In the

United States Court of Appeals

for the Seventh Circuit

No. 19-2393

CHRISTOPHER SEE,

Plaintiff-Appellant,

v.

ILLINOIS GAMING BOARD, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois.
No. 4:17-cv-4050 — **Sara Darrow**, *Chief Judge*.

ARGUED NOVEMBER 2, 2020 — DECIDED MARCH 21, 2022

Before SYKES, *Chief Judge*, and EASTERBROOK and WOOD, *Circuit Judges*.

SYKES, *Chief Judge*. Christopher See is a law-enforcement officer for the Illinois Gaming Board, a state agency tasked with regulating gambling in Illinois. The Board has statutory authority to make use of the Illinois State Police to fulfill its law-enforcement responsibilities and often hires State Police officers for Gaming Board jobs. In his capacity as a union representative, See began voicing concern over the Board's

promotion policies. He thought State Police employees were given unfair advantages over Gaming Board employees.

After expressing his concerns to the Board's labor-relations liaison, See began to exhibit signs of paranoia. He complained to the Board's management that his supervisor was spreading malicious rumors about him in an effort to intimidate and scare him. He also said that his wife was "seriously afraid" that someone from the State Police would harm them. He pleaded for help in stopping the rumors and intimidation. When this odd behavior continued, management became concerned about his mental stability and placed him on administrative leave pending an examination of his fitness for duty. A few weeks later See passed the examination and returned to work.

See then filed suit under 42 U.S.C. § 1983 alleging that the Board and several of its officials retaliated against him for exercising his First Amendment right to free speech and discriminated against him in violation of the Americans with Disabilities Act ("ADA"), *id.* § 12112, by requiring him to undergo a medical examination without a job-related justification. The district court entered summary judgment for the defendants on both claims.

We affirm. There is no need to address whether See established a prima facie case of retaliation. Even if he did, the defendants offered a legitimate, nonretaliatory reason for placing him on leave and requiring a fitness-for-duty examination: they were genuinely concerned about his mental health based on his strange complaints about rumors, intimidation, and fear of harm from the State Police. See presented no evidence that this reason was pretextual. The ADA claim also fails for lack of proof. See is an armed law-enforcement

officer, so the possibility of mental instability posed a serious public-safety concern. The fitness-for-duty examination was therefore job related and consistent with business necessity.

I. Background

The Illinois Gaming Board regulates riverboat and video gambling in Illinois. 230 ILL. COMP. STAT. 10/5. To carry out its law-enforcement responsibilities, the Board has statutory authority to use the services of the Illinois State Police. *Id.* § 10/5(d). Approximately 50% of the Gaming Board's staff are officers assigned to it by the State Police. These officers are eligible for promotion within the Board.

Christopher See is a sworn law-enforcement officer employed by the Gaming Board and works as a gaming special agent at Jumer's Casino and Hotel in Rock Island, Illinois. In that capacity See investigates criminal activity related to gambling and ensures the integrity of gaming in Illinois. He is also a union representative.

In July 2016 See grew concerned about the Board's hiring and promotion practices. He emailed Karen Weathers, the Gaming Board's labor-relations liaison, complaining that State Police officers enjoyed a higher promotion rate than Board employees. He indicated that he was investigating this issue in his capacity as a union representative for a possible grievance. As part of his investigation, See requested documentation of any similar past grievances, including documents concerning the demotion of Michael Miroux, another Gaming Board law-enforcement officer.

Weathers responded to See's email, explaining that Miroux had voluntarily agreed to be reassigned. She also informed See of a similar past grievance alleging that the

Gaming Board filled too many positions with State Police officers.

See went on vacation on July 30 and was not scheduled to return to work until August 16. While on vacation, however, he emailed Weathers and Captain Frank Spizzirri, the Gaming Board's law-enforcement commander, saying that he would formally file a grievance in the next few days. The email, which was dated August 8, included a draft of his forthcoming grievance.

The document spanned 79 pages. Among many other allegations, See claimed that the Board, through its administrator Mark Ostrowski, had given the State Police "de facto control over the [Board]." He alleged that State Police employees accounted for a larger percentage of Gaming Board leadership positions than Gaming Board employees. He also complained about corruption within the Gaming Board and in Illinois government more generally.

Despite the length of the grievance and its wide-ranging allegations, it was what See wrote in his email transmitting the draft grievance that raised concerns among the Board's management. See claimed that Richard Gesiorski, his direct supervisor at the casino, was "spreading false rumors about" him and his wife in retaliation for his planned grievance. He added that his "wife [was] scared and [he] fear[ed] further retaliation." He asked the recipients of the email to "please put a stop to any and all retaliation and false rumors."

See didn't stop there. He sent a second email on August 8 again pleading for help and noting that his "wife [was] now afraid." Captain Spizzirri responded to the email, asking See to send his phone number so that Spizzirri could call him.

See did so, adding: "My wife and I need help and my wife is seriously afraid. Can you please help us?" He again indicated that Gesiorski was spreading false rumors about him.

Captain Spizzirri spoke with See by phone that day and became concerned that he was behaving irrationally. During the call, See continued to insist that Gesiorski was spreading malicious rumors to intimidate him and that his wife was afraid that the State Police might harm them.

See sent Spizzirri another email the next morning. He again expressed his belief that he and his wife were the subjects of "malicious and false rumors"—a smear campaign that was intended to "intimidate and scare" them. He reiterated that his wife "believe[d that] the Illinois State Police may even actually try and send someone to physically harm [their] family." He wrote that his family was "counting on [Spizzirri] to put an end to the retaliation and false rumors about" them.

By now Captain Spizzirri was concerned enough about See's mental state to discuss the matter with the Gaming Board's general counsel, Weathers, and a few other officials. The group met that same day and concluded that when See returned from his vacation, he should be placed on administrative leave and evaluated for fitness for duty. In yet another email to Spizzirri the next day, August 10, See repeated his complaint about his supervisors spreading false rumors and asked whether Spizzirri had "[a]ny luck with trying to get 'them' to stop spreading false rumors about my wife, Melissa[,] and I." Spizzirri called See and assured him that his allegations would be investigated after his vacation.

On August 11—while he was still on vacation—See unexpectedly showed up at Jumer's Casino before 7 a.m. to formally file his grievance. From his work computer, See emailed the grievance to Weathers, Spizzirri, and Frank Contreras, an operations supervisor for Jumer's. Later that day he hand-delivered a copy of the grievance to Contreras. When other employees reported that they saw the two arguing in Contreras's office, Spizzirri called Contreras, who put the call on speakerphone so that the captain could talk with See. Over the speakerphone, Spizzirri ordered See to leave the casino.

In light of See's persistent odd behavior and his agitation during his unexpected visit to work, Captain Spizzirri decided to immediately place him on administrative leave rather than wait until he returned from vacation. Spizzirri attempted to inform See of his decision by phone but See didn't answer. Spizzirri wanted to notify See personally of this action, but See lived in Bettendorf, Iowa, beyond the Gaming Board's jurisdiction. So Spizzirri contacted the Bettendorf Police Department for assistance. At Spizzirri's request Bettendorf detectives delivered a written notice to See informing him that the Board had placed him on administrative leave and that he could not return to work until he completed a fitness-for-duty examination. After delivering the notice, the detectives collected See's service items, including his gun.

On August 22 See passed the fitness-for-duty exam. He was cleared to return to work effective September 12. He filed this damages action in 2017 against the Gaming Board, Captain Spizzirri, and several other officials. He raised two claims: (1) a First Amendment retaliation claim under § 1983

against Spizzirri, Ostrowski, Weathers, Contreras, and Mark Brannon (another operations supervisor at Jumer's Casino); and (2) an ADA claim against the Gaming Board.

The case proceeded to summary judgment. See conceded that he could not prevail on his retaliation claim against Contreras; the district judge entered judgment for the remaining defendants on both claims.

II. Discussion

We review a summary judgment de novo, construing the evidence and drawing reasonable inferences in favor of the nonmoving party. *Consolino v. Towne*, 872 F.3d 825, 829 (7th Cir. 2017).

A. First Amendment Retaliation Claim

"The First Amendment generally prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected … activity." *Heffernan v. City of Paterson*, 578 U.S. 266, 268 (2016). To establish a prima facie case of unlawful retaliation for exercising free-speech rights, a plaintiff public employee must present evidence that (1) the speech at issue was constitutionally protected; (2) his employer subjected him to a deprivation of the sort that is likely to deter free speech; and (3) his speech was a motivating factor in the employer's actions. *Consolino,* 872 F.3d at 829.

If the plaintiff establishes a prima facie case, the burden shifts to the defendant employer to show that it would have taken the same action even in the absence of the plaintiff's protected speech. *Id.* If the employer does so, the burden shifts back to the plaintiff to show that the employer's reason is merely pretextual—i.e., that the employer is lying about

the true reason for its actions. *Valentino v. Village of South Chicago Heights*, 575 F.3d 664, 670 (7th Cir. 2009).

The district judge assumed without deciding that See met his burden to establish a prima facie case, moving directly to the second and third steps of the burden-shifting framework. We do the same. The defendants offered a legitimate, nonretaliatory reason for the decision to place See on administrative leave and require a fitness-for-duty examination: they were concerned about his mental stability based on his persistent claims that his supervisors were spreading malicious rumors to intimidate and scare him and that the State Police would harm him and his family. The defendants therefore satisfied their burden to "produce[] evidence that the same decision would have been made in the absence of the protected speech." *Thayer v. Chiczewski*, 705 F.3d 237, 252 (7th Cir. 2012). See does not argue otherwise.

It was See's burden, then, to produce evidence that would allow a reasonable jury to find that this justification was pretextual. "Pretext means more than a mistake on the part of the employer; pretext means a lie, specifically a phony reason for some action." *Smith v. Chi. Transit Auth.*, 806 F.3d 900, 905 (7th Cir. 2015) (quotation marks omitted). If the employer honestly believed its reasons for taking the challenged actions, even if those reasons were incorrect, then the reasons were not pretextual. *McCann v. Badger Mining Corp.*, 965 F.3d 578, 590 (7th Cir. 2020).

See has not carried this burden. He insists that Captain Spizzirri's concerns about his mental health were phony, but all of his arguments rely on speculation or unreasonable inferences. For instance, See points out that the Bettendorf detectives' police report does not say that he presented a

danger to others. That's neither here nor there. The detectives' report states only that Captain Spizzirri and Brannon "believed that Mr. See was paranoid for unknown reasons and they were concerned about his mental state." The fact that the report doesn't specify *why* Spizzirri and Brannon thought See was paranoid does not support an inference that their concerns about his mental state were pretextual.

See also notes that although his wife was afraid for their safety, he did not share her fears. It's not clear why he thinks that matters. His argument seems to focus on the wrong inquiry. The relevant question is not whether See was *actually* paranoid but whether Captain Spizzirri and the other defendants were genuinely—i.e., honestly—concerned about his mental health. In other words, when assessing pretext, "[t]he question is not whether the employer's stated reason was *inaccurate* … but whether the employer honestly believed the reason it has offered." *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 635 (7th Cir. 2011) (emphasis added). Even if Spizzirri and the other defendants overreacted to See's behavior or if their reasoning was "foolish or trivial or even baseless," their concerns were not pretextual so long as they were "honestly believed." *Culver v. Gorman & Co.*, 416 F.3d 540, 547 (7th Cir. 2005) (quotation marks omitted).

No record evidence casts doubt on the honesty of their beliefs. To the contrary, the memorandum placing See on leave specifically referred to his paranoid behavior as the reason for the decision. Nothing in the record suggests that this reason was a lie to cover up retaliatory intent. Rather, the uncontradicted evidence all points in the opposite direction: See's repeated emails and phone calls complaining of "malicious rumors" and "scare tactics" and his wife's fear

that the State Police would harm their family prompted honest concerns about his mental health. Spizzirri's concerns only increased after See's unexpected decision to visit work while on vacation and his increasing agitation while there. This visit was the tipping point to immediately place See on administrative leave.

Finally, See argues that a jury might simply choose not to believe Captain Spizzirri. But a plaintiff cannot withstand summary judgment by relying solely on "challenges to [a] witness'[s] credibility" while providing "no independent facts—no proof—to support his claims." *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008). After all, it was See's burden to produce evidence that would allow a reasonable jury to infer that the defendants' proffered reason for their actions was pretextual. *Thayer*, 705 F.3d at 252. He did not do so.

B. ADA Medical-Examination Claim

The ADA claim also suffers from a fundamental failure of proof. Our analysis of this claim can be brief. The ADA prohibits employers from making certain medical inquiries or requiring medical examinations unless they are justified by business necessity. § 12112(d)(4)(A) ("[An employer] shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."). In this context, "a medical examination is job-related and consistent with business necessity when an employer has a reasonable belief based on objective evidence that a medical condition will impair an employee's ability to perform

essential job functions or that the employee will pose a threat due to a medical condition." *Coffman v. Indianapolis Fire Dep't*, 578 F.3d 559, 565 (7th Cir. 2009).

We have repeatedly held that the ADA permits fitness-for-duty examinations when public-safety employees are involved. *See, e.g.*, *Kurtzhals v. County of Dunn*, 969 F.3d 725, 731 (7th Cir. 2020) (holding that § 12112(d)(4)(A) permitted a fitness-for-duty examination of a police officer who had a "short fuse"); *Freelain v. Village of Oak Park*, 888 F.3d 895, 903–04 (7th Cir. 2018) (permitting a fitness-for-duty examination of a police officer who experienced medical conditions due to stress); *Coffman*, 578 F.3d at 565–66 (holding that a fire-fighter's fitness-for-duty examination was job related and consistent with business necessity when she appeared to be "withdrawn" and "suffering from paranoia"); *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772, 786–87 (7th Cir. 2007) (permitting paid leave pending a psychological examination after an officer used force against a mentally unstable woman); *Krocka v. City of Chicago*, 203 F.3d 507, 515 (7th Cir. 2000) ("It was entirely reasonable, and even responsible, for [the police department] to evaluate [the officer's] fitness for duty once it learned that he was experiencing difficulties with his mental health."). Public-safety officers operate in a "special work environment" performing "mentally and physically demanding work." *Coffman*, 578 F.3d at 566. Because of this special work environment, the reasonable perception that an officer is "even mildly paranoid" will justify a fitness-for-duty examination under the ADA. *Kurtzhals*, 969 F.3d at 731 (quoting *Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999)).

Unable to contest this point, See simply reiterates his contention that he was required to undergo a fitness-for-duty examination in retaliation for his protected speech. This argument fares no better as a basis for the ADA claim. As we have explained, nothing in the record suggests that the Gaming Board's concerns about his mental stability were fabricated as a cover for retaliation. Instead, the Board's management reasonably "believed there was a possibility that [he] was suffering from paranoia" based on his persistent odd behavior. *Coffman*, 578 F.3d at 565. Given See's position as an armed public-safety officer, the Board's requirement that he pass a fitness-for-duty examination before returning to work was job related and consistent with business necessity, as required by the ADA.

AFFIRMED