28 U.S.C. § 1915(e)(2)(B)(ii)); *Golden v. City of Longview*, No. 6:20-CV-620-JDK-JDL, 2021 WL 3809265, at *1 (E.D. Tex. Aug. 26, 2021) (adopting recommendation); *Golden v. City of Longview*, No. 6:20-CV-00620-JDL, 2022 WL 2704533, at *11 (E.D. Tex. July 11, 2022) (summary judgment dismissing remaining ADA claims); *Golden v. City of Longview*, 2022 WL 16625713, at *9 (E.D. Tex. Nov. 1, 2022) (same).

Finding no reversible error, we AFFIRM. *See* 5TH CIR. R. 47.6.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

KEVIN RASHAAN GOLDEN,	§	
	§	
	§	**CIVIL ACTION NO. 6:20-CV-00620-JDL**
Plaintiff,	§	
	§	
v.	§	
	§	
CITY OF LONGVIEW, PUBLIC WORKS DIVISION;	§	
	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

Before the court is Defendant the City of Longview's ("Defendant") motion for summary judgment. (Doc. No. 143.) Plaintiff Kevin Golden has filed a response (Doc. Nos. 156; 162)[1], to which Defendant has filed a reply (Doc. No. 157). Upon consideration, Defendant's motion for summary judgment (Doc. No. 143) is **GRANTED**.

BACKGROUND

Plaintiff initiated this action on November 27, 2020. (Doc. No. 1.) On August 4, 2021, the court granted Defendants' motion to dismiss all of Plaintiff's claims except for Plaintiff's Americans with Disabilities Act ("ADA") claims against Defendant the City of Longview. (Doc. No. 41.) Defendant thereafter moved for summary judgment on Plaintiff's ADA discrimination and retaliation claims. (Doc. No. 97.) In an amended memorandum opinion and order issued on

[1] Plaintiff filed a motion to exceed the page limit in his response. (Doc. No. 154.) The court denied his motion (Doc. No. 155), but Plaintiff filed his response in excess of the page limit before the court's order was filed (Doc. No. 156). Plaintiff later filed a response compliant with the 30-page limit. (Doc. No. 162.) The court considers both responses out of fairness. Much of Plaintiff's response, however, rehashes his discrimination claim that Defendant discharged him after learning of his disability. (Doc. No. 156, at 16–18, 20, 23.) The court granted Defendant's summary judgment motion on Plaintiff's discrimination claim. (Doc. No. 129.) Thus, the court will not consider the merits of those arguments herein.

cleaning despite his disability. *Id.* at 10–12, 14. Regarding his employment with Defendant, Plaintiff testified that he performed the essential functions of a Signs and Markings Technician without accommodation. *Id.* at 44–46, 50, 53–54.

b. Affidavit of Keith Covington

In his affidavit, Mr. Covington, a Traffic Signal Supervisor for Defendant, and Plaintiff's direct supervisor, avows that shortly after Plaintiff was hired, Plaintiff informed him that he had ADHD but did not take his prescribed medications. (Doc. No. 143-3, at 1.) He admits that Plaintiff asked for additional assistance to perform the essential functions of his job, and he agreed to provide additional assistance. *Id.* Mr. Covington maintains that he, along with Plaintiff's coworkers, Chris Walker and Richard Comer, provided Plaintiff with additional time, training, and supervision to perform his job duties. *Id.* He also asserts that despite the additional help, Plaintiff's performance of his essential job functions did not improve. *Id.* Mr. Covington maintains that until his termination, Plaintiff failed to follow instructions and adequately perform the essential functions of his job. *Id.* Mr. Covington includes the notes he recorded regarding Plaintiff's job performance. *Id.* at 1–2, 5–20. The notes indicate that Plaintiff:

- Applied markings at a traffic project incorrectly, creating a public safety hazard;
- Used his time inefficiently;
- Submitted incomplete paperwork;
- Failed to prepare for assigned tasks;
- Failed to follow instructions;
- Failed to respond to service calls in a timely manner;
- Refused to work with coworkers;

- Failed to follow the process for work orders;
- Used his personal phone during training;
- Failed to follow verbal and written instructions; and
- Failed to prioritize his assignments.

Id. at 1–2. He also provides specific instances where Plaintiff was provided with additional training and supervision. Mr. Covington acknowledges that:

- Plaintiff was provided with specific instructions of location and where to install markers, but he installed them horizontally instead of vertically. *Id.* at 5.
- Plaintiff submitted an incomplete service request and Mr. Covington had to retrain him on "something we have been training him to do since he started." *Id.*
- Plaintiff did not have the necessary supplies for the project, and Mr. Covington had to explain Plaintiff's assignment again. *Id.* at 7.
- Plaintiff was not doing work assigned to him but was looking for additional work. He would not listen to Mr. Walker's advice on completing the work assigned. *Id.* at 8.
- Plaintiff submitted incomplete work orders and received a written awareness warning from Mr. Covington. *Id.* at 8.
- Plaintiff continued to struggle with submitting work orders. Mr. Covington had to explain the work order process again. *Id.* at 9–10.
- Plaintiff had to sit down with Mr. Walker to learn about making signs. Plaintiff was on his phone, not paying attention. *Id.* at 10.
- Mr. Walker brought Plaintiff to Mr. Covington to explain how to complete work orders and service requests again. *Id.* at 11.

Mr. Covington asserts that both Plaintiff and Mr. Comer struggled with pre-planning their time and assignments. *Id.* at 7.

Mr. Covington also identifies the essential job functions of a Signs and Markings Technician. *Id.* at 3–4. The primary duties of a Signs and Markings Technician include:

- Using computer aided graphics software applications to create traffic sign design and lettering;
- Designing and fabricating standard and customized signs in accordance with city standards and the Manual on Uniform Traffic Control Devices;
- Operating, maintaining, and cleaning sign shop equipment;
- Managing sign shop inventory by ordering paint, materials, parts, and supplies;
- Assisting with street stripping and pavement markings and maintaining equipment;
- Creating specialty signs and decals for city departments;
- Preparing estimates for special projects and damage recovery;
- Maintaining necessary records of installation, location, maintenance, and repairs of traffic signs and devices;
- Creating a daily log of incident and accident reports;
- Following all safety rules and regulations on the job site;
- Closely following verbal and written instructions and procedures; and
- Performing other related duties as assigned or required.

Id.

c. Affidavit of Plaintiff

In his affidavit, Plaintiff maintains that he did not realize his position as a Signs and Markings Technician required speed and multitasking skills, and once he realized this, he informed Mr. Covington about his ADHD and requested an accommodation. (Doc. No. 156-2, at 3.) Plaintiff acknowledges that Mr. Walker's training techniques were too fast and complex, which led him to request patience, effective communication, and assistance with multitasking from Mr. Covington.

Id. at 3–4. Plaintiff avows that Mr. Covington did not ask for his medical records evidencing his ADHD diagnosis. *Id.* at 1. Plaintiff also avows that Mr. Covington told him that he did not inform any other employees about Plaintiff's disability, his requested accommodations, or the accommodations provided. *Id.* at 6. He admits that Mr. Covington agreed to provide his requested accommodations but asserts that he did not do so. *Id.* at 3–4. Plaintiff further maintains that he did not receive any notice of the accommodations Defendant provided for his ADHD nor did he agree to the accommodations provided. *Id.* at 2. Plaintiff asserts that Mr. Walker was reassigned to a new position and Mr. Comer, another probationary Signs and Markings Technician, took over training Plaintiff. *Id.* at 4–5. He admits that he and Mr. Comer received training from Mr. Covington after submitting incomplete work orders and that they both continued to incorrectly submit work orders after this training. *Id.* at 2. Plaintiff also maintains that when he informed his previous employers about his ADHD, they accommodated him so he could perform the essential functions of his jobs. *Id.* at 5.

d. Audio Recording of Plaintiff's Conversation with Keith Covington

In the audio recording, Plaintiff informs Mr. Covington that he suffers from ADHD. He requests Mr. Covington be patient, provide effective communication, and assist with multitasking to accommodate his ADHD, and Mr. Covington agrees to accommodate Plaintiff.

e. Written Warning

On September 5, 2018, Mr. Covington provided Plaintiff and Mr. Comer with written warnings for submitting incomplete work orders. (Doc. No. 156-3, at 30.) The warning indicates that it was a final warning and more serious action would be taken if their performance did not improve. *Id.*

f. Plaintiff's Job History

Plaintiff's job history indicates that he was employed by E-Tech Services as a chat sales employee for Verizon Wireless. *Id.* at 33. In this position, Plaintiff struggled to type 35–40 words per minute and was distracted by other employees. *Id.* After learning of his ADHD, E-Tech Services accommodated Plaintiff by moving him to the night shift and away from other employees who distracted him. *Id.* They also provided "short cuts" to enable Plaintiff to respond to customers in a timely manner. *Id.*

Plaintiff also worked for Tyson foods as a general floor worker and union steward. *Id.* As a general floor worker, Plaintiff had difficulty staying focused in a cold environment doing heavy lifting for hours at a time. *Id.* After learning of his ADHD, Tyson Foods allowed Plaintiff to take a short break to eat a snack and reenergize. *Id.* at 34. As a union steward, Plaintiff struggled to separate food in a fast-paced environment. *Id.* at 35. After learning of his ADHD, they allowed Plaintiff to rotate between jobs. *Id.*

g. Termination Letters

On September 14, 2018, Plaintiff received a letter from Defendant recommending that he be terminated. *Id.* at 38. The letter reveals that Defendant's articulated reasons for discharging Plaintiff were submitting incomplete work orders and making discourteous remarks to coworkers. *Id.* On September 19, 2018, Plaintiff was terminated. *Id.* at 40.

h. Plaintiff's Emails to Keith Covington

Plaintiff also includes emails he sent to Mr. Covington while employed by Defendant containing photos of assignments he completed. *Id.* at 48–67.

LEGAL STANDARD

A motion for summary judgment should be granted if the record, taken as a whole, "together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986); *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). The Supreme Court has interpreted the plain language of Rule 56 as mandating "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

The party moving for summary judgment "must 'demonstrate the absence of a genuine issue of material fact,' but need not negate the elements of the nonmovant's case." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (quoting *Celotex*, 477 U.S. at 323–25). A fact is material if it might affect the outcome of the suit under the governing law. *Merritt-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957, 961 (5th Cir. 1999). Issues of material fact are "genuine" only if they require resolution by a trier of fact and if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Merritt-Campbell, Inc.*, 164 F.3d at 961. If the moving party "fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response." *Little*, 37 F.3d at 1075.

If the movant meets this burden, Rule 56 requires the opposing party to go beyond the pleadings and to show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial.

EEOC v. Texas Instruments, Inc., 100 F.3d 1173, 1180 (5th Cir. 1996); *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1046–47 (5th Cir. 1996). The nonmovant's burden may not be satisfied by argument, conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a mere scintilla of evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 585 (1986); *Wallace*, 80 F.3d at 1047; *Little*, 37 F.3d at 1075.

When ruling on a motion for summary judgment, the court is required to view all justifiable inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970); *Merritt-Campbell, Inc.*, 164 F.3d at 961. However, the court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995), *as modified*, 70 F.3d 26 (5th Cir. 1995). Unless there is sufficient evidence for a reasonable jury to return a verdict in the opposing party's favor, there is no genuine issue for trial, and summary judgment must be granted. *Celotex*, 477 U.S. at 322–23; *Anderson*, 477 U.S. at 249–51; *Texas Instruments*, 100 F.3d at 1179.

DISCUSSION

Defendant argues that it is entitled to summary judgment on Plaintiff's failure to accommodate claim because: (1) Plaintiff is not a qualified individual under the ADA; (2) Defendant reasonably accommodated Plaintiff; and (3) Plaintiff's testimony forecloses his claim. (Doc. No. 143, at 14, 16–18.) Plaintiff contends that: (1) he was a qualified individual; (2) Defendant failed to provide a reasonable accommodation; and (3) Defendant failed to engage in the interactive process. (Doc. No. 156, at 15, 19.)

To prevail on a claim for failure to accommodate under the ADA, Plaintiff must show that:

(1) he is a "'qualified individual with a disability;' (2) the disability and its consequential limitations were 'known' by the covered employer; and (3) the employer failed to make 'reasonable accommodations' for such known limitations." *Feist v. La, Dep't of Just., Off. of the Att'y. Gen.*, 730 F.3d 450, 452 (5th Cir. 2013).

As an initial matter, the court has already determined that Plaintiff has raised a genuine issue of material fact with respect to his disability (Doc. No. 129, at 10); therefore, the court will not reconsider that issue in the present opinion and Defendant does not argue it for purposes of briefing. (Doc. No. 143, at 14.) Defendant also does not dispute that it had knowledge of Plaintiff's ADHD or that Plaintiff requested an accommodation. (Doc. No. 143-3, at 1.) Thus, the court will only consider whether (1) Plaintiff was a qualified individual under the ADA, and (2) Defendant provided a reasonable accommodation.

I. Qualified Individual Under the ADA

Under the ADA, a "qualified individual" is an individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The court shall consider "the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." *Id.* Plaintiff bears the burden to show that he is qualified under the ADA. *See Moss v. Harris Cnty. Constable Precinct One*, 851 F.3d 413, 419 (5th Cir. 2017). To survive summary judgment on the qualified-individual issue, Plaintiff must show either: (1) that "he could perform the essential functions of his job in spite of his disability" or (2) "that a reasonable accommodation of his disability would have enabled him to

perform the essential functions of the job." *Weber v. BNSF Ry. Co.*, 989 F.3d 320, 324 (5th Cir. 2021).

Defendant contends that Plaintiff is not a qualified individual under the ADA. (Doc. No. 143, at 14.) Defendant presents evidence that after learning of Plaintiff's ADHD, it provided additional time, training, and supervision to accommodate Plaintiff, but his job performance never improved, in fact, Plaintiff digressed. (Doc. Nos. 143, at 14–15; 143-3, at 1.) Defendant includes performance notes evidencing Plaintiff's deficient performance, including repeatedly failing to follow basic instructions and failing to adequately perform his work, which it contends are essential functions of the job. (Doc. No. 143-3.) Defendant therefore maintains that Plaintiff was not able to perform the essential functions of the job with or without an accommodation. (Doc. No. 143, at 16.)

Regarding whether he was a qualified individual, Plaintiff suggests that he was a qualified individual because he was a trainee and poor performance did not prevent him from being qualified because he was still training to become a Signs and Markings Technician. (Doc. No. 156, at 15, 18.) As an initial matter, to the extent Plaintiff is arguing that he is a qualified individual under the ADA because he was recently hired and in training, that argument fails. Simply because an individual was hired for the position does not make him a qualified individual under the ADA. *See Thompson v. Microsoft Corp.*, 2 F.4th 460, 468 (5th Cir. 2021) (holding an individual was not qualified under the ADA when the only evidence presented was that he was a good fit for the job and initially received positive feedback about his performance).

Initially, in his deposition, Plaintiff testified that he performed the essential functions of his job without accommodation (Doc. No. 143-1, at 44–46, 50, 53–54),[2] but in his response to Defendant's motion for summary judgment, Plaintiff acknowledges that he had poor job performance before and after Defendant's accommodations. *See* Affidavit of Kevin Golden (Doc. No. 156-2, at 3) ("[S]ome of the training efforts from Senior employee Chris Walker were way too fast and complex per the delivery of his training methods[,] which involved me having to request for accommodations as to being 'patient' with me to catching up with instructions, multitasking efforts and delivery of the training methods specifically pertaining to his technique of training me, that exceeded my limitations."); *see also id.* at 2 (identifying that he received additional training from Mr. Covington regarding how to complete work orders but failed to properly submit orders after the additional training). Moreover, although Plaintiff provides emails containing pictures of assignments he completed for Defendant (Doc. No. 156-3, at 48–67), Plaintiff admits he was successful in some aspects of the job, while he performed poorly in others, including following instructions. (Doc. No. 156, at 15, 19.) As such, Plaintiff does not dispute that his performance was deficient.

Plaintiff now focuses his arguments on his contention that he could have performed the essential functions of his job with reasonable accommodations, but that Defendant failed to provide reasonable accommodations. *Id.* at 25–26.[3] Specifically, Plaintiff contends that he would have been able to perform the essential functions of his job if he was properly trained. *Id.* at 15–16, 19. Plaintiff, however, has failed to present evidence creating a genuine issue of material fact

[2] Defendant maintains that Plaintiff's testimony forecloses his failure to accommodate claim. (Doc. No. 143, at 17–18.) But Defendant's argument is inapposite because Plaintiff can prove he was a qualified individual under the ADA by showing he performed the essential functions of his job despite his disability. *See Weber*, 989 F.3d at 324. Plaintiff's testimony therefore is evidence of whether he was qualified.

[3] Whether Defendant provided reasonable accommodations will be discussed in Section II.

with respect to whether he could perform the essential functions of Signs and Markings Technician had Defendant provided "proper training." Plaintiff instead presents evidence that in his previous jobs as a chat sales employee for E-Tech Services and a general floor worker and union steward for Tyson Foods, he was able to perform the essential functions of the jobs with reasonable accommodations. (Doc. Nos. 156-2, at 5; 156-3, at 33–35.) Plaintiff's evidence regarding his ability to perform his previous jobs with accommodations, however, is insufficient to demonstrate that he could perform the essential functions of a Signs and Markings Technician with reasonable accommodations.

As a chat sales employee for E-Tech Services, Plaintiff was required to type 34–40 words per minute. (Doc. No. 156-3, at 33.) Plaintiff had difficulty meeting this requirement and was often distracted by other employees. *Id.* After informing his employer of his ADHD, E-Tech Services accommodated Plaintiff by providing "short cuts" to enable him to respond to customers in a timely manner. *Id.* It also adjusted Plaintiff's schedule to allow him to work the night shift in a cubicle away from other employees to minimize distractions. *Id.* As a general floor worker for Tyson Foods, Plaintiff was required to lift and stack heavy objects in a cold environment for hours on end. *Id.* He struggled to concentrate in this environment and would request to use the restroom, slowing down production. *Id.* at 33–34. After informing Tyson Foods of his ADHD, it allowed Plaintiff to take additional breaks and eat a snack to allow him to reenergize and remain focused. *Id.* at 34. As a union steward on behalf of Tyson Foods, Plaintiff was required to separate meat in a fast-paced environment, but he struggled to keep up with production. *Id.* at 35. After informing his supervisor of his ADHD, Plaintiff was allowed to rotate between jobs. *Id.*

Plaintiff maintains that these accommodations enabled him to perform the essential functions of his previous jobs. But Plaintiff's evidence is, at best, circumstantial evidence

regarding whether he could perform certain essential functions of a Signs and Markings Technician with reasonable accommodations. Here, Defendant identified the essential functions of Plaintiff's job, including maintaining necessary records of installation, location, maintenance, and repairs of traffic signs and devices, and closely following verbal and written instructions and procedures. (Doc. No. 143-3, at 3–4.) Recognizing that he was struggling to keep up with Mr. Walker's training, Plaintiff requested patience, effective communication, and assistance with multitasking as accommodations. (Doc. No. 156-2, at 3–4.) Plaintiff, however, fails to draw a connection that accommodations like those provided by his previous employers, even if requested, would have enabled him to perform the essential functions of a Signs and Markings Technician.

Moreover, Plaintiff does not elaborate on how any training or other accommodation would have enabled him to perform the essential functions of Signs and Markings Technician. Plaintiff's general assertions are not enough to create a genuine dispute of material fact that he was a qualified individual under the ADA. *See Goodson v. City of Corpus Christi*, 202 F.3d 730, 735 (5th Cir. 2000) (citation omitted) ("Although we consider the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the nonmovant, the nonmoving party may not rest on the mere allegations or denials of its pleadings, but must respond by setting forth specific facts indicating a genuine issue for trial."); *Fuentes v. Postmaster Gen. of U.S. Postal Serv.*, 282 F. App'x 296, 300 (5th Cir. 2008) ("The nonmovant is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim.").

Plaintiff has thus failed to produce competent evidence to demonstrate that he was a qualified individual under the ADA. He has not shown that he could perform the essential functions of his job despite his ADHD or that a reasonable accommodation of his ADHD would have enabled him to perform the essential functions of his job. *See Ikekwere v. Mnuchin*, No. 1:15-CV-418-

DAE, 2017 WL 4479614, *9–11 (W.D. Tex. May 15, 2017), *aff'd sub nom. Ikekwere v. Dep't of the Treasury*, 722 F. App'x 388 (5th Cir. 2018) (holding an individual was not qualified under the ADA where his job performance was poor with and without reasonable accommodation). Because Plaintiff has failed to raise a genuine dispute of material fact on an essential element of his failure to accommodate claim, Plaintiff's claim cannot survive summary judgment.

II. Reasonable Accommodations

Even if Plaintiff was a qualified individual under the ADA, he has failed to create a genuine issue of material fact as to whether Defendant provided reasonable accommodations for his ADHD. The ADA defines reasonable accommodations to include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B). The accommodation provided need not be the best accommodation, so long as it meets the job-related needs of the employee being accommodated. *E.E.O.C. v. Agro Distribution, LLC*, 555 F.3d 462, 471 (5th Cir. 2009). "[T]he employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide." *Id.*

Defendant argues that it provided reasonable accommodations for Plaintiff's ADHD. (Doc. No. 143, at 16.) Defendant presents evidence that it accommodated Plaintiff by providing additional time, training, and supervision. (Doc. No. 143-3.) Plaintiff does not dispute that Defendant provided him with these accommodations (Doc. No. 156-2, at 2); instead, he argues that Defendant's accommodations were unreasonable, and Defendant should have provided the

accommodations he requested and that Mr. Covington initially agreed to provide (Doc. Nos. 156, at 25–26; 156-2, at 3–4). Plaintiff asserts that he asked Mr. Covington for patience, effective communication, and assistance with multitasking. (Doc. No. 156-2, at 3–4.)

Plaintiff contends that Defendant's alleged accommodations were not reasonable because they were not effective. (Doc. No. 156, at 25, 31.) Plaintiff specifically takes issue with Mr. Covington appointing Mr. Comer to train him because Mr. Comer was also a probationary employee and, like Plaintiff, Mr. Comer did not properly complete his work orders and struggled with pre-planning his assignments. (Doc. Nos. 143-3, at 7; 156, at 16, 22–23; 156-2, at 2.) Plaintiff therefore contends that Mr. Comer was not qualified to train him, and, to the extent that this was an accommodation, it was not reasonable. (Doc. No. 156, at 16, 22–23.)

The record reflects that Plaintiff was struggling to keep up with Mr. Walker's training. (Doc. No. 156-2, at 3.) After informing Mr. Covington about his disability, Mr. Walker was reassigned to a new position and Mr. Comer took over training Plaintiff. *Id.* at 4–5. Mr. Covington's performance notes identify that in addition to training by Mr. Comer, Plaintiff was given additional training by Mr. Covington and Mr. Walker pertaining to work orders and planning assignments to enable him to perform the essential functions of his job. (Doc. No. 143-3, at 5, 7–11.) The accommodations provided by Defendant were not unreasonable just because Plaintiff's job performance did not improve.

Plaintiff has not shown that Mr. Comer had a similar performance record to Plaintiff making him unqualified to train Plaintiff. To the extent that Mr. Comer's instruction was deficient in some areas, Plaintiff does not present any evidence or arguments why the additional time, training, and supervision by Mr. Walker and Mr. Covington did not adequately enable him to perform the essential functions of a Signs and Markings Technician. Thus, the court finds that the

accommodations provided by Defendant were reasonable. *See* 42 U.S.C. § 12111(9)(B) (identifying that modification of training may be considered a reasonable accommodation).

That Plaintiff requested patience, effective communication, and assistance with multitasking and did not specifically request additional time, training, and supervision does not change the court's analysis. "The ADA provides a right to reasonable accommodation, not to the employee's preferred accommodation." *Agro Distribution, LLC*, 555 F.3d at 471. And to the extent that patience is an accommodation, *see Scott v. Am. Airlines, Inc.*, No. 3:95-CV-1393-R, 1997 WL 278129, at *1, *5 (N.D. Tex. May 15, 1997); *Miron v. Minn. Mining & Mfg. Co.*, No. Civ. 00-2175DSD/JMM, 2001 WL 1663870, at *5 (D. Minn. Dec. 19, 2001), the accommodations provided by Defendant likely encompassed Plaintiff's preferred accommodations. Plaintiff has therefore failed to raise a genuine issue of material fact that the accommodations provided by Defendant were unreasonable.[4]

Plaintiff further contends that Defendant failed to engage in a good-faith interactive process. (Doc. No. 156, at 20–21.) He contends that no written documentation of the interactive process exists. *Id.* at 24–26, 33. The ADA requires employers to engage in an informal interactive process with an employee who requests an accommodation because of his disability to determine what adjustments would allow him to perform the essential functions of his job. *Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 735 (5th Cir. 1999); 29 C.F.R. § 1630.2(o)(3). "The regulation's direction to the parties to engage in an interactive process is not an end [in] itself—it is a means to the end of forging reasonable accommodations." *Loulseged*, 178 F.3d at 736. Thus, "when an employer's unwillingness to engage in a good faith interactive process leads to a failure to

[4] Plaintiff also contends that Defendant cannot prove undue hardship. (Doc. No. 156, at 27–31.) An employer violates the ADA if it fails to reasonably accommodate an employee, unless the employer can prove that the accommodation causes undue hardship. 42 U.S.C. § 12112(b)(5)(a). Because Defendant reasonably accommodated Plaintiff, and does not argue undue hardship, the court will not consider this argument.

reasonably accommodate an employee, the employer violates the ADA." *Id.* Because Defendant provided Plaintiff with reasonable accommodations for his ADHD, Plaintiff has not created a genuine issue of material fact on this claim.

Even so, there is no evidence that Defendant was unwilling to engage in a good-faith interactive process, as Plaintiff contends. Rather, the record indicates that Plaintiff informed Mr. Covington about his ADHD and requested patience, effective communication, and assistance with multitasking as accommodations. (Doc. No. 156-2, at 3–4.) Mr. Covington agreed to accommodate Plaintiff and provided him with additional time, training, and supervision. (Doc. No. 143-3, at 1.) That written documentation does not exist evidencing the interactive process does not defeat Plaintiff's own evidence that he engaged in a verbal discussion with Mr. Covington about his disability and Mr. Covington agreed to accommodate him. *See Silva v. City of Hidalgo, Tex.*, 575 F. App'x 419, 423 (5th Cir. 2014) (quoting *Loulseged*, 178 F.3d at 735) (identifying that the interactive process can be informal); 29 C.F.R. § 1630.2(o)(3). No reasonable juror could conclude that Defendant failed to provide reasonable accommodations or was unwilling to engage in a good-faith interactive process. As such, summary judgment is appropriate on Plaintiff's failure to accommodate claim.

CONCLUSION

In sum, the undisputed evidence shows that Defendant provided Plaintiff with additional time, training, and supervision to accommodate his ADHD and that despite these accommodations, Plaintiff could not perform the essential functions of his job. Even liberally construing Plaintiff's arguments and evidence given his *pro se* status, he fails to articulate specific facts showing a genuine issue for trial. His failure to accommodate claim therefore cannot survive summary judgment. For the reasons stated above, Defendant's motion for summary judgment (Doc. No.

143) is **GRANTED** and Plaintiff's failure to accommodate claim is dismissed with prejudice.

So ORDERED and SIGNED this 1st day of November, 2022.

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

KEVIN RASHAAN GOLDEN,	§	
	§	
Plaintiff,	§	**CIVIL ACTION NO. 6:20-CV-00620-JDK**
	§	
v.	§	
	§	
CITY OF LONGVIEW, ET AL.,	§	
	§	
	§	
Defendants.	§	

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

Before the court is Defendants City of Longview (the "City"), Rolin McPhee, Chi Ping Stephen Ha, Keith Covington, Mary Ann Miller, Robin Edwards, and Dwayne Archer's (collectively the "Individual Defendants") Motion to Dismiss. (Doc. No. 31.) Plaintiff Kevin Rashaan Golden has responded (Doc. No. 33) and submitted a motion for sanctions (Doc. No. 36). For the reasons stated herein, the court **RECOMMENDS** that Defendants' motion to dismiss (Doc. No. 13) be **GRANTED** as to Plaintiff's ADA, HIPPA, and TMRPA claims against the Individual Defendants and those claims be **DISMISSED** with prejudice. Furthermore, the court **RECOMMENDS** that all of Plaintiff's section 1983 claims be **DISMISSED** with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). Finally, Plaintiff's motions for sanctions (Doc. No. 36) is **DENIED.**

I. Background and Procedural History

Plaintiff Kevin Rashaan Golden brought this case on November 27, 2020. (Doc. No. 1.) Plaintiff initially named the City of Longview Public Works Division, Rolin McPhee, Chi Ping

Stephen, Keith Covington, Mary Ann Miller, and a John and Jane Doe as Defendants.[1] *Id.* On April 5, 2021, Defendants filed a motion to dismiss arguing that: (1) the City of Longview Public Works Division is not a legal entity which can be sued, and (2) the other defendants cannot be sued in their individual capacities under the ADA. (Doc. No. 18 at 4–6.) The court agreed, and on April 26, 2021, the court issued a Report recommending that the motion be granted and Plaintiff's claims against the City of Longview Public Works Division and the Individual Defendants be dismissed with prejudice. (Doc. No. 19 at 9.) The Report also recommended that Plaintiff's claims against the John and Jane Doe be dismissed without prejudice. *Id.* at 9.

On May 6, 2021, the court received Plaintiff's motion for leave to file an amended complaint which the court granted as Plaintiff is proceeding *pro se*. (Doc. Nos. 24, 28.) The court received Plaintiff's amended complaint and supplemental complaint on June 17, 2021. (Doc. No. 30.) Though difficult to discern, Plaintiff's amended complaint still names Rolin McPhee, Chi Ping Stephen, Keith Covington, Mary Ann Miller as Defendants. *Id.* at 1. The amended complaint also adds the City of Longview, Dwayne Archer, and Robin Edwards as Defendants. *Id.* Plaintiff alleges that Edwards is a "Human resource agent/counsel for the City of Longview" and Archer was "the Public Works Division Assistant Director" while Plaintiff was employed by the City. *Id.* at 3, 25. Plaintiff no longer brings claims against the City Public Works Division or a John and Jane Doe.

Plaintiff alleges that he was discriminated against because he has Attention-Deficit Hyperactivity Disorder ("ADHD"). *Id.* at 24–35. Plaintiff contends that while he worked for the Public Works Division, he informed his supervisor Keith Covington of his diagnosis and requested

[1] As stated in the court's previous Report, Plaintiff alleges that he was an employee of the Public Works Division; that Rolin McPhee is the "Director" for the Public Works Division; that Chi Ping Stephen Ha is a "Supervisor" and Keith Covington is an "Assistant Supervisor" within the Public Works Division; and that Mary Ann Miller is the "Human Resource Director." (Doc. No. 1 at 2.)

reasonable accommodations which Covington agreed to provide. *Id.* He claims that he did not receive reasonable accommodations for his disability, was retaliated against, and ultimately fired as a result. *Id.* at 6–9. The court construes his amended complaint to bring four causes of action: (1) claims under the Americans with Disability Act ("ADA"); (2) claims under the Health Insurance Portability and Accountability Act of 1996 ("HIIPPA"); (3) claims under the Texas Medical Records Privacy Act ("TMRPA"); and, (4) multiple claims pursuant to 42 U.S.C. § 1983. *See id.* Plaintiff seeks damages for lost wages and for pain and suffering. *Id.* at 81.

II. Defendants' Motion to Dismiss

Defendants filed the instant motion on June 22, 2021; the motion concerns only certain claims against the Individual Defendants. (Doc. No. 31.) The City of Longview also filed a separate answer to Plaintiff's amended complaint. (Doc. No. 32.) Defendants state that because they have had difficulty interpreting Plaintiff's claims, they construe the amended complaint to assert three causes of action: (1) various claims under the ADA; (2) a cause of action under HIPPA; and, (3) a cause of action under TMRPA. (Doc. No. 31 at 3.) They believe that Plaintiff pleads six causes of action under the ADA against all Defendants: (1) Disability Discrimination; (2) Retaliation; (3) Failure to Reasonably Accommodate Plaintiff's Disability; (4) "Failure to Engage in Interactive Process of Plaintiff Mental Disability;" (5) "Prejudicially Denied/Failed to Provide Equal Training to Plaintiff Protected Class;" and, (6) "Mental Disability Discrimination." *Id.* at 3–4.

Defendants maintain that the Individual Defendants cannot be sued under the ADA because individual liability does not exist under the ADA. *Id.* at 4–5. For that reason, Defendants argue that all of Plaintiff's ADA claims against the Individual Defendants should be dismissed. *Id.* at 5. Defendants also assert that because no private cause of action exists under either HIPPA or

TMRPA, Plaintiff's HIPPA and TMPRA claims should be dismissed against the Individual Defendants as well. *Id.* at 6.

III. Plaintiff's Response

The court received Plaintiff's response on July 7, 2021. (Doc. No. 33.) Similar to his amended complaint, Plaintiff's response is difficult to understand. The majority of Plaintiff's response does not directly address the instant motion (Doc. No. 31) but addresses the City's answer (Doc. No. 32) as if the answer was a motion to dismiss. Specifically, Plaintiff argues that he has sufficiently plead facts to bring various ADA claims against the City. As to the arguments that Defendants made in their motion, Plaintiff argues that he is not suing the Individual Defendants under the ADA, HIPPA, or TMRPA, and that he only brings those claims against the City of Longview. (Doc. No. 31 at 14, 20.) He states that he is suing the Individual Defendants under 42 U.S.C. § 1983 for violating "federal and state constitutional law [by] discriminating against the plaintiff on account of his mental disability and retaliate[ing] against the plaintiff." *Id.* at 15.

LEGAL STANDARD

When a defendant files a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the trial court must assess whether a complaint states a plausible claim for relief. *See Raj v. Louisiana State Univ.*, 714 F.3d 322, 329–30 (5th Cir. 2013) (citing *Bass v. Stryker Corp.*, 669 F.3d 501, 506 (5th Cir. 2012)). Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). The Supreme Court clarified the standards that apply in a motion to dismiss for failure to state a claim in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* at 555. The Court does "not require heightened fact pleading of specifics, but only enough facts to

state a claim to relief that is plausible on its face." *Id.* at 570. A complaint may be dismissed if a plaintiff fails to "nudge [his] claims across the line from conceivable to plausible." *Id.* The distinction between merely being possible and plausible was reiterated by the Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Federal Rule of Civil Procedure 8(a) does not require "detailed factual allegations but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 677–78. A pleading offering "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" will not suffice, nor does a complaint which provides only naked assertions that are devoid of further factual enhancement. Courts need not accept legal conclusions as true, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, are not sufficient. *Id.* at 678.

A plaintiff meets this standard when he "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint may be dismissed if a plaintiff fails to "nudge [his] claims across the line from conceivable to plausible," or if the complaint pleads facts merely consistent with or creating a suspicion of the defendant's liability. *Id.*; *see also Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 421 (5th Cir. 2006).

The pleading of a *pro se* plaintiff is to be liberally construed and is held to less stringent standards than formal pleadings drafted by lawyers. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Nevertheless, even with *pro se* litigants, "conclusory allegations or legal conclusions masquerading as factual conclusions," are not sufficient for a well-pleaded complaint. *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) (quoting *S. Christian Leadership Conference v. Supreme Court of State of La.*, 252 F.3d

781, 786 (5th Cir. 2001)). If the facts alleged in a complaint do not permit the court to infer more than the mere possibility of misconduct, a plaintiff has not shown entitlement to relief. *Id.* (citing Fed. R. Civ. P. 8(a)(2)). Dismissal is proper if a complaint lacks a factual allegation regarding any required element necessary to obtain relief. *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 421 (5th Cir. 2006).

DISCUSSION

Here, Defendants argue that Plaintiff's claims against the Individual Defendants should be dismissed because there is no individual liability under the ADA, and no private cause of action exists under either HIPPA or the TMRPA. (Doc. No. 31.) The court agrees that these claims should be dismissed as should Plaintiff's section 1983 claims against all Defendants. Finally, Plaintiff's motion for sanctions (Doc. No. 36) should be denied.

I. Plaintiff's ADA, HIPPA, and TMRPA claims

As Defendants state in their motion, Plaintiff's amended complaint is difficult to decipher. (Doc. No. 31.) Though Plaintiff argues otherwise, it does appear that he brings ADA, HIPPA, and TMRPA claims against the Individual Defendants. At multiple points in the amended complaint, he explicitly accuses the Individual Defendants of violating the statutes. (Doc. No. 30 at 1–3, 7–8, 10–20, 22–23, 35–71.) For example, the first and second sections of his amended complaint are titled "Title I ADA Complaint" and "42 U.S.C. Section 1983 Complaint." (*Id.* at 22–23.) Underneath each section title are various alleged violations of law, but there is no language which would make it apparent whether these various claims are brought against one or all the Defendants. Because Plaintiff specifically accuses all Defendants of violating the ADA, HIPPA, and the TMRPA at various points throughout his amended complaint, it was logical for Defendants to construe his amended complaint to bring these claims. For these reasons, the court also construes

Plaintiff's amended complaint to bring ADA, HIPPA, and TMRPA claims against the Individual Defendants.

As the court stated in its previous Report (Doc. No. 19), there is no individual liability under the ADA. The ADA prohibits employers from discriminating against a "qualified individual with a disability on the basis of that disability." 42 U.S.C. § 12112(a); *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 694 (5th Cir. 2015). The ADA defines "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day ... and any agent of such person." 42 U.S.C. § 12111(5)(A). The Fifth Circuit has not specifically addressed the issue of individual liability under the ADA, but courts within the Fifth Circuit have consistently found that individual liability is precluded under the ADA. *Bailey v. Dallas Cty. Sch.*, No. 3:16-CV-1642-M, 2016 WL 7638146, at *4 (N.D. Tex. Dec. 9, 2016), report and recommendation adopted, No. 3:16-CV-1642-M, 2017 WL 57836 (N.D. Tex. Jan. 4, 2017); *see Franklin v. City of Slidell*, 928 F. Supp. 2d 874, 882 (E.D. La. 2013) (collecting cases); *see also Shabazz v. Texas Youth Comm'n*, 300 F. Supp. 2d 467, 473 (N.D. Tex. 2003) (holding that "due to the similarity in the definitions of 'employers' under Title VII, the ADEA, and the ADA ... that personal capacity suits are likewise prohibited under the ADA.").

Plaintiff alleges that Rolin McPhee is the "Director" for the City of Longview Public Works Division; that Chi Ping Stephen Ha is a "Supervisor" and Keith Covington is an "Assistant Supervisor" within Public Works Division; that Mary Ann Miller is the "Human Resource Director;" that Dwayne Archer was "the Public Works Division Assistant Director" while Plaintiff was employed by the City, and that Robin Edwards is a "Human resource agent/counsel for the City of Longview." (Doc. Nos. 1; 30 at 3, 25.) Defendants contend that the Individual Defendants are employees of the City of Longview and do not meet the ADA definition of "employer." (Doc.

No. 31 at 4–5.) The court agrees. Plaintiff has not pleaded factual allegations that plausibly show, or from which it may be inferred, that any of the Individual Defendants were his "employer" under the ADA. To the extent that Plaintiff brings ADA claims against the Individual Defendants, Plaintiff's complaint fails to plead sufficient facts to state a claim upon which relief can be granted and cannot survive a 12(b)(6) motion. Accordingly, Plaintiff's ADA claims against the Individual Defendants should be dismissed.

As stated above, the court construes Plaintiff's amended complaint to assert causes of action against all the Individual Defendants under HIPPA and the TMRPA. (Doc. No. 30.) However, neither of these statutes provide a private cause of action. The Fifth Circuit has explicitly held that HIPAA does not provide a private cause of action. *Acara v. Banks*, 470 F.3d 569, 572 (5th Cir. 2006) ("We hold there is no private cause of action under HIPAA and therefore no federal subject matter jurisdiction over [Plaintiff's] asserted claims."); *Bullard v. Texas Dep't of Aging & Disability Servs.*, 19 F. Supp. 3d 699, 706 (E.D. Tex. 2013). Similarly, courts have held that the TMRPA does not provide a private cause of action. *Anderson v. Octapharma Plasma, Inc.*, No. 3:19-CV-2311-D, 2020 WL 7245075, at *21 (N.D. Tex. Dec. 9, 2020) (citing *Sloan v. Farmer*, 217 S.W.3d 763, 766 (Tex. App. 2007, pet. denied) ("[N]either [HIPAA] nor the TMRPA provide a private remedy."); *see* Tex. Health & Safety Code Ann. § 181.201 (authorizing attorney general to institute action for injunctive relief or civil penalties but not authorizing private right of action). Therefore, Plaintiff's HIPPA and TMRPA claims should be dismissed against all the Individual Defendants.

For the reasons stated above, the court **RECOMMENDS** that Defendants' motion to dismiss regarding Plaintiff's ADA, HIPPA, and TMRPA claims against the Individual Defendants be **GRANTED** and those claims be **DISMISSED** with prejudice.

II. Plaintiff's Section 1983 Claims

Plaintiff argues that he brings claims against the Individual Defendants under 42 U.S.C. § 1983. (Doc. No. 33 at 14–15.) Defendants have not responded to Plaintiff's argument regarding his alleged section 1983 claims. The court liberally construes Plaintiff's amended complaint with all possible deference due a *pro se* litigant. *See Erickson*, 551 U.S. at 94 (*Pro se* pleadings are "to be liberally construed," and "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers."). Under this most liberal construction, the court construes Plaintiff's amended complaint (Doc. No. 30) to assert claims against all Defendants under section 1983.

Plaintiff explicitly references section 1983 multiple times throughout his amended complaint. (Doc. No. 30 at 2, 5, 10, 13, 15, 22–23,71, 73, 81.) For example, after listing the claims he brings only against the City, Plaintiff lists "42 U.S.C. Section 1983 Federal & State Law Divisions Complaint" as the title of a section which lists claims against both the City and the Individual Defendants. *Id.* at 71. Within this section, Plaintiff lists multiple claims under section 1983, alleging that Defendants violated his rights to due process and equal protection under the Fourteenth Amendment, the ADA, the Texas Constitution, and various Texas laws. (Doc. No. 30 at 71–81.) Specifically, he maintains that Defendants violated his rights through: 1) disability discrimination; 2) a deprivation of an investigation and a hearing on discrimination complaints; 3) a deprivation of a hearing on negative statements about his work performance resulting in his termination; and, 4) conspiracy to commit employment discrimination. (Doc. No. 30 at 73, 76, 78, 80.)

As Plaintiff is proceeding *in forma pauperis* (Doc. No. 5), the court's screening authority pursuant to 28 U.S.C. § 1915(e)(2) requires it to scrutinize these claims at this stage. 28 U.S.C. § 1915(e)(2) provides that:

> Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—
>
> (A) the allegation of poverty is untrue; or
> (B) the action or appeal—
> (i) is frivolous or malicious;
> (ii) fails to state a claim on which relief may be granted; or
> (iii) seeks monetary relief against a defendant who is immune from such relief.

Though Defendants only moved on certain claims, the court must give all of Plaintiff's asserted claims careful consideration pursuant to section 1915(e)(2).

While the court construes Plaintiff's amended complaint to assert claims under section 1983, that does not mean that he can successfully bring these claims. First, to the extent that Plaintiff attempts to bring section 1983 claims for violations of state law, he is thwarted by the language of section 1983 itself. To establish liability under section 1983, a plaintiff must (1) allege a violation of a right secured by the Constitution or laws of the United States, and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013); *see also Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (noting that whether the plaintiff has been deprived of a right secured by the Constitution is a threshold inquiry in a section 1983 claim). Therefore, Plaintiff's claims under the Texas Constitution and Texas labor laws should be dismissed as section 1983 may not be used to enforce rights under state laws.

Furthermore, to the extent that Plaintiff seeks relief pursuant to section 1983 for Defendants' alleged violations of the ADA, those claims too must fail because section 1983 may not be used to enforce rights under statutes with their own specific remedial schemes. *Johnston v.*

Harris County Flood Control Dist., 869 F.2d 1565, 1574 (5th Cir. 1989) (holding that "Section 1983 is not an available remedy for the deprivation of a statutory right when the statute itself provides an exclusive remedy for violations of its own terms."). Because the ADA provides the exclusive remedy for disability discrimination, Plaintiff must pursue claims against Defendants pursuant to the processes provided under that statute. *See Johnston*, 869 F.2d at 1574; *Doe v. Eanes Indep. Sch. Dist.*, No. A-19-CV-00538-LY, 2019 WL 5693767, at *4 (W.D. Tex. Nov. 4, 2019); *Leeper v. Travis Cty.*, 2018 WL 2452972, at *2 (W.D. Tex. May 31, 2018) (holding ADA's comprehensive enforcement scheme precludes § 1983 claims for violations of Title II). Accordingly, Plaintiff's section 1983 claims alleging violations of the ADA are preempted, though as previously stated, his disability discrimination claims against the Individual Defendants are also subject to dismissal because is no individual liability under the ADA.

For the reasons stated above, it is **RECOMMENDED** that Plaintiff's section 1983 claims alleging violations of the Texas Constitution, Texas state laws, and the ADA be **DISMISSED** with pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

a. Alleged Fourteenth Amendment Violations

The only remaining section 1983 claims are Plaintiff's alleged Fourteenth Amendment violations. As stated above, Plaintiff maintains that Defendants violated his rights under the Fourteenth Amendment through: 1) disability discrimination; 2) a deprivation of an investigation and a hearing on his discrimination complaints; 3) a deprivation of a hearing on negative statements about his work performance resulting in his termination; and, 4) conspiracy to commit employment discrimination. (Doc. No. 30 at 73, 76, 78, 80.) The Fourteenth Amendment to the Constitution of the United States guarantees, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. AMEND. XIV, § 1.

Section 1983 provides a cause of action against an individual who, acting under color of state law, has deprived a person of a federally protected statutory or constitutional right. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 426 U.S. 40, 49–50 (1999). Therefore, to prevail on his Fourteenth Amendment claim, Plaintiff must establish: (1) a deprivation of a property or liberty interest (2) under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 536–37 (1981).

Plaintiff describes his first alleged violation as "mental disability discrimination" in violation of the equal protection clause of the Fourteenth Amendment. (Doc. No. 30 at 73.) This claim must fail because, as previously stated, the ADA provides the exclusive remedy for disability discrimination. *See Johnston*, 869 F.2d at 1574. Furthermore, because there is no individual liability under the ADA, any claims of disability discrimination against the Individual Defendants too must fail.

Interpreting Plaintiff's second and third alleged violations liberally—deprivations of an investigation and a hearing on his discrimination complaints and of a hearing on negative statements about his work performance which resulted in his termination—both claims stem from the manner in which he was terminated. After coworkers made "adverse statements" about his work performance to his superior, Plaintiff alleges that Stephen Ha sent a letter to Rolin McPhee recommending that Plaintiff be terminated for "unsatisfactory or inefficient performance of job duties and [that Plaintiff demonstrated] discourteous, offensive, or abusive behavior either by attitude, language or conduct to the public or to fellow employees while in line of duty." (Doc. No. 30 at 30.) Plaintiff alleges that he tried to argue that the allegations against him were due to discrimination but was told that he "could not appeal or argue issues relevant to his pretermination" because he was in a probationary period of employment. *Id.* at 30–31. Therefore the court construes Plaintiff's second and third alleged violations to state that Defendants violated his civil rights by

not investigating his assertion that his coworkers' "adverse statements" about him were discriminatory and then not affording him a hearing on the matter prior to his termination. In bringing these claims, Plaintiff alleges one of two things—either violations of Plaintiff's procedural due process or substantive due process rights under the Fourteenth Amendment. As Plaintiff does not specify whether he brings either claim, the court shall address both due process claims.

i. Procedural Due Process

The Due Process Clause has procedural and substantive components. *See County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998). The procedural component requires states to provide a constitutionally adequate process before depriving an individual of life, liberty, or property. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (internal quotations and citations omitted). To the extent that Plaintiff asserts a procedural due process violation, the court interprets Plaintiff's claim to be that Defendants violated the Fourteenth Amendment by: (1) failing to investigate Plaintiff's claim that his coworkers' "adverse statements" about him were due to discrimination, and, (2) failing to provide him a hearing on the matter prior to his termination.

To state a claim for procedural due process, a plaintiff must demonstrate that a state actor deprived him of life, liberty, or property without due process of law. *See Jordan v. Fisher*, 823 F.3d 805, 810 (5th Cir. 2016). To enjoy a property interest in employment, an employee must have a legitimate claim of entitlement created and defined by existing rules or understandings that stem from an independent source such as state law. *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010). "[U]nless the state 'specifically creates a property interest in a noneconomic benefit—such as a work assignment—a property interest in employment generally does not create due process property protection for such benefits.'" *Davis v. Mann*, 882 F.2d 967, 973 n. 16 (5th Cir. 1989). In

other words, Plaintiff must show that state law affords him a vested property interest in his job before he is entitled to due process of law when he is terminated from that job. *Bishop v. Wood*, 426 U.S. 341, 346 (1976); *Board of Regents v. Routh*, 408 U.S. 564, 569 (1972). However, under Texas law, "there exists a presumption that employment is at-will unless that relationship has been expressly altered ... by contract ... or by express rules or policies." *Muncy v. City of Dallas*, 335 F.3d 394, 398 (5th Cir. 2003) (citations omitted). "[A]bsent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all." *Guerra v. City of Pleasanton*, No. SA-20-CV-00536-XR, 2020 WL 6922632, at *6 (W.D. Tex. Nov. 24, 2020) (quoting *Montgomery Cty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998)).

Plaintiff neither alleges nor argues that he has a property interest in his continued employment because of a contract, rule, or policy. Accordingly, he is presumed to have been employed at-will. Because he is presumed to have been an at-will employee, Plaintiff did not have a property interest in his continued employment, was not entitled to procedural due process prior to termination, and could be terminated "at will, for good cause, bad cause, or no cause at all." *Id.* Therefore, to the extent that Plaintiff alleges a property interest in his employment, this claim fails.

Even if Plaintiff does not demonstrate a property interest in continued employment, his claims may implicate a liberty interest subject to due process protections. The Fifth Circuit has held that "discharge from public employment under circumstances that put the employee's reputation, honor[,] or integrity at stake gives rise to a liberty interest under the Fourteenth Amendment to a procedural opportunity to clear one's name." *Rosenstein v. City of Dallas*, 876 F.2d 392, 395 (5th Cir. 1989). "[A] government employer deprives an employee of liberty under the Fourteenth Amendment if the 'government employer discharges [the] individual under

circumstances that will do special harm to the individual's reputation and fails to give that individual an opportunity to clear his name[.]'" *Cunningham v. Castloo*, 983 F.3d 185, 191 (5th Cir. 2020) (quoting *Rosenstein*, 876 F.2d at 395). In that situation, a public employee has a limited constitutional right to a hearing to clear his name. *Routh*, 408 U.S. at 573. In the Fifth Circuit, the elements of a liberty interest claim are: (1) the employee was discharged; (2) stigmatizing charges were made against him in connection with his discharge; (3) the charges were false; (4) he was not provided notice or an opportunity to be heard prior to his discharge; (5) the charges were made public; (6) he requested a hearing to clear his name; and, (7) the employer refused his request for a hearing. *Bledsoe v. City of Horn Lake, Miss.*, 449 F.3d 650, 653 (5th Cir. 2006).

In his amended complaint, Plaintiff alleges that coworkers "Richard Comer and Steven Fleming drafted an adverse statement" against him which was used by Stephen Ha as a basis to recommend Plaintiff's termination. (Doc. No. 30 at 30.) Plaintiff also asserts that he attempted to "pleaded discrimination before Mr. Ha and Dwayne Archer" but they told him that because he was in a probationary period of employment, he "could not appeal or argue issues relevant to his pretermination." *Id.* at 30–31. He further alleges that he "was not given a hearing," allowed to contest the allegations against him, or "given early notice of having the stated allegations existing as disciplinary warnings or otherwise" prior to a letter by Mr. Ha recommending that his termination. *Id.* at 31–32.

Discharge from employment, without more, is insufficient to implicate a liberty interest. *Vines v. City of Dallas*, 52 F.3d 1067, at *4 (5th Cir. 1995). A plaintiff must allege that the state actor made "concrete, false assertions of wrongdoing on the part of the plaintiff," not offer mere "opinion" about the employee. *Gordon v. Univ. of Tex. Med. Branch*, 700 F. App'x 350, 351 (5th Cir. 2017). A plaintiff must allege more than merely the stigma of discharge; he must allege more

than concern about the impact of the discharge on his general reputation and must allege facts establishing that he was discharged in a manner that creates a false and defamatory impression about him and thus stigmatizes him and forecloses him from other employment opportunities. *Hughes v. City of Garland*, 204 F.3d 223, 227 (5th Cir. 2000). Though Plaintiff alleges that the allegations used as the basis for his termination were false, he does not allege that they reached the required level of stigma to implicate a protected liberty interest. *See Felder v. Hobby*, 1999 WL 1067892, at 5 (5th Cir. 1999) (holding that a coworker's negative comments about a plaintiff's job performance did not rise the required level of stigma to assert a liberty interest). For example, dismissals for dishonesty, *White v. Thomas*, 660 F.2d 680, 684–85 (5th Cir. 1981) (lying on job application); *Robinson v. Wichita Falls & North Texas Community Action Corp.*, 507 F.2d 245 (5th Cir. 1975)(falsifying travel vouchers), for having committed a serious felony, *United States v. Briggs*, 514 F.2d 794, 798 (5th Cir.1975), for manifest racism, *Wellner v. Minnesota State Junior College*, 487 F.2d 153 (8th Cir. 1973), and for lack of "intellectual ability, as distinguished from his performance," *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975), have been held to implicate a protected liberty interest.

Furthermore, Plaintiff has failed to plead the fifth element of a "stigma plus infringement" claim—that the charges be made public. *See Bledsoe*, 449 F.3d at 653 (5th Cir. 2006). The publicization occurs "where the governmental agency has made or is likely to make the allegedly stigmatizing charges public in any official or intentional manner, other than in connection with the defense of (related legal) action." *Ortwein v. Mackey*, 511 F.2d 696, 699 (5th Cir. 1975) (quotation omitted). Plaintiff fails to allege facts that plausibly demonstrate that Defendants made the "adverse statements" publicly through some official or intentional manner. Therefore, to the extent

Plaintiff alleges the deprivation of a liberty interest when he was not provided a hearing on negative comments about his work performance, the claim also fails.

ii. Substantive Due Process

Substantive due process "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992) (internal citation omitted). Substantive due process is satisfied if the employer acted with a specific exercise of professional judgment in a non-arbitrary and non-capricious manner. *Spuler v. Pickar*, 958 F.2d 103, 107 (5th Cir.1992) ("The only substantive process due Spuler, assuming he had a property interest, was the exercise of professional judgment, in a non-arbitrary and non-capricious fashion."); *Texas ex rel. Bd. of Regents of the Univ. of Tex. Sys. v. Walker*, 142 F.3d 813, 819 (5th Cir.1998) (holding that substantive due process is not violated unless the court can say the official's determinations "so lacked a basis in fact that their decision ... was arbitrary, capricious, or taken without professional judgment").

However, a threshold requirement of any due process claim is that the plaintiff demonstrate a property or liberty interest protected by due process. To proceed with a substantive due process claim in the public employment context, Plaintiff must show that he had a property interest in his employment and that his employer's termination of that interest was arbitrary and capricious. *Babin v. Breaux*, 587 F. App'x 105, 112-13 (5th Cir. 2014); *Moulton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993). As previously stated, Plaintiff has not alleged any facts from which it may be inferred that he had a property interest in his employment. Accordingly, to the extent Plaintiff alleges a substantive due process violation, this claim must also be dismissed.

b. Conspiracy

Finally, Plaintiff alleges that Defendants violated his civil rights by conspiring to commit employment discrimination. (Doc. No. 30 at 80–81.) The Fifth Circuit has stated that specific facts must be pleaded when a conspiracy is alleged. *Hale v. Harney*, 786 F.2d 688, 690 (5th Cir. 1986). In pleading these specific facts, Plaintiff must allege the operative facts of the alleged conspiracy. *Lynch v. Cannatella*, 810 F.2d 1363, 1369–70 (5th Cir. 1987). "Bald allegations that a conspiracy existed are insufficient." *Id.* Under section 1983, a claim for conspiracy must allege (1) an agreement between private and public defendants to commit an illegal act, and (2) a constitutional deprivation. *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994).

Here, even if Plaintiff's allegations could be construed liberally to amount to a constitutional violation for employment discrimination, Plaintiff has failed to allege any agreement existed between Defendants to commit an illegal act. He merely alleges that Defendants conspired against him "to injure him in concert with Covington's process to terminate" him by depriving him "of protected class rights to [be] free from discriminatory acts at the workplace." (Doc. 30 at 80.) Plaintiff's allegations are conclusory and fail to recite a cognizable claim for relief. As such, Plaintiff's conspiracy claims should be dismissed.

c. Conclusion to Plaintiff's 1983 Claims

Plaintiff has already been afforded an opportunity to amend his complaint. (Doc. No. 28.) Given the motions by Defendants, the amendments from Plaintiff, along with the lack of clarity in Plaintiff's pleadings, the court finds that any further amendment would not give rise to a plausible claim and that such efforts to amend would be futile. *See Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998) (holding that a district court does not err in dismissing a pro se complaint with

on a motion to dismiss with an attorney's obligation to present facts favorable to the client. Plaintiff also seems to falsely believe that Defendants' counsel must wait until after discovery to present a defense or deny Plaintiff's assertions. While the court appreciates that Plaintiff is proceeding *pro se*, the court cannot impose sanctions when the deterrent purpose of Rule 11 would be undermined or the alleged conduct violating Rule 11 is merely an attorney defending their client. Accordingly, the court declines to impose Rule 11 sanctions and **DENIES** Plaintiff's motion. (Doc. No. 36.)

CONCLUSION

For these reasons, the court **RECOMMENDS** that Defendants' motion to dismiss (Doc. No. 31) be **GRANTED** as to Plaintiff's ADA, HIPPA, and TMRPA claims against the Individual Defendants and those claims be **DISMISSED** with prejudice. Furthermore, the court **RECOMMENDS** that Plaintiff's section 1983 claims against all Defendants be **DISMISSED** with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). Accordingly, the court **RECOMMENDS** that the Individual Defendants be **DISMISSED** from the case. Plaintiff's ADA claims against the City of Longview will proceed before the court. Finally, Plaintiff's motions for sanctions (Doc. No. 36) is **DENIED**.

Within fourteen (14) days after receipt of the Magistrate Judge's report and recommendation, any party may serve and file written objections to the findings and recommendations contained in the report and recommendation. A party's failure to file written objections to the findings, conclusions and recommendations contained in this report and recommendation within fourteen days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79

prejudice if the court determines the plaintiff has alleged his best case). As such, the court **RECOMMENDS** that Plaintiff's section 1983 claims be dismissed with prejudice.

III. Plaintiff's Motion for Sanctions

Plaintiff also filed a motion for sanctions against the Defendants' counsel pursuant to Federal Rule of Civil Procedure 11. (Doc. No. 36.) In his motion, Plaintiff contends that sanctions are warranted because: (1) counsel caused an unnecessary delay by filing the City's answer to Plaintiff's amended complaint (Doc. No. 32) and the instant motion to dismiss (Doc. No. 31) on the same day; and, (2) counsel violated Federal Rules of Civil Procedure 11(b)(3) and (4) by denying Plaintiff's claims in the City's Answer and "second guessing the factual assertions (evidence) within the [P]laintiff's complaint." (Doc. No. 36 at 4.) Defendants' counsel argues that the motion for sanctions should be denied in its entirety. (Doc. No. 38.) They argue that the motion to dismiss and answer were filed simultaneously in an effort to expedite resolution of the case as the three newly added defendants voluntarily appeared without service or summons and asserted their arguments for dismissal timely. *Id.* at 3. They also assert that the arguments presented in the filing are based on sound authority and not frivolous. *Id.*

Reviewing Plaintiff's motion, the court cannot ascertain a basis for Rule 11 sanctions. First, Plaintiff is incorrect that counsel caused unnecessary delay by filing the motion to dismiss and the City's answer on the same day. Given that Plaintiff added three new defendants to this case with his amended complaint, counsel has in fact expedited this case by requesting dismissal of claims against the new defendants at the same time as moving the case forward by filing the City's answer. Second, despite Plaintiff's insistence, the court does not find that counsel violated either Fed. R. Civ. P. 11(b)(3) or (4). Plaintiff incorrectly argues that counsel must accept his pleadings as true. (Doc. No. 36 at 4.) Plaintiff appears to conflate the standard that a court must apply when ruling

F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

So ORDERED and SIGNED this 4th day of August, 2021.

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

KEVIN RASHAAN GOLDEN,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 6:20-cv-620-JDK-JDL
	§	
CITY OF LONGVIEW, et al.,	§	
	§	
Defendants.	§	
	§	

ORDER ADOPTING THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

This case was referred to United States Magistrate Judge John D. Love pursuant to 28 U.S.C. § 636. On August 4, 2021, Judge Love issued a Report and Recommendation recommending that the Court grant Defendants' motion to dismiss (Docket No. 31) as to Plaintiff's ADA, HIPAA, and Texas Medical Records Privacy Act ("TMRPA") claims against Defendants Rolin McPhee, Chi Ping Stephen Ha, Keith Covington, Mary Ann Miller, Robin Edwards, and Dwayne Archer (collectively the "Individual Defendants"), dismissing those claims with prejudice. Judge Love also recommended that the Court dismiss Plaintiff's § 1983 claims against the Individual Defendants and Defendant the City of Longview with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). Docket No. 41.

Plaintiff did not file objections to the Report or a motion for an extension by the deadline. Accordingly, the Court reviewed and adopted the Report. Docket

No. 43. The same day, objections from Plaintiff were received and docketed. Docket No. 45. In his objections, Plaintiff generally re-argues his previous allegations.

Although Plaintiff failed to timely object, the Court has reviewed the objected-to findings and conclusions of the Magistrate Judge de novo. 28 U.S.C. § 636(b)(1). In conducting a de novo review, the Court has examined the entire record and made an independent assessment under the law. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*), *superseded on other grounds by statute*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

Having conducted a de novo review of the record in this case, Plaintiff's objections, and the Magistrate Judge's Report, the Court has determined that the Report of the Magistrate Judge is correct, and Plaintiff's objections are without merit. Accordingly, the Court hereby **OVERRULES** Plaintiff's objections (Docket No. 45). The Court's prior Order adopting the Report of the Magistrate Judge as the opinion of the District Court (Docket No. 43) shall remain in effect.

So **ORDERED** and **SIGNED** this **27th** day of **August, 2021.**

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

KEVIN RASHAAN GOLDEN,	§	
	§	
Plaintiff,	§	**CIVIL ACTION NO. 6:20-CV-00620-JDL**
v.	§	
	§	
CITY OF LONGVIEW, ET AL.,	§	
	§	
Defendants.	§	
	§	

ORDER

Before the court is Plaintiff's "motion for Magistrate Judge to make additional factual findings and conclusions of law to Plaintiff's 14th Amendment 1983 claim of Equal Protection Clause violation." (Doc. No. 46.) Plaintiff's motion merely rehashes his objections to the Magistrate Judge's Report. (Doc. No. 41.) Because the court has already denied Plaintiff's objections as being without merit (Doc. No. 49), Plaintiff's motion (Doc. No. 46) is likewise **DENIED**.

So ORDERED and SIGNED this 27th day of August, 2021.

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

KEVIN RASHAAN GOLDEN,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**CIVIL ACTION NO. 6:20-CV-00620-JDL**
CITY OF LONGVIEW,	§	
	§	
	§	
Defendant.	§	
	§	
	§	

MEMORANDUM OPINION AND ORDER

Before the court is Defendant the City of Longview's Motion for Summary Judgment (Doc. No. 97.) Plaintiff Kevin Rashaan Golden has filed a response (Doc. No. 103)[1], to which Defendant has filed a reply (Doc. No. 104.) Plaintiff subsequently filed a sur-reply. (Doc. No. 106.)[2] Upon consideration of the parties' arguments and the evidence presented, Defendant's Motion (Doc. No. 97) is **GRANTED.**

BACKGROUND

Plaintiff initiated this action on November 27, 2020. (Doc. No. 1.) On August 4, 2021, the court granted Defendants' motion to dismiss all of Plaintiff's claims except for Plaintiff's Americans with Disabilities Act ("ADA") claims against Defendant the City of Longview. (Doc. No. 41.) Defendant now seeks summary judgment on the discrimination and retaliation ADA claims. (Doc. No. 97.)

[1] Plaintiff titled Doc. No. 103 "Plaintiff's motion for summary judgment to oppose Defendant's summary judgment;" however, the court interprets Doc. No. 103 as a response.

[2] The court has considered Plaintiff's sur-reply (Doc. No. 106); however, the court did not consider Plaintiff's attachment to the sur-reply (Doc. No. 106-1), as the court granted Defendant's motion to strike the attachment to the sur-reply. (Doc. No. 111.)

Plaintiff claims that he suffers from Attention-Deficit Hyperactive Disorder (ADHD) and that Defendant discriminated against him because of his disability, failed to provide reasonable accommodations, and retaliated against Plaintiff for requesting such accommodations. (Doc. No. 103, at 14–33.) Plaintiff was previously employed by Defendant, on a probationary basis, as a Signs and Markings Technician. (Doc. No. 97-3, at 1–2.) Shortly after Plaintiff was hired, he informed his supervisor, Keith Covington, that he would need additional assistance because of his ADHD. (Doc. No. 103 at 6; Doc. No. 97-3, at 1.) Plaintiff states that he requested extra time, extra training, and attention. (Doc. No. 103, at 6.) Mr. Covington states that he and his team provided Plaintiff with additional instruction, additional supervision, and additional time to perform tasks. (Doc. No. 97-3.) However, Plaintiff disputes that he was provided these accommodations. (Doc. No. 103.) Over the course of his employment, there were several evaluations that documented that Plaintiff was not meeting performance expectations. (Doc. No. 97-3, at 1–2, 5–18.) Mr. Golden received several warnings regarding his performance. *Id.* at 18.

On September 12, 2018, there was an alleged incident between Plaintiff and employees Richard Comer and Steve Fleming. (Doc. No. 97-4, at 1.) According to Mr. Fleming, Plaintiff assumed that Fleming and Comer had locked Plaintiff out of a garage and Plaintiff began screaming and cussing at Mr. Comer over the phone, which Mr. Comer had placed on speaker. *Id.* Mr. Fleming states that he reported this incident to Mr. Covington the next morning. *Id.* Mr. Covington states that once he learned of Plaintiff's alleged abusive behavior, he reported it to Mr. Ha, the Manager of the Traffic Division. (Doc. No. 97-3, at 2.) On September 14, 2018, Mr. Ha sent Plaintiff a pre-termination letter, informing Plaintiff that he was recommending that Plaintiff be terminated due to Plaintiff's poor job performance and "his discourteous attitude towards a fellow employee." (Doc. No. 97-5, at 2.) On September 19, 2018, Director of Public Works, Rolin

McPhee, sent Mr. Golden a letter informing him that he had been terminated. (Doc. No. 97-5, at 3.)

LEGAL STANDARD

A motion for summary judgment should be granted if the record, taken as a whole, "together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986); *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). The Supreme Court has interpreted the plain language of Rule 56 as mandating "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

The party moving for summary judgment "must 'demonstrate the absence of a genuine issue of material fact,' but need not negate the elements of the nonmovant's case." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (quoting *Celotex*, 477 U.S. at 323–25). A fact is material if it might affect the outcome of the suit under the governing law. *Merritt-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957, 961 (5th Cir. 1999). Issues of material fact are "genuine" only if they require resolution by a trier of fact and if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Merritt-Campbell, Inc.*, 164 F.3d at 961. If the moving party "fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response." *Little*, 37 F.3d at 1075.

If the movant meets this burden, Rule 56 requires the opposing party to go beyond the

pleadings and to show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173, 1180 (5th Cir. 1996); *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1046–47 (5th Cir. 1996). The nonmovant's burden may not be satisfied by argument, conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a mere scintilla of evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 585 (1986); *Wallace*, 80 F.3d at 1047; *Little*, 37 F.3d at 1075.

When ruling on a motion for summary judgment, the Court is required to view all justifiable inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970); *Merritt-Campbell, Inc.*, 164 F.3d at 961. However, the Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995), *as modified*, 70 F.3d 26 (5th Cir. 1995). Unless there is sufficient evidence for a reasonable jury to return a verdict in the opposing party's favor, there is no genuine issue for trial, and summary judgment must be granted. *Celotex*, 477 U.S. at 322–23; *Anderson*, 477 U.S. at 249–51; *Texas Instruments*, 100 F.3d at 1179.

DISCUSSION

Plaintiff's amended complaint is difficult to understand; however, the court reads the complaint to assert a discrimination claim, a retaliation claim, a failure to accommodate claim, and a failure to engage in the interactive process of seeking an accommodation claim under the ADA. (Doc. No. 30.) Defendant has moved for summary judgment on the discrimination and retaliation claims. (Doc. No. 97.)

a. Discrimination Claim

The ADA prohibits covered employers from "discriminat[ing] against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). "In a discriminatory-termination action under the ADA, the employee may either present direct evidence that she was discriminated against because of her disability or alternatively proceed under the burden-shifting analysis first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." *E.E.O.C. v. LHC Grp., Inc.*, 773 F.3d 688, 694 (5th Cir. 2014). Under the *McDonnell Douglas* approach, a plaintiff must demonstrate a *prima facie* case of discrimination. *Id.* To establish a *prima facie* case under the ADA, Plaintiff must show that (1) he is an individual with a disability within the meaning of the ADA; (2) he was qualified for his job; and (3) "an adverse employment decision was made solely because of [his] disability." *Owens v. Trane Co.*, 145 F.3d 360, 1 (5th Cir. 1998) (citing *Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.2d 758, 763 (5th Cir. 1996)). If the plaintiff succeeds in establishing his *prima facie* case, then the defendant must articulate a legitimate, nondiscriminatory reason for the termination. *E.E.O.C.*, 773 F.3d at 694. Finally, the burden shifts back to the plaintiff to show that defendant's proffered reason is pretextual. *See Id.* In the summary judgment context, a case of discrimination plus a showing that the proffered reason is pretextual is typically enough to survive summary judgment. *Id.* (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146–48 (2000)).

Defendant argues that Plaintiff is not disabled within the meaning of the ADA and that he was not qualified for the job, thus failing to make a *prima facie* case. (Doc. No. 97, at 16–21.) Further, Defendant argues that even if Plaintiff can make a *prima facie* showing, Defendant has stated a legitimate non-discriminatory reason for the termination, and Plaintiff does not meet his burden of proving that the stated reason was pretextual. *Id.* at 21–23. Plaintiff responds that he

does have a disability within the meaning of the ADA, that he was qualified for the job, and that Defendant's reasons for termination are pretextual. (Doc. No. 103.) Defendant's reply brief (Doc. No. 104) reiterates the same point made in the motion. Similarly, Plaintiff reiterates his points in the sur-reply. (Doc. No. 106.)

i) Direct Evidence

Defendant's motion is based upon the *McDonnell Douglas* approach and does not address the issue of direct discrimination. However, in Plaintiff's response, Plaintiff states that Covington's evaluation notes provide direct evidence of discrimination. (Doc. No. 103, at 19.) Plaintiff points to the entry on August 13, 2018, which states that Covington has to "teach him as though he had the mind of a young child." (Doc. No. 103, at 19; Doc. No. 103-2, at 9.) Plaintiff also points to Covington's notes that "he never thinks for himself," and "[w]e not only have to train him about signs, we also, like a child, make him understand." (Doc. No. 103, at 19; Doc. No. 103-2, at 10, 13.) Defendant does not address this argument in its reply.

The court does not find that these statements are sufficient to constitute direct evidence of discrimination. "If an inference is required for evidence to be probative as to an employer's discriminatory animus, the evidence is circumstantial, not direct." *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 341 (5th Cir. 2019). Here, the comments that Plaintiff has the mind of a child and does not think for himself could just be statements showing that Covington was unsatisfied with Plaintiff's performance and thought he was not performing the job successfully. In order to find evidence of animus, an inference would have to be drawn that Covington thought Plaintiff was performing poorly due to his ADHD and that Plaintiff was terminated for this reason. *See id.* (stating that comments by managers regarding an employee who was diagnosed with Parkinson's disease that he "was never coming back to work" and "people with Parkinson's don't get better" were not

sufficient to show direct discrimination because the inference had to be drawn that Plaintiff was not coming back to work due to the irreversible nature of his disability).

Thus, since the court finds that Plaintiff has not shown direct evidence of discrimination, the court turns to the *McDonnell Douglas* approach.

ii) *McDonnell Douglas* Framework

Defendant argues that Plaintiff is not disabled within the meaning of the ADA for two reasons: (1) Plaintiff has been successful at a multitude of jobs in the past and it was only this particular job that he could not perform, even with reasonable accommodations; and (2) Plaintiff's ADHD does not substantially limit a major life activity. (Doc. No. 97, at 18.) As to the first point, Defendant interprets Plaintiff's complaint as alleging that Plaintiff's major life activity that was impacted by his ADHD is that he was unable to perform his duties as a Signs and Markings Technician. (Doc. No. 97, at 16.) Defendant argues that when the major life activity under consideration is working, Plaintiff must show that he is unable to work in a broad class of jobs, not just a particular job. *Id.* Thus, Defendant argues that Plaintiff is not disabled because the evidence of record shows that Plaintiff held various jobs over the years and stated that he has been able to perform all of the jobs successfully. *Id.* at 18. As to the second point, Defendant argues that the evidence shows that Plaintiff's other major life activities are not substantially limited by his ADHD, and thus Plaintiff is not disabled within the meaning of the ADA. *Id.*

Plaintiff responds that he has ADHD and points to a psychiatric evaluation that shows that he has a low average Contextual Verbal Learning, he has a low average Auditory Working Memory, is moderately impaired at Selective Visual Attention, and has a low average for Abstract Reasoning and Logical Analysis. (Doc. No. 103, at 15.) Thus, Plaintiff concludes that "[l]earning, reading, concentrating, and thinking are all major life activities" and he has shown he is disabled.

Id. In his sur-reply, Plaintiff clarifies that he is claiming that he is disabled because his major life activities of learning, reading, and concentrating are substantially limited by his ADHD; Plaintiff states that he is not claiming that his ADHD prevents him from working. (Doc. No. 106, at 2.)

"As a threshold requirement in an ADA claim, the plaintiff must, of course, establish that he has a disability." *Waldrip v. General Electric Co.*, 325 F.3d 652, 654 (5th Cir. 2003). "The ADA defines 'disability' to include: (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (2) a record of such impairment; or (3) being regarded as having such an impairment." *Brown v. Bd. of Trustees Sealy Indep. Sch. Dist.*, 871 F. Supp. 2d 581, 605 (S.D. Tex. 2012).

Here, Plaintiff claims that his ADHD substantially limits his major life activities of learning, reading, concentrating, and thinking and that the psychiatric evaluation of Dr. Levi Armstrong documents the impairment. (Doc. No. 103, at 15.)

A.) Substantial Limitation of a Major Life Activity

"To determine whether an individual is substantially limited in a major life activity other than working, the court looks to whether that person can perform the normal activities of daily living." *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1120 (5th Cir. 1998). "Major life activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Bennett v. Calabrian Chemicals Corp.*, 324 F. Supp. 2d 815, 826 (E.D. Tex. 2004). "The statutory language, requiring a substantial limitation of a major life activity, emphasizes that the impairment must be a significant one." *Id.*

Plaintiff merely states that his ADHD substantially limits his major life activities of learning, reading, concentrating, and thinking. (Doc. No. 103, at 15.) Plaintiff references the

psychiatric report of Dr. Armstrong, that he claims proves that he is substantially limited. *Id.* However, as discussed at length below, the report does not demonstrate substantial limitation.

Plaintiff also attaches a sworn affidavit, in which he states that while he worked at E-tech services, he would get distracted by other employees and had difficulty typing 35–40 words per minute. (Doc. No. 103-3, at 4.) Plaintiff states that his supervisor allowed him to work the night shift and gave him a cubicle far away from other employees. *Id.* Plaintiff also states that when he worked at Tyson foods he worked in a cold environment, lifting heavy products, and was on his feet hours at a time. *Id.* Plaintiff states that because of this he would get very hyper sometimes due to being tired. *Id.* at 4–5. Plaintiff states that after several hours of work he would occasionally ask to go to the restroom; he states that management allowed him to take an additional small break to eat a snack to get re-energized. *Id.* at 5. Plaintiff also describes another occasion at Tyson foods where he was too slow at separating meat product and because of this was switched to a position where he could rotate between jobs. *Id.*

Besides the report and Plaintiff's affidavit, Plaintiff does not point to any specific evidence in the record as to how his ADHD substantially limits a major life activity. Defendant asserts that Plaintiff's testimony demonstrates that Plaintiff's normal life activities are not substantially limited by his ADHD. (Doc. No. 97, at 4.) Plaintiff testified that he pays his own bills, manages his money, drives, cooks, cleans, does his grocery shopping, takes care of himself, and reads "constructive" books such as books about history, astronomy, astrology, science, and religion. (Doc. No. 97-1, at 12–14.) Plaintiff also testified that he graduated from high school without taking any special education courses. *Id.* at 8. Further, Plaintiff testified to holding a multitude of jobs throughout his life and stated that he was able to perform them all well. *Id.* at 17–38.

The court finds that Plaintiff has failed to show that he is substantially limited in a major life activity because Plaintiff has not pointed to any evidence in the record to support his allegation. Plaintiff's affidavit does not demonstrate that Plaintiff is substantially limited in a major life activity. Plaintiff merely states that he would get distracted by co-workers, was unable to type 35–40 words per minute, would get tired after hours of heavy lifting and have to use the restroom, and was unable to keep up the pace of separating meat product. (Doc. No. 103-3, at 4–5.) The events described by Plaintiff are not sufficient show that Plaintiff is substantially limited in a major life activity because the events described do not demonstrate a significant impairment when compared to the average person. *See DeMar v. Car-Freshner Corp.*, 49 F. Supp. 2d 84, 91 (N.D.N.Y. 1999) (quoting 29 C.F.R. § 1630.2(j) (stating that "[a]n individual is not substantially limited in a major life activity if the limitation ... does not amount to a significant restriction when compared with the abilities of the average person.")); *see also Calef v. Gillette Co.*, 322 F.3d 75, 86 (1st Cir. 2003) (finding that a plaintiff who stated that his "ADHD makes it more difficult for him to respond to stressful situations, that when he becomes angry, he sometimes loses control and can neither speak nor think well" was not sufficient to show a substantial limitation on a major life activity). Rather, these events may demonstrate employment difficulties Plaintiff faced but these events, either singly or as a group, fail to show a substantial limitation of a major life activity.

Further, the evidence of record indicates that Plaintiff is not substantially limited because he testified that he is able to perform daily life activities, graduated from high school with no accommodations, and performed a multitude of jobs successfully. *See Vertrees v. Baylor All Saints Med. Ctr.*, No. 4:06-CV-177-Y, 2007 WL 9718183, at *6 (N.D. Tex. Nov. 7, 2007) (finding that Plaintiff who was able to read, write, graduate from high school and college, and maintain employment was not disabled within the definition of the ADA merely because it took Plaintiff

longer to learn the skills required to be an anesthesia technician); *Calef*, 322 F.3d at 86 (stating that "[m]erely pointing to a diagnosis of ADHD is inadequate" to show that a plaintiff is substantially limited in a major life activity and plaintiff's assertion that his ADHD makes it more difficult to respond to stressful situations does not constitute a substantial limitation).

B.) Record of Impairment

"[I]n order to make out a claim for discrimination based on a record of impairment, the plaintiff must show that at some point in the past, [he] was classified or misclassified as having a mental or physical impairment that substantially limits a major life activity." *Sherrod*, 132 F.3d at 1120–21. "It is not enough for an ADA plaintiff simply to show that he has a record of an adverse medical diagnosis; in order to establish the existence of a disability under § 12102(2)(B) there must be a record of an impairment that substantially limits one or more of the ADA plaintiff's major life activities." *Bennett*, 324 F. Supp. 2d at 832 (internal quotations omitted).

Plaintiff claims that the Psychiatric Evaluation by Dr. Levi Armstrong demonstrates that his ADHD substantially limits his major life activities of learning, reading, concentrating, and thinking (Doc. No. 103, at 15.) However, the court finds that Plaintiff has not produced evidence that establishes a record of impairment. The psychiatric report that Plaintiff points to does not establish that Plaintiff's ADHD substantially limits a major life activity; at most, the report shows that Plaintiff has symptoms "consistent with longstanding ADHD," that have a mild to moderate impact on certain aspects of his life. (*See* Doc. 103-2, at 38–44.) Plaintiff references four categories: a low average Contextual Verbal Learning, he has a low average Auditory Working Memory, is moderately impaired at Selective Visual Attention, and has a low average for Abstract Reasoning and Logical Analysis. (Doc. No. 103, at 15.) As noted above, the record referenced by Plaintiff does not establish that Plaintiff is substantially limited in a major life activity. Instead, the

record addresses Plaintiff's cognitive functioning and merely shows that Plaintiff is in the low average in three out of the four categories he discusses and is moderately impaired in the fourth. In addition, the general nature of Dr. Armstrong's report shows that Plaintiff is within the average range (either low average, average, or high average) for most of the cognitive functions. (Doc. No. 103-2, at 43–44.) In fact, Plaintiff was found either mildly or moderately impaired in only three out of thirty-one categories. *Id.* Dr. Armstrong found that Plaintiff's intelligence is within the average range, and that the "neuropsychological test results reflect evidence of mildly impaired working memory/selective visual attention and subtle weakness of his executive functioning." *Id.* at 38. Accordingly, the court does not find that the report is sufficient to demonstrate a record of impairment.

For these reasons, Plaintiff has failed to raise a triable issue of fact demonstrating that he is an individual with a disability within the meaning of the ADA and summary judgment is therefore appropriate. Because this initial requisite element of Plaintiff's *prima facie* case fails, the court will not consider the remaining elements of his *prima facie* case. Thus, the court finds that Defendant's motion for summary judgment on the discrimination claim should be granted.

b. Retaliation Claim

To establish a *prima facie* case of retaliation under the ADA, a plaintiff must show that (1) he engaged in a statutorily protected activity; (2) the employer took an adverse action against him; and (3) there was a causal connection between the adverse action and the protected activity. *Feist v. Louisiana, Dep't of Just., Off. of the Atty. Gen.*, 730 F.3d 450, 454 (5th Cir. 2013). "If the employee establishes a *prima facie* case, the burden shifts to the employer to state a legitimate, non-retaliatory reason for its decision. After the employer states its reason, the burden shifts back to the employee to demonstrate that the employer's reason is actually a pretext for retaliation,

which the employee accomplishes by showing that the adverse action would not have occurred but for the employer's retaliatory motive." *Id.* at 454 (internal citations omitted).

i) No Causal Connection

Defendant argues that Plaintiff has failed to show a causal connection between the protected activity and the adverse employment action. (Doc. No. 97, at 25.) Defendant states that it reads Plaintiff's complaint to state that the protected activity was Plaintiff's request for reasonable accommodations. *Id.* Defendant argues that since Plaintiff requested the accommodations on July 31, 2018, and Plaintiff was terminated on September 19, 2018, after documented poor job performance and documented disrespectful and abusive behavior, Plaintiff cannot show that "but for" the request for accommodations, Plaintiff would not have been terminated. *Id.* at 25–26. Plaintiff argues that he can show a causal connection because he was hired on July 5, 2018, informed Mr. Covington of his ADHD and requested reasonable accommodations on July 31, 2018, and only after this request for accommodations did Covington start documenting Plaintiff's poor job performance. (Doc. No. 103, at 22.) Further, Plaintiff argues that after he received the pre-termination letter from Mr. Ha, he complained to Robyn Edwards that Covington was discriminating against Plaintiff and then Plaintiff was terminated. *Id.* at 22–25.

Regarding Plaintiff's argument that the request for accommodations was the reason for his termination, the court finds that Plaintiff has failed to establish a causal link. Plaintiff complains that Covington started documenting Plaintiff's poor performance after Plaintiff requested reasonable accommodations. (Doc. No. 103, at 22.) However, Plaintiff must show that but for the protected activity, he would not have been terminated. The protected activity here is the request for accommodations made on July 31, 2018, and the adverse action is Plaintiff's termination on

September 19, 2018. Plaintiff seems to be claiming that there is a temporal connection that demonstrates the causal link between requesting accommodations and being terminated. However, "[g]enerally, more than a temporal connection between the protected conduct and the adverse employment action is required to present a genuine issue of fact on retaliation." *E.E.O.C. v. Prod. Fabricators, Inc.*, 763 F.3d 963, 973 (8th Cir. 2014). Further, the evidence of record indicates that the determinative event that resulted in Plaintiff's termination was Plaintiff's aggressive outburst towards his co-workers. According to Covington's notes, Plaintiff had been performing poorly for almost two months. (Doc. No. 97-3, at 5–14.) However, Covington's recommendation to Mr. Ha that Plaintiff be terminated occurred almost immediately after Plaintiff's outburst, which allegedly occurred on September 12, 2018. (Doc. No. 97-3, at 2.) On September 14, 2018, only two days after the alleged outburst, Mr. Ha recommended to his director that Plaintiff be terminated and Mr. Ha sent Plaintiff the pre-termination letter. (Doc. No. 97-5, at 2.) Director McPhee subsequently terminated Plaintiff on September 19, 2018, stating that the reason for termination was Plaintiff's poor performance and the aggressive outburst. *Id.* at 3. Plaintiff states in his sur-reply that he "made clear to Covington that he did not commit the verbal assault against Richard Comer." (Doc. No. 106, at 4.) During Plaintiff's deposition, he stated that he did not use profanity and was not disrespectful; however, Plaintiff stated that he was direct, and "came at them in a way to make them feel like y'all wasn't trying to be team members ... I'm quite sure they didn't like that language..." (Doc. No. 97-1, at 49.) Thus, regardless of whether Plaintiff actually had an aggressive outburst, the evidence indicates that this incident was determinative in Covington's decision to recommend that Plaintiff be terminated, and in Mr. Ha and Director McPhee's decision to terminate Plaintiff. Thus, Plaintiff fails to establish the causal link that he was terminated because of his request for accommodations. *See Seaman v. CSPH, Inc.*, 179 F.3d 297, 301 (5th

Cir. 1999) (finding that an employee failed to show a causal connection when he informed his supervisor that he had filed a discrimination complaint and was then terminated moments later, because there was sufficient evidence to show that the employee had been terminated for insubordination when he yelled at his supervisor on the phone).

To the extent that Plaintiff claims that he can show a causal connection because he informed Robyn Edwards that he wanted to file a discrimination complaint against Covington one day before the final termination letter came down, the court finds that Plaintiff cannot establish a causal connection. Mr. Ha's pre-termination letter had already recommended to Director McPhee that Plaintiff be terminated several days before the final termination letter was issued. (Doc. No. 97-5, at 2–3.) Thus, Plaintiff has not shown a causal link between his request for an investigation and the official letter that terminated him. It is clear from the evidence that the decision to terminate Plaintiff had already been set in motion before Plaintiff ever requested the discrimination investigation.

For these reasons, Plaintiff has failed to raise a triable issue of fact as to the requisite causal connection element of his *prima facie* case and summary judgment is therefore appropriate. Thus, the court finds that Defendant's motion for summary judgment on the retaliation claim should be granted.

c. Failure to Accommodate Claim

Discrimination includes failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability ... unless such covered entity can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A). To prevail on a claim for failure to accommodate under the ADA, Plaintiff must show that: (1) he is a "qualified individual with a disability;" (2) the disability and

its consequential limitations were "known" by the covered employer; and (3) the employer failed to make "reasonable accommodations" for such known limitations. *Feist*, 730 F.3d at 452.

Defendants do not move on the failure to accommodate claim. However, the court reviews the claim under its screening authority pursuant to 28 U.S.C. § 1915(e)(2). 28 U.S.C. § 1915(e)(2) provides that:

> Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—
>
> (A) the allegation of poverty is untrue; or
>
> (B) the action or appeal—
>
> (i) is frivolous or malicious;
>
> (ii) fails to state a claim on which relief may be granted; or
>
> (iii) seeks monetary relief against a defendant who is immune from such relief.

In order to state a plausible claim for relief, a pleading must contain (1) "a short and plain statement of the grounds for the court's jurisdiction," (2) "a short and plain statement of the claim showing that the pleader is entitled to relief," and (3) "a demand for the relief sought." Fed.R.Civ.P. 8. Moreover, to withstand scrutiny for pleading in federal court, allegations must meet the requirements of *Iqbal* and *Twombly*. *See Bell Atl. Corp. v. Twombly*, 550 U.S 544, 545 (2007) (interpreting Rule 8); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 684–85 (2009) (applying *Twombly* generally to civil actions pleaded under Rule 8). Allegations that are implausible and unsupported by facts or evidence are insufficient to state a claim. *Id.*

In his amended complaint, Plaintiff merely alleges that he has ADHD, which causes him to get distracted easily, interrupting his ability to think, learn and concentrate on what he is being trained to do. (Doc. No. 30, at 49.) Plaintiff alleges that he requested reasonable accommodations from his supervisor, Covington, and Covington agreed to be patient with Plaintiff. *Id.* at 49–50.

Plaintiff also states that he sometimes gets frustrated and requested that Covington appoint him an appropriate employee to train Plaintiff. *Id.* at 57.

The court finds that Plaintiff has failed to state a claim for failure to accommodate because Plaintiff has failed to allege sufficient facts to infer that he is disabled under the ADA. "The ADA defines 'disability' to include: (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (2) a record of such impairment; or (3) being regarded as having such an impairment." *Brown*, 871 F. Supp. 2d at 605. "[A]n impairment must substantially limit a major life activity before it may be deemed a disability for purposes of the ADA." *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 506 (7th Cir. 1998).

Plaintiff states that he has ADHD and that it affects his ability to concentrate and learn due to Plaintiff being easily distracted. (Doc. No. 30, at 49.) Plaintiff has not stated the severity of his ADHD, and has failed to state sufficient facts to show that his ADHD substantially limits one or more of his major life activities. *See Brown*, 871 F. Supp. 2d at 605 (finding that the statement that "Plaintiff suffers from and was diagnosed with [ADHD] which adversely affects her ability to remember [short] term and to concentrate on one task at a time" failed to state a claim because it did not provide sufficient facts for the court to conclude that Plaintiff's ADHD substantially affected a major life activity.)

Further, because Plaintiff has already had the opportunity to amend as well as to complete discovery on these claims, the court finds that any further amendment would be futile. As discussed above in section (a)(ii)(1), there is no evidence in the record that Plaintiff points to that creates a genuine dispute of material fact that Plaintiff's ADHD substantially limits one or more of his major life activities. Thus, the court finds that Plaintiff's failure to accommodate claim should be dismissed, with prejudice, for failure to state a claim upon which relief may be granted.

d. Failure to Engage in the Interactive Process Claim

Plaintiff also asserts that Defendant failed to engage in the interactive process of giving Plaintiff a reasonable accommodation. (Doc. No. 30, at 36–43.) Defendant does not address this argument independently. However, several Circuits have held that the failure to engage in the interactive process is not an independent claim. *See Sheng v. M&TBank Corp.*, 848 F.3d 78, 87 (2d Cir. 2017) (stating that "a failure to engage in a good faith interactive process is not an independent violation of the ADA"); *Thompson v. Fresh Prod., LLC*, 985 F.3d 509, 525 (6th Cir. 2021) (finding that "[i]n this circuit, failure to engage in the interactive process does not give rise to an independent claim. Instead, it is a violation of the ADA only if the plaintiff establishes a *prima facie* case of failure to accommodate.") (internal citations omitted); *Murphy v. Sec'y, U.S. Dep't of Army*, 769 F. App'x 779, 782 (11th Cir. 2019) (stating that "[t]here is no independent cause of action for bad faith interactive process.")

Thus, the court finds that to the extent Plaintiff intended to plead a separate claim for failure to engage in the interactive process, this does not create a standalone claim and should be dismissed, with prejudice, for failure to state a claim upon which relief may be granted, pursuant to 28 U.S.C. § 1915(e)(2). Moreover, given Plaintiff's allegations, the court considers such a claim to be subsumed in Plaintiff's failure to accommodate claim, which was already considered above, and fails for the reasons set forth herein.

CONCLUSION

For the reasons stated above, Defendant's motion for summary judgment (Doc. No. 97) is **GRANTED** as to Plaintiff's discrimination and retaliation claims and those claims are **DISMISSED** with prejudice. Further, the court finds that Plaintiff's failure to accommodate and

failure to engage in the interactive process claims should be **DISMISSED** with prejudice for failure to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2).

So ORDERED and SIGNED this 1st day of June, 2022.

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

KEVIN RASHAAN GOLDEN,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 6:20-CV-00620-JDL**
	§	
CITY OF LONGVIEW,	§	
	§	
Defendant.	§	
	§	

AMENDED MEMORANDUM OPINION AND ORDER

Upon consideration of Plaintiff's motion to reconsider (Doc. No. 117) the court's memorandum opinion granting Defendant's motion for summary judgment, the court **GRANTS** Plaintiff's motion to reconsider (Doc. No. 117) as set forth herein and hereby withdraws its previous memorandum opinion (Doc. No. 114) and issues the following opinion in its place. Upon reconsideration of the Defendant's motion for summary judgment (Docket No. 97), the court alters its rationale but maintains the conclusion that Defendant's motion for summary judgment should be **GRANTED** for the reasons set forth below.

BACKGROUND

Plaintiff initiated this action on November 27, 2020. (Doc. No. 1.) On August 4, 2021, the court granted Defendants' motion to dismiss all of Plaintiff's claims except for Plaintiff's Americans with Disabilities Act ("ADA") claims against Defendant the City of Longview. (Doc. No. 41.) Defendant now seeks summary judgment on the discrimination and retaliation ADA claims. (Doc. No. 97.)

Plaintiff claims that he suffers from Attention-Deficit Hyperactive Disorder (ADHD) and that Defendant discriminated against him because of his disability, failed to provide reasonable accommodations, and retaliated against Plaintiff for requesting such accommodations. (Doc. No. 103, at 14–33.) Plaintiff was previously employed by Defendant, on a probationary basis, as a Signs and Markings Technician. (Doc. No. 97-3, at 1–2.) Shortly after Plaintiff was hired, he informed his supervisor, Keith Covington, that he would need additional assistance because of his ADHD. (Doc. No. 103 at 6; Doc. No. 97-3, at 1.) Plaintiff states that he requested extra time, extra training, and attention. (Doc. No. 103, at 6.) Mr. Covington states that he and his team provided Plaintiff with additional instruction, additional supervision, and additional time to perform tasks. (Doc. No. 97-3.) However, Plaintiff disputes that he was provided these accommodations. (Doc. No. 103.) Over the course of his employment, there were several evaluations that documented that Plaintiff was not meeting performance expectations. (Doc. No. 97-3, at 1–2, 5–18.) Mr. Golden received several warnings regarding his performance. *Id.* at 18.

On September 12, 2018, there was an alleged incident between Plaintiff and employees Richard Comer and Steve Fleming. (Doc. No. 97-4, at 1.) According to Mr. Fleming, Plaintiff assumed that Fleming and Comer had locked Plaintiff out of a garage and Plaintiff began screaming and cussing at Mr. Comer over the phone, which Mr. Comer had placed on speaker. *Id.* Mr. Fleming states that he reported this incident to Mr. Covington the next morning. *Id.* Mr. Covington states that once he learned of Plaintiff's alleged abusive behavior, he reported it to Mr. Ha, the Manager of the Traffic Division. (Doc. No. 97-3, at 2.) On September 14, 2018, Mr. Ha sent Plaintiff a pre-termination letter, informing Plaintiff that he was recommending that Plaintiff be terminated due to Plaintiff's poor job performance and "his discourteous attitude towards a fellow employee." (Doc. No. 97-5, at 2.) On September 19, 2018, Director of Public Works, Rolin

McPhee, sent Mr. Golden a letter informing him that he had been terminated. (Doc. No. 97-5, at 3.)

LEGAL STANDARD

A motion for summary judgment should be granted if the record, taken as a whole, "together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986); *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). The Supreme Court has interpreted the plain language of Rule 56 as mandating "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

The party moving for summary judgment "must 'demonstrate the absence of a genuine issue of material fact,' but need not negate the elements of the nonmovant's case." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (quoting *Celotex*, 477 U.S. at 323–25). A fact is material if it might affect the outcome of the suit under the governing law. *Merritt-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957, 961 (5th Cir. 1999). Issues of material fact are "genuine" only if they require resolution by a trier of fact and if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Merritt-Campbell, Inc.*, 164 F.3d at 961. If the moving party "fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response." *Little*, 37 F.3d at 1075.

If the movant meets this burden, Rule 56 requires the opposing party to go beyond the

pleadings and to show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173, 1180 (5th Cir. 1996); *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1046–47 (5th Cir. 1996). The nonmovant's burden may not be satisfied by argument, conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a mere scintilla of evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 585 (1986); *Wallace*, 80 F.3d at 1047; *Little*, 37 F.3d at 1075.

When ruling on a motion for summary judgment, the Court is required to view all justifiable inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970); *Merritt-Campbell, Inc.*, 164 F.3d at 961. However, the Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995), *as modified*, 70 F.3d 26 (5th Cir. 1995). Unless there is sufficient evidence for a reasonable jury to return a verdict in the opposing party's favor, there is no genuine issue for trial, and summary judgment must be granted. *Celotex*, 477 U.S. at 322–23; *Anderson*, 477 U.S. at 249–51; *Texas Instruments*, 100 F.3d at 1179.

DISCUSSION

Plaintiff's amended complaint is difficult to understand; however, the court reads the complaint to assert a discrimination claim, a retaliation claim, a failure to accommodate claim, and a failure to engage in the interactive process of seeking an accommodation claim under the ADA. (Doc. No. 30.) Defendant has moved for summary judgment on the discrimination and retaliation claims. (Doc. No. 97.)

a. Discrimination Claim

The ADA prohibits covered employers from "discriminat[ing] against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). "In a discriminatory-termination action under the ADA, the employee may either present direct evidence that she was discriminated against because of her disability or alternatively proceed under the burden-shifting analysis first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." *E.E.O.C. v. LHC Grp., Inc.*, 773 F.3d 688, 694 (5th Cir. 2014). Under the *McDonnell Douglas* approach, a plaintiff must demonstrate a *prima facie* case of discrimination. *Id.* To establish a *prima facie* case under the ADA, Plaintiff must show that "(1) the plaintiff has a disability, or was regarded as disabled; (2) he was qualified for the job; and (3) he was subject to an adverse employment decision on account of his disability." *Cannon v. Jacobs Field Servs. N. Am., Inc.*, 813 F.3d 586, 590 (5th Cir. 2016). If the plaintiff succeeds in establishing his *prima facie* case, then the defendant must articulate a legitimate, nondiscriminatory reason for the termination. *E.E.O.C.*, 773 F.3d at 694. Finally, the burden shifts back to the plaintiff to show that defendant's proffered reason is pretextual. *See Id.* In the summary judgment context, a case of discrimination plus a showing that the proffered reason is pretextual is typically enough to survive summary judgment. *Id.* (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146–48 (2000)).

Defendant argues that Plaintiff is not disabled within the meaning of the ADA and that he was not qualified for the job, thus failing to make a *prima facie* case. (Doc. No. 97, at 16–21.) Further, Defendant argues that even if Plaintiff can make a *prima facie* showing, Defendant has stated a legitimate non-discriminatory reason for the termination, and Plaintiff does not meet his burden of proving that the stated reason was pretextual. *Id.* at 21–23. Plaintiff responds that he

does have a disability within the meaning of the ADA, that he was qualified for the job, and that Defendant's reasons for termination are pretextual. (Doc. No. 103.)[1] Defendant's reply brief (Doc. No. 104) reiterates the same point made in the motion. Similarly, Plaintiff reiterates his points in the sur-reply. (Doc. No. 106.)[2]

i.) Direct Evidence

Defendant's motion is based upon the *McDonnell Douglas* approach and does not address the issue of direct discrimination. However, in Plaintiff's response. Plaintiff states that Covington's evaluation notes provide direct evidence of discrimination. (Doc. No. 103, at 19.) Plaintiff points to the entry on August 13, 2018, which states that Covington has to "teach him as though he had the mind of a young child." (Doc. No. 103, at 19; Doc. No. 103-2, at 9.) Plaintiff also points to Covington's notes that "he never thinks for himself," and "[w]e not only have to train him about signs, we also, like a child, make him understand." (Doc. No. 103, at 19; Doc. No. 103-2, at 10, 13.) Defendant does not address this argument in its reply.

The court does not find that these statements are sufficient to constitute direct discrimination. "If an inference is required for evidence to be probative as to an employer's discriminatory animus, the evidence is circumstantial, not direct." *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 341 (5th Cir. 2019). Here, the comments that Plaintiff has the mind of a child and does not think for himself could just be statements showing that Covington was unsatisfied with Plaintiff's performance and thought he was not performing the job successfully. In order to find evidence of animus, an inference would have to be drawn that Covington thought Plaintiff was performing

[1] Plaintiff titled Doc. No. 103 "Plaintiff's motion for summary judgment to oppose Defendant's summary judgment;" however, the court interprets Doc. No. 103 as a response.

[2] The court has considered Plaintiff's sur-reply (Doc. No. 106); however, the court did not consider Plaintiff's attachment to the sur-reply (Doc. No. 106-1), as the court granted Defendant's motion to strike the attachment to the sur-reply. (Doc. No. 111.)

poorly due to his ADHD and that Plaintiff was terminated for this reason. *See Id.* (stating that comments by managers regarding an employee who was diagnosed with Parkinson's disease that he "was never coming back to work" and "people with Parkinson's don't get better" were not sufficient to show direct discrimination because the inference had to be drawn that Plaintiff was not coming back to work due to the irreversible nature of his disability).

Thus, since the court finds that Plaintiff has not shown evidence of direct discrimination, the court turns to the *McDonnell Douglas* approach.

ii.) *McDonnell Douglas* Framework

(1) Is Plaintiff disabled within the meaning of the ADA?

Defendant argues that Plaintiff is not disabled within the meaning of the ADA for two reasons: (1) Plaintiff has been successful at a multitude of jobs in the past and it was only this particular job that he could not perform, even with reasonable accommodations; and (2) Plaintiff's ADHD does not substantially limit a major life activity. (Doc. No. 97, at 18.) As to the first point, Defendant interprets Plaintiff's complaint as alleging that Plaintiff's major life activity that was impacted by his ADHD is that he was unable to perform his duties as a Signs and Markings Technician. (Doc. No. 97, at 16.) Defendant argues that when the major life activity under consideration is working, Plaintiff must show that he is unable to work in a broad class of jobs, not just a particular job. *Id.* Thus, Defendant argues that Plaintiff is not disabled because the evidence of record shows that Plaintiff held various jobs over the years and stated that he has been able to perform all of the jobs successfully. *Id.* at 18. As to the second point, Defendant argues that the evidence shows that Plaintiff's other major life activities are not substantially limited by his ADHD, and thus Plaintiff is not disabled within the meaning of the ADA. *Id.*

Plaintiff responds that he has ADHD and points to a psychiatric evaluation that shows that he has a low average Contextual Verbal Learning, he has a low average Auditory Working Memory, is moderately impaired at Selective Visual Attention, and has a low average for Abstract Reasoning and Logical Analysis. (Doc. No. 103, at 15.) Thus, Plaintiff concludes that "[l]earning, reading, concentrating, and thinking are all major life activities" and he has shown he is disabled. *Id.* Plaintiff also attaches a sworn affidavit in which he discusses challenges he has faced related to concentrating and thinking quickly. (Doc. No. 103-3.) In his sur-reply, Plaintiff clarifies that he is claiming that he is disabled because his major life activities of learning, reading, and concentrating are substantially limited by his ADHD; Plaintiff states that he is not claiming that his ADHD prevents him from working. (Doc. No. 106, at 2.)

"The ADA defines the term disability in three, alternative ways. It is either (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Sechler v. Modular Space Corp.*, No. 4:10-CV-5177, 2012 WL 1355586, at *13 (S.D. Tex. Apr. 18, 2012) (citing 42 U.S.C. § 12102(1)) (internal quotations omitted).

Here, Plaintiff claims that his ADHD substantially limits his major life activities of learning, reading, concentrating, and thinking and that the psychiatric evaluation of Dr. Levi Armstrong documents the impairment. (Doc. No. 103, at 15.)

A.) Substantial Limitation of a Major Life Activity

In 2008, the ADA Amendments Act of 2008 was passed and is incorporated into the current ADA. 42 U.S.C. § 12102(4)(A). Of note, the Amendments Act of 2008 expanded the definition of "major life activities" to caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating,

thinking, communicating, and working. 42 U.S.C.A. § 12102 (2)(A) (2009). The limitation that the impairment places on a major life activity must be "substantial." § 12102 (1)(A). To be substantial, an impairment must limit the ability of an individual to perform a major life activity as compared to most people in the general population. 29 C.F.R. § 1630.2(j)(1)(ii). This standard is to be "construed broadly in favor of expansive coverage." 29 C.F.R. § 1630.2(j)(1)(i).

Plaintiff argues that his ADHD substantially limits his major life activities of learning, reading, concentrating, and thinking. (Doc. No. 103, at 15.) Plaintiff references the psychiatric report of Dr. Armstrong, that he claims proves that he is substantially limited in major life activities as it states that Plaintiff has symptoms "consistent with longstanding ADHD," that have a mild to moderate impact on certain aspects of his life. (*See* Doc. 103-2, at 38–44.) Plaintiff references four categories: a low average Contextual Verbal Learning, a low average Auditory Working Memory, moderately impaired at Selective Visual Attention, and a low average for Abstract Reasoning and Logical Analysis. (Doc. No. 103, at 15.) Plaintiff also attaches a sworn affidavit, in which he states that while he worked at E-tech services, he would get distracted by other employees and had difficulty typing 35–40 words per minute, and that his supervisor allowed him to work the night shift and gave him a cubicle far away from other employees. (Doc. No. 103-3, at 4.) Plaintiff also states that when he worked at Tyson foods he worked in a cold environment, lifting heavy products, and was on his feet hours at a time and that because of this he would get very hyper sometimes due to being tired. *Id.* at 4–5. Plaintiff states that after several hours of work he would occasionally ask to go to the restroom; he states that management allowed him to take an additional small break to eat a snack to get re-energized, and describes another occasion at Tyson foods where he was too slow at separating meat product and because of this was switched to a position where he could rotate between jobs. *Id.*

Defendant asserts that Plaintiff's testimony demonstrates that Plaintiff's normal life activities are not substantially limited by his ADHD. (Doc. No. 97, at 4.) Plaintiff testified that he pays his own bills, manages his money, drives, cooks, cleans, does his grocery shopping, takes care of himself, and reads "constructive" books such as books about history, astronomy, astrology, science, and religion. (Doc. No. 97-1, at 12–14.) Plaintiff also testified that he graduated from high school without taking any special education courses. *Id.* at 8. Further, Plaintiff testified to holding a multitude of jobs throughout his life and stated that he was able to perform them all well. *Id.* at 17–38.

The court acknowledges that its prior analysis relied on jurisprudence that predated the 2008 Amendments Act, which is of relevance to the case at hand. (Doc. No. 114.) While the statutory language affected by the amendment does not foreclose the possibility of reaching the court's prior conclusion, the court acknowledges that the interpretation of the amendments by courts post-2008 has been significantly broadened with respect to disability findings. Specifically, the Fifth Circuit has acknowledged that the substantially limits consideration on summary judgment creates a "relatively low bar." *Williams v. Tarrant Cnty. Coll. Dist.*, 717 F. App'x 440, 448 (5th Cir. 2018).

Here, Plaintiff has submitted a declaration that states he had trouble concentrating at work, experienced fatigue, would get hyper and required breaks to refocus, and was too slow to perform certain tasks of past work, all on account of his ADHD. (Doc. No. 103-3.) The court finds that Mr. Golden's declaration is sufficient to create a genuine issue of material fact with respect to disability. *See, e.g., Williams,* 717 F. App'x at 448 ("In the light of the relatively low bar created by the substantially-limits and summary-judgment standards, [Plaintiff's] declaration creates a genuine dispute of material fact for whether her impairments are substantially limiting."); *Mercer*

v. Arbor E & T, LLC, 2013 WL 164107, at *13 (S.D. Tex. Jan. 15, 2013) ("even if the Court confined it's analysis to [plaintiff's] deposition testimony alone, she ... demonstrate[d] a genuine [dispute] of material fact regarding whether [she] is disabled"); *Sechler*, 2012 WL 1355586, at *11 ("In light of the 'substantially limits' standard created by the [ADA Amendments Act of 2008], the Court thinks it appropriate to read [plaintiff's] testimony as giving rise to a genuine [dispute] of material fact"). Further, Dr. Armstrong's report finding that Plaintiff is in the low average range on many categories, and recommending academic accommodations for Plaintiff due to his ADHD (Doc. No. 103-2, at 39, 43–44), provides additional support that Plaintiff is substantially limited in major life activities on account of his ADHD. *See Pritchard v. Fla. High Sch. Athletic Ass'n, Inc.*, No. 2:19-CV-94-FTM-29MRM, 2020 WL 3542652, at *6 (M.D. Fla. June 30, 2020) (finding that Plaintiff raised a genuine dispute of material fact as to whether his learning disability affected his ability to learn because he scored below average in reading and math and accommodations were recommended to help plaintiff learn even though "the psychological evaluation indicates plaintiff scored in the average range across a variety of subjects" and took some honors courses in high school.)

Although, Plaintiff has done enough to create a genuine issue of material fact regarding disability, the court's conclusion on summary judgment with respect to Plaintiff's ADA discrimination claim must remain the same for the reasons explained below. Previously, the court did not render an analysis beyond that of disability, as it was unnecessary. *See* Doc. No. 114, at 12. However, having now found a genuine issue of material fact with respect to disability, the court must continue with its analysis of the remaining requirements for Plaintiff's discrimination claim.

(2) Legitimate Non-Discriminatory Reason for Termination

Defendant states that even if Plaintiff could make a prima facie showing of discrimination, Defendant can show that Plaintiff was terminated for legitimate non-discriminatory reasons. (Doc. No. 97, at 21.)

If Plaintiff makes a prima facie showing, a presumption of discrimination arises. *Rodriguez v. Eli Lilly & Co.*, 820 F.3d 759, 765 (5th Cir. 2016). However, Defendant can rebut the presumption "by articulating legitimate business reasons for the adverse action." *Id.*

Here, Defendant states that Plaintiff was terminated "based solely upon his poor job performance and his documented disrespectful and abusive behavior with his co-employees, both in violation of established City of Longview policies." (Doc. No. 97, at 23.) Thus, the court finds that Defendant has stated a legitimate, nondiscriminatory reason for terminating Plaintiff.

(3) Pretext

If Defendant states a legitimate, nondiscriminatory reason for termination, the Plaintiff "must offer evidence to show that reason was pretext for discrimination." *Rodriguez*, 820 F.3d at 765. The Plaintiff must "produce evidence from which a jury could conclude that the employer's articulated reason is pretextual." *Cannon*, 813 F.3d at 590. The Plaintiff "must rebut each nondiscriminatory ... reason articulated by the employer." *Rodriguez*, 820 F.3d at 765.

Defendant states that Plaintiff cannot meet his burden to show that Defendant's stated reasons for termination were pretextual. (Doc. No. 97, at 23.) Plaintiff argues that he has presented sufficient evidence to show pretext. (Doc. No. 103, at 26–31.) Specifically, Plaintiff states several reasons that he claims prove that Defendant's stated reasons are pretextual. *Id.* The court finds that Plaintiff has not provided sufficient evidence to meet his burden to show pretext and thus finds that Defendant's motion for summary judgement on the discrimination claim should be granted.

First, Plaintiff states that he has shown pretext because Covington has provided perjured,[3] false, and inaccurate statements. (Doc. No. 103, at 26–27.) Plaintiff claims that Covington stated that Plaintiff could not make a sign or perform his job tasks. *Id.* However, Plaintiff claims that these statements are false because Plaintiff has provided emails demonstrating that Plaintiff successfully completed job tasks. *Id.* However, the court has found no such emails in the record.

Second, Plaintiff states that he has shown pretext because Defendant has failed to provide any documents that show that Plaintiff could not perform the job and because Defendant failed to provide any documents that show Plaintiff engaged in abusive behavior. *Id.* at 27. Plaintiff asserts that the written awareness warning is not enough to show that he could not perform the job well because it only encompassed a small fraction of his job duties. *Id.* Further, Plaintiff argues that Defendant does not have an affidavit from Mr. Comer, the individual that Plaintiff was allegedly verbally abusive to. *Id.* Plaintiff's statements are simply not consistent with the evidence of record. There are several documents that show that Plaintiff was not performing well at his job. Mr. Covington, Plaintiff's supervisor, documented multitudes of instances of Plaintiff's poor performance over the course of two months. (Doc. No. 97-3, at 5–14.) Defendant has also submitted several other letters and notes documenting Plaintiff's poor performance. *Id.* at 15–18. Defendant also submitted the affidavit of Mr. Fleming, who was a witness to the telephone conversation between Plaintiff and Mr. Comer; Fleming's affidavit states that Plaintiff was verbally abusive to Mr. Comer. (Doc. No. 97-4, at 1.) Thus, Plaintiff's statements that there is no documentation regarding his poor performance and alleged instance of verbal abuse are simply incorrect. Plaintiff cites to of *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 240 (5th Cir. 2015) for the proposition that "a lack of contemporaneous documentation coupled with evidence

[3] To the extent Plaintiff argues that Covington committed perjury during his deposition, the court has found that Plaintiff provided no evidence to demonstrate this allegation. *See* Doc. No. 110.

that such documentation should exist" can be evidence of pretext. (Doc. No. 103, at 27.) However, in *Burton*, the documentation of poor performance was created after the termination decision. *Burton*, 798 F.3d at 240. This is different from the current case where there is documented proof of poor performance prior to Plaintiff being terminated.

Third, Plaintiff states that Defendant has offered a reason for termination that is so subjective and essentially meaningless that it provides proof of pretext. (Doc. No. 103, at 28.) Plaintiff implies that he was terminated because Covington thought that he was not a "perfect fit" for the job. *Id.* However, as discussed at length above, Defendant states that Plaintiff was terminated because he could not perform the job duties and because he had an aggressive outburst. At no point does Defendant argue that Plaintiff was terminated because he was not a perfect fit.

Fourth, Plaintiff argues that Defendant's reason for termination is factually false. *Id.* at 29. Plaintiff generally reiterates his argument that Defendant has not provided documentation that Plaintiff could not perform the job and has not provided documentation of his aggressive outburst. *Id.* As discussed above, this is simply not accurate and more importantly, Plaintiff provides no evidence that he could perform the job duties.

Fifth, Plaintiff states that Defendant failed to follow company policy when dealing with Plaintiff's alleged aggressive outburst. *Id.* at 30. Plaintiff states that Defendant did not comply with its "corrective action" policy. *Id.* Plaintiff does not cite to any specific page of the policy. However, Defendant's Personnel Policies and Procedures handbook states that "[d]iscourteous, offensive, or abusive behavior either by attitude, language or conduct, to the public or to fellow employees while in the line of duty," is an example that qualifies for prompt corrective action and/or termination from employment. (Doc. No. 103-2, at 6.)

Sixth, Plaintiff states that he has shown pretext because Mr. Comer, another employee of Defendant who allegedly has no mental disability committed nearly identical acts of misconduct under similar circumstances but was treated differently. (Doc. No. 103, at 30–31.) Plaintiff states that Covington testified that once he warns employees "once, twice, three times for the same thing," the employee receives a disciplinary infraction. *Id.* at 31. Plaintiff then seems to argue that Mr. Comer also had inefficient job performance warnings, but did not receive disciplinary actions like Plaintiff and was not terminated because of them. *Id.*

"To support a claim of disparate treatment, a plaintiff may present evidence that a similarly situated coworker was given more favorable treatment." *Robles v. Texas Tech Univ. Health Scis. Ctr.*, 131 F. Supp. 3d 616, 627 (W.D. Tex. 2015). Employees who "are subjected to adverse employment action for dissimilar violations are not similarly situated." *Id.* (quoting *Lee v. Kansas City S. Ry. Co.*, 574 F.3d 253, 259–60 (5th Cir. 2009). The actions of a fellow employee who is offered as a comparator must have occurred "under nearly identical circumstances," which includes having "essentially comparable violation histories." *Id.* at 627–28. Further, "the plaintiff's conduct that drew the adverse employment decision must have been nearly identical to that of the proffered comparator who allegedly drew dissimilar employment decisions." *Id.* at 628.

Here, Plaintiff has not shown that he and Mr. Comer were similarly situated, nor has Plaintiff shown disparate treatment. The only evidence in the record concerning Mr. Comer is a written awareness warning. (Doc. No. 97-3, at 18.) The awareness warning states that Mr. Comer and Plaintiff had been verbally warned several times about the proper way to complete a work order and neither Mr. Comer nor Plaintiff were completing the work order forms properly. *Id.* Thus, Mr. Comer and Plaintiff were both disciplined in the same manner for the same infraction. Plaintiff indicates that he was terminated for the awareness warning while Mr. Comer was not.

(Doc. No. 103, at 31, n. 75.) However, Plaintiff was not terminated solely because of the awareness warning. Plaintiff was terminated for a continuous lack of satisfactory performance and for an aggressive outburst. Plaintiff does not provide any evidence that Mr. Comer has an essentially comparable violation history to Plaintiff. There is no allegation that Mr. Comer had an aggressive outburst, nor is there any evidence that Mr. Comer has a nearly identical record of the same poor performance as Plaintiff. Further, when Mr. Comer committed the same infraction as Plaintiff, Mr. Comer received the same written awareness warning that Plaintiff did. (Doc. No. 97-3, at 18.) Thus, Plaintiff has failed to establish that a similarly situated coworker was given more favorable treatment.

Seventh, Plaintiff argues that Covington's demeaning comments about Plaintiff's "cognitive thinking abilities" are evidence of pretext. (Doc. No. 103, at 28.) Here, two out of three of the comments that Plaintiff references were made over a month before Plaintiff was terminated. (Doc. No. 103-2, at 8–17.) Plaintiff has provided no evidence that links Covington's comments to Plaintiff's termination. *See Angell v. Fairmount Fire Prot. Dist.*, 907 F. Supp. 2d 1242, 1252 (D. Colo. 2012) (stating that "[f]or a statement to constitute evidence of discrimination (rather than a stray remark), the plaintiff must show that it was made by a decision maker, and that there was a nexus between the discriminatory statement and the decision to terminate") (internal quotations omitted). Thus, the court finds that these comments are insufficient to show pretext.

Further, it appears that Plaintiff is arguing that he has shown pretext due to the temporal connection between his request for accommodations, the negative performance evaluations, and his termination. (Doc. No. 103, at 17, 25.) Plaintiff states that he has shown pretext because he was hired on July 5, 2018, informed Mr. Covington of his ADHD and requested reasonable accommodations on July 31, 2018, and only after this request for accommodations did Covington

start documenting Plaintiff's poor job performance. (Doc. No. 103, at 22.) Plaintiff implies that asking for accommodations on July 31 eventually led to his termination on September 19. However, temporal proximity, by itself, is insufficient to establish pretext. *Burton*, 798 F.3d at 240; *Mancini v. Accredo Health Grp., Inc.*, 411 F. Supp. 3d 243, 253 (D. Conn. 2019). Further, Defendant has stated a reason for the temporal proximity: that it terminated Plaintiff due to a report of an inappropriate outburst towards another employee that occurred only *one week* prior to his termination. *See Sechler*, 2012 WL 1355586, at *13 (finding Plaintiff failed to raise a genuine dispute of material fact as to pretext because Defendant stated a legitimate nondiscriminatory reason both for the termination and for the timing of the termination). Thus, Plaintiff has failed to create a genuine dispute of material fact that Defendant terminated Plaintiff due to Plaintiff's request for reasonable accommodations.

Plaintiff also appears to argue that he has shown pretext because he denies yelling or using profanity in the alleged outburst incident. (Doc. No. 103, at 6, 18, 25; Doc. No. 106, at 4-5.) Plaintiff states that he was not given the opportunity to contest the allegations since he was not working the day that the outburst incident was reported to Covington. (Doc. No. 103, at 18.) However, even though Plaintiff disputes the nature of the incident, he does not deny that some type of altercation occurred. During Plaintiff's deposition, he stated that he did not use profanity and was not disrespectful; however, Plaintiff stated that he was direct, and "came at them in a way to make them feel like y'all wasn't trying to be team members ... I'm quite sure they didn't like that language..." (Doc. No. 97-1, at 49.) Thus, although Plaintiff raises some factual disputes underpinning the confrontation that occurred on September 12, 2018—namely that, he did not use profanity—the undisputed record shows that indeed a confrontation between Plaintiff and

coworkers occurred on September 12, 2018, and that Plaintiff was terminated shortly thereafter as a result. (Doc. No. 97-1; Doc. No. 97-5.)

Finally, to the extent Plaintiff relies on evidence from the Texas Workforce Commission's ("TWC") report (Doc. No. 106, at 5) to contend he was not fired for misconduct and Defendant's proffered reason for termination is pretext, this argument also fails. The Texas Workforce Commission's report cannot be used as evidence in a lawsuit, and thus cannot be considered by the court. *See Williams v. Aviall Servs., Inc.*, 76 F. App'x. 534, 536 (5th Cir. 2003) ("Under Texas law, the Texas Workforce Commission's findings and conclusions may not be used as evidence in lawsuits."); *Dortch v. Mem'l Herman Healthcare Sys.-Sw.*, 525 F. Supp. 2d 849, 865 (S.D. Tex. 2007) (declining to consider the TWC Appeal Tribunal finding that Plaintiff's discharge was not for work-related misconduct on summary judgment as such evidence may not be used in lawsuits).

For these reasons, the court finds that Plaintiff has failed to raise a genuine dispute of material fact that Defendant's reasons for termination were pretextual and summary judgment is therefore appropriate as to Plaintiff's discrimination claim.

b. Retaliation Claim

To establish a *prima facie* case of retaliation under the ADA, a plaintiff must show that: (1) he engaged in a statutorily protected activity; (2) the employer took an adverse action against him; and (3) there was a causal connection between the adverse action and the protected activity. *Feist v. Louisiana, Dep't of Just., Off. of the Atty. Gen.*, 730 F.3d 450, 454 (5th Cir. 2013). "If the employee establishes a *prima facie* case, the burden shifts to the employer to state a legitimate, non-retaliatory reason for its decision. After the employer states its reason, the burden shifts back to the employee to demonstrate that the employer's reason is actually a pretext for retaliation,

which the employee accomplishes by showing that the adverse action would not have occurred but for the employer's retaliatory motive." *Id.* at 454 (internal citations omitted).

i.) Causal Connection

Defendant argues that Plaintiff has failed to show a causal connection between the protected activity and the adverse employment action. (Doc. No. 97, at 25.) Defendant states that it reads Plaintiff's complaint to state that the protected activity was Plaintiff's request for reasonable accommodations. *Id.* Defendant argues that since Plaintiff requested the accommodations on July 31, 2018, and Plaintiff was terminated on September 19, 2018, after documented poor job performance and documented disrespectful and abusive behavior, Plaintiff cannot show that "but for" the request for accommodations, Plaintiff would not have been terminated. *Id.* at 25–26. Plaintiff argues that he can show a causal connection because he was hired on July 5, 2018, informed Mr. Covington of his ADHD and requested reasonable accommodations on July 31, 2018, and only after this request for accommodations did Covington start documenting Plaintiff's poor job performance. (Doc. No. 103, at 22.) Further, Plaintiff argues that after he received the pre-termination letter from Mr. Ha, he complained to Robyn Edwards that Covington was discriminating against Plaintiff and then Plaintiff was terminated. *Id.* at 22–25.

"A causal link is established when the evidence demonstrates that the employer's decision to terminate was based in part on knowledge of the employee's protected activity." *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 349 (5th Cir. 2019) (internal quotations omitted). Regarding Plaintiff's argument that the request for accommodations led to his termination, the court finds that Plaintiff has raised a genuine dispute of material fact as to whether there is a causal link. Plaintiff complains that Covington started documenting Plaintiff's poor performance after Plaintiff requested

reasonable accommodations. (Doc. No. 103, at 22.) The protected activity here is the request for accommodations made on July 31, 2018, and the adverse action is Plaintiff's termination on September 19, 2018. Plaintiff seems to be claiming that there is a temporal connection that demonstrates the causal link between requesting accommodations and being terminated.

The Fifth Circuit has stated that a temporal connection on its own is not sufficient to establish a causal link, unless the timeframe is very short. *See Gosby v. Apache Indus. Servs., Inc.*, 30 F.4th 523, 527 (5th Cir. 2022) (stating that, "[i]n retaliation cases, temporal proximity between protected activity and adverse employment action is sometimes enough to establish causation at the *prima facie stage*. This guidance is qualified, though: The protected act and the adverse employment action must be very close in time.") (internal quotations omitted). In *Gosby*, the court noted that one week qualified as "very close in time." *Id.* The Fifth Circuit also stated that, "[w]e have ruled, for example, that a six-and-a-half-week timeframe is sufficiently close, but that a five month lapse is not close enough, without other evidence of retaliation, to establish the "causal connection" element of a prima facie case of retaliation.") *Lyons v. Katy Indep. Sch. Dist.*, 964 F.3d 298, 305 (5th Cir. 2020). Here, the protected activity occurred six weeks prior to Plaintiff's termination. Thus, the court finds that the six-week gap between protected activity and an adverse employment action is sufficient to raise a genuine dispute of material fact as to the causal link element under the governing caselaw.

ii.) Pretext

Even though Plaintiff has raised a genuine dispute of material fact as to the causal link element, the court finds that summary judgment is still appropriate because Plaintiff has not raised a genuine dispute of material fact that Defendant's reason for termination was pretextual. As discussed above, Defendant has stated a legitimate non-discriminatory reason for termination: poor

performance and an aggressive outburst. "At [this] point, in response to a motion for summary judgment, an employee must present substantial evidence that the employer's legitimate, nondiscriminatory reason for termination is pretextual." *Gosby*, 30 F.4th at 527.

Even though temporal proximity alone can be sufficient to establish a causal link, it is not sufficient to establish pretext. *See Lyons v. Katy Indep. Sch. Dist.*, 964 F.3d 298, 306–07 (5th Cir. 2020) (stating that "[v]ery close temporal proximity is sufficient to establish the "causal connection" element of her *prima facie* case, but it is insufficient to demonstrate pretext.) (internal quotations omitted). "Ultimately, the employee must show that 'but for' the protected activity, the adverse employment action would not have occurred." *Nall*, 917 F.3d at 349.

Plaintiff has not shown that but for his request for accommodations he would not have been terminated. Further, the evidence of record indicates that the determinative event that resulted in Plaintiff's termination was Plaintiff's aggressive outburst towards his co-workers. According to Covington's notes, Plaintiff had been performing poorly for almost two months. (Doc. No. 97-3, at 5–14.) However, Covington's recommendation to Mr. Ha that Plaintiff be terminated occurred almost immediately after Plaintiff's outburst, which occurred on September 12, 2018. (Doc. No. 97-3, at 2.)

On September 14, 2018, only two days after the alleged outburst, Mr. Ha recommended to his director that Plaintiff be terminated and Mr. Ha sent Plaintiff the pre-termination letter. (Doc. No. 97-5, at 2.) Director McPhee subsequently terminated Plaintiff on September 19, 2018, stating that the reason for termination was Plaintiff's poor performance and the aggressive outburst. *Id.* at 3. Plaintiff states in his sur-reply that he "made clear to Covington that he did not commit the verbal assault against Richard Comer." (Doc. No. 106, at 4.) During Plaintiff's deposition, he stated that he did not use profanity and was not disrespectful; however, Plaintiff stated that he was

direct, and "came at them in a way to make them feel like y'all wasn't trying to be team members ... I'm quite sure they didn't like that language..." (Doc. No. 97-1, at 49.)

Thus, the evidence indicates that this incident was determinative in Covington's decision to recommend that Plaintiff be terminated, and in Mr. Ha and Director McPhee's decision to terminate Plaintiff. As such, Plaintiff fails to raise a triable issue of fact that he was terminated because of his request for accommodations. *See Seaman v. CSPH, Inc.*, 179 F.3d 297, 301 (5th Cir. 1999) (finding that an employee failed to show that his termination was retaliatory when he informed his supervisor that he had filed a discrimination complaint and was then terminated moments later, because there was sufficient evidence to show that the employee had been terminated for insubordination when he yelled at his supervisor on the phone).

To the extent that Plaintiff claims that he was terminated because he informed Robyn Edwards that he wanted to file a discrimination complaint against Covington one day before the final termination letter came down, the court finds that Plaintiff has not raised a triable issue of fact that he would not have been terminated had he not stated that he wanted to file a discrimination complaint. Mr. Ha's pre-termination letter had already recommended to Director McPhee that Plaintiff be terminated several days before the final termination letter was issued. (Doc. No. 97-5, at 2–3.) Thus, it is clear from the evidence that the decision to terminate Plaintiff had already been set in motion before Plaintiff ever requested the discrimination investigation.

For these reasons, Plaintiff has failed to raise a triable issue of fact that Defendant's stated reason for termination was pretext for retaliation and summary judgment is appropriate. Thus, the court finds that Defendant's motion for summary judgment on the retaliation claim should be granted.

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