In the

United States Court of Appeals

For the Seventh Circuit

No. 20-1747

BENYEHUDAH WHITFIELD, II,

Plaintiff-Appellant,

v.

BETSY SPILLER, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Illinois
No. 3:13-cv-00653-SMY — **Staci M. Yandle**, *Judge*.

ARGUED JANUARY 5, 2022
RE-ARGUED JANUARY 11, 2023[1] — DECIDED AUGUST 7, 2023

Before WOOD, BRENNAN, and SCUDDER, *Circuit Judges*.

WOOD, *Circuit Judge*. BenYehudah Whitfield was scheduled for discharge from Menard Correctional Center on

[1] This appeal was initially argued before a panel consisting of Judges Kanne, Wood, and Brennan. After Judge Kanne passed away on June 16, 2022, the panel was reconstituted to include Judges Wood, Brennan, and Scudder. The case was then re-argued before the new panel.

January 7, 2010, at which point he was to begin a term of mandatory supervised release. But things went badly off the tracks that day. The problems began when prison officials handed Whitfield only the signature page of a document called the "Electronic Detention Program Agreement" (the Agreement). That page stated in boldface that "**the following conditions of the Program apply only to sex offender cases.**" Whitfield was (and is) not a sex offender, and so he reasonably thought that the signature requirement on the provided form should not apply to him. Furthermore, he objected to signing the Agreement without an explanation from a prison official clarifying why he, a non-sex offender, had to sign a form designed exclusively for sex offenders.

Whitfield's objections were brushed aside. Four times, clinical services supervisor Betsy Spiller directed Whitfield to sign the form. After his continued refusal, she ordered a disciplinary ticket to be issued against Whitfield for failure to follow a direct order. The disciplinary ticket triggered a cascade of unfortunate events: Whitfield was transferred to disciplinary segregation; the Illinois Prisoner Review Board (the Board) held a hearing on whether he had violated the terms of his supervised release; he was declared a violator of the release conditions; and finally, his eligibility for supervised release was revoked. In the end, Whitfield remained in custody for another 18 months.

In response to his prolonged incarceration, Whitfield sued Spiller, other Menard officials, and certain members of the Board, alleging several constitutional violations under 42 U.S.C. § 1983. By now, the case has boiled down to Whitfield's claims against Spiller and then-warden William Gaetz for violations of his First and Eighth Amendment rights. We

conclude that the district court correctly granted summary judgment to defendants on some of these claims, but that Whitfield has adduced sufficient evidence that Spiller's conduct violated his First Amendment rights to move forward. We therefore affirm in part and reverse in part.

I. Factual Background

A. The Revocation of Whitfield's Supervised Release

Whitfield was sentenced by a state court to a 28-year term of imprisonment for home invasion and aggravated battery—crimes he committed in December 1994. He was transferred to Menard on September 10, 2008. On September 16, 2009, the Board approved Whitfield for mandatory supervised release under several conditions, including electronic monitoring. Whitfield's release date was calculated as January 7, 2010; he was to live at an approved host site called "Henry House."

When January 7 arrived, Whitfield was taken to Menard's reception center to meet with Vickie Howie, a Clinical Services Counselor. Howie instructed him to sign five or six release documents, one of which was the signature page of the Agreement we mentioned earlier. No one showed Whitfield the rest of the Agreement, and he refused to sign it. Whitfield later testified that he was aware of the dangers of signing one's rights away, thanks to his long involvement in litigation against officials from the Illinois Department of Corrections (IDOC). Whitfield's concern was reinforced by the fact that the signature page's header read "**The following conditions of the Program Agreement apply only to sex offender cases.**"

After Whitfield's initial refusal, Spiller stepped in. Whitfield asked her for a legal justification for the signature requirement. But she told him that she did not know the legal

basis for the signature requirement. During this exchange, Whitfield tried to explain that he should not have been subject to electronic monitoring and that he wanted to preserve his ability to contest it as a condition of his supervised release. Whitfield also contended that the statute governing participant consent requirements for electronic monitoring, 730 ILCS 5/5-8A-5, did not require his signature in any event. He was concerned that, by signing the Agreement, he would be consenting to improper release conditions and would thus be at risk of being returned to custody for "bogus" infractions.

Though Whitfield likely was mistaken about his eligibility for any exemption from electronic monitoring, it was true that Illinois law did not require his signature on the Agreement. Under 730 ILCS 5/5-8A-5, signed consent is not required for "persons subject to electronic monitoring or home detention as a term or condition of parole, aftercare release, or mandatory supervised release." This carve-out applied to Whitfield and meant that his signature was *not* a legal requirement of his discharge that day. The electronic monitoring was going to happen, signature or no signature.

Spiller did not request guidance from a supervisor or consult with a legal authority such as a lawyer from the Attorney General's Office. Nor does the record reflect any prison policy or rule that might have controlled Spiller's response. Instead, she warned Whitfield that failure to sign the Agreement would be considered a violation of his supervised release conditions and would warrant a disciplinary ticket. Sure enough, when Whitfield continued to withhold his signature after Spiller ordered him four times to sign the Agreement, Spiller directed Howie to write and file a disciplinary ticket.

Spiller knew that the issuance of a disciplinary ticket would result in Whitfield's immediate placement in segregation under "temporary confinement" status, and that is just what happened. Spiller understood that this placement in segregation was intended as punishment for Whitfield's refusal to sign. She explained in discovery that Whitfield "had already committed an offense or violation of the rules for disobeying a direct order," and so "punishment was meted out." That same day, Whitfield's sentence was recalculated to include an additional 18 months of imprisonment based on an alleged violation of his supervised-release conditions.

On January 11, after four days in segregation, Whitfield filed a grievance addressed to Warden Gaetz. He expressed a willingness to sign the Agreement if someone explained the legal authority for requiring his signature. He restated his contention that Illinois law did not require him to be placed on electronic monitoring. He also questioned the legal authority to detain him on his release date and declare him a violator of his supervised-release conditions without a hearing.

Whitfield did not mark the grievance as an emergency filing, and so under Menard policy it was redirected to Spiller, who generally handled non-emergency grievances about the conduct of a member of the counseling staff. Spiller summarily denied the grievance. She did not investigate the relevant Illinois law, nor did she respond to Whitfield's requests for legal authority or provide him another opportunity to sign the Agreement. Instead, she told Whitfield that his "[supervised-release] term was violated in accordance with IDOC directives. Inmate was afforded 4 opportunities to sign his [supervised-release] agreement and refused to do so."

On January 12, Menard's Adjustment Committee held a hearing on Whitfield's disciplinary ticket. Whitfield was informed of the hearing the same day, but he was not allowed to attend, ostensibly because his braids violated the Adjustment Committee's dress code. He was not given sufficient time to remove them. The Adjustment Committee found Whitfield guilty of disobeying a direct order and recommended three months of disciplinary segregation as a punishment. Whitfield ultimately spent more than four months in segregation.

On January 20, 2010, not quite two weeks after his initial encounter, Whitfield finally signed the Agreement, even though he never was given a full copy of the document. But because the Adjustment Committee had already recommended three months of disciplinary segregation, Whitfield's efforts to comply with Spiller's orders were judged insufficient to warrant removal from segregation or discharge from Menard. Shortly thereafter, Whitfield was deemed to have refused his spot at Henry House and lost his host-site placement. This made him ineligible for supervised release until another host site could be located.

About a month later, on February 24, Whitfield attended a release revocation hearing before the Board. Whitfield explained in a letter why he withheld his signature, restating his contention that his signature was not required, explaining that no one answered his request for legal authority, and adding that one of the reasons he refused to sign the Agreement was because officials would not allow him to read a full copy of the document. But the Board found that his failure to sign the Agreement was a violation of his supervised-release conditions. Because Whitfield had signed the Agreement in the

meantime, the Board did not revoke his eligibility for parole. Whitfield attended a second release revocation hearing on May 19, which resulted in the same outcome: a confirmed violation but no revocation of release eligibility. Nevertheless, Whitfield was still trapped at Menard because no new host site had been confirmed. No IDOC official ever discussed his release plan or a new host site with him. In fact, Whitfield asserted, he heard that the officials were intentionally delaying approval of his release plan because he had refused to sign the Agreement. Spiller recalled having trouble locating a new host site for Whitfield but did not remember any other details.

On September 15, Whitfield (without a lawyer) attended yet another release revocation hearing before the Board. At that hearing, the Board again decided that Whitfield had violated the terms of his release because of his refusal to sign the Agreement. This time, however, the Board revoked his eligibility for release. Whitfield was then transferred to Western Illinois Correctional Center, where he remained until his final release on July 7, 2011.

B. Procedural History

Whitfield initiated this lawsuit against Spiller, Gaetz, other Menard employees, and certain Board members in 2013; in it, he contended that the defendants had violated his rights under the First, Eighth, and Fourteenth Amendments to the Constitution. All of the defendants moved for summary judgment. The Menard defendants, including Spiller and Gaetz, were successful: the district court concluded that there was insufficient evidence of their personal involvement in the deprivations of Whitfield's rights.

But the district court denied the Board members' motion for summary judgment. It found that there was a question of fact whether the Board members violated Whitfield's Fourteenth and Eighth Amendment rights by denying Whitfield access to legal counsel at his revocation release hearing and by revoking his supervised release eligibility for no readily apparent reason, particularly since Whitfield's eligibility had been confirmed in the two prior hearings. The court also decided that the evidence would permit a trier of fact to find that the Board members had retaliated against Whitfield for his refusal to sign the Agreement. Finally, the court denied the Board members' request for qualified immunity.

At that point, the claims against the Board defendants proceeded to trial. Whitfield prevailed, winning a jury award of $50,000. He eventually settled with the Board members. With all claims against all parties resolved, Whitfield was ready for an appeal. He filed a timely notice of appeal from the summary judgment rulings in favor of the Menard defendants.[2] In this court, Whitfield has asked that we reverse with respect to all Menard defendants. His arguments, however, address only his First and Eighth Amendment claims against Spiller and Gaetz. He has thus forfeited his claims against the other Menard officials (Jeannette Cowan, Tara Goins, and David Rednour), and so we do not address them further.

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[2] To be clear, the court entered its judgment against the Board defendants on January 12, 2018. They filed a timely renewed motion for judgment as a matter of law or for new trial on February 8, 2018. The district court denied those motions on March 23, 2020. With the final judgment secure, Whitfield filed a notice of appeal from the adverse summary judgment decisions on April 22, 2020 (the postmark date, pursuant to Southern District of Illinois Admin. Order No. 261).

When we first heard this appeal, the parties focused on whether Spiller or Gaetz was sufficiently involved in the decisions Whitfield is challenging to support section 1983 liability. They also raised a qualified immunity defense to the Eighth Amendment count, but not to the First Amendment theory. Before re-argument, in the supplemental briefs we requested, the parties addressed two additional questions: "[w]hat role, if any, do considerations of 'false speech' have in the analysis of a First Amendment retaliation claim by a prisoner?"; and "[w]hat role, if any, does a defendant's good faith have in an analysis of a First Amendment retaliation claim?"

II. First Amendment Retaliation

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We evaluate a grant of summary judgment independently, drawing all reasonable inferences and interpreting the facts in the light most favorable to the non-moving party. *Moran v. Calumet City*, 54 F.4th 483, 491 (7th Cir. 2022).

Whitfield's First Amendment theory hinges on three central determinations: first, whether the defendants were sufficiently involved in the actions taken against Whitfield to satisfy the personal involvement requirement of section 1983; second, whether Whitfield's refusal to sign the Agreement was protected activity; and third, whether the defendants' asserted defenses and their alleged good faith exonerate them from liability as a matter of law.

Again, we note that the scope of Whitfield's lawsuit has narrowed a great deal at this point. While many of Whitfield's legal arguments sound in the language of a due process

violation, he has already prevailed on his claims under the Due Process Clause against the defendants who denied him adequate procedural protections during the revocation of his release eligibility. Whitfield does not argue in this appeal that Spiller was responsible for those deprivations. The focus is instead on her involvement in different penological decisions, such as issuing a disciplinary ticket and placing him in segregation. These kinds of decisions typically do not trigger due-process protections. See *Montanye v. Haymes*, 427 U.S. 236, 242 (1976) ("The [Due Process] Clause does not require hearings in connection with transfers whether or not they are the result of the inmate's misbehavior or may be labeled as disciplinary or punitive."). But they can implicate the First Amendment. See *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996) (explaining that confinement in segregation can violate First Amendment rights when done in retaliation, even if the confinement does not "independently violate the Constitution").

A. Defendants' Personal Involvement

"To recover damages under § 1983, a plaintiff must establish that a defendant was personally responsible for the deprivation of a constitutional right." *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995). For this purpose, we must consider each defendant independently.

Whitfield's evidence of Warden Gaetz's personal involvement is thin to nonexistent. Gaetz testified that he did not recall being told that Whitfield was placed into segregation. Moreover, Whitfield has proffered no evidence that would allow a factfinder to impute knowledge of this incident to Gaetz. All he has is Gaetz's admission that a person who refused to sign their release paperwork "would be sent to segregation and housed separately due to the fact that there's an

indiscretion with his failure to sign his parole plan." That is far too vague to suffice; it is just a generic description of institutional practice. It is not enough to show that Gaetz was warden while Whitfield was sent to segregation and kept in prison for an extra 18 months. The district court properly granted summary judgment in Gaetz's favor on this theory because he lacked the requisite personal involvement in the events at issue.

The case against Spiller is another matter. Whitfield contends that Spiller was personally involved in four punitive acts directed against him for his refusal to sign: 1) Whitfield's placement in segregation; 2) the disciplinary ticket issued against Whitfield; 3) Whitfield being declared a supervised-release violator; and 4) the delay of Whitfield's release plan. We can be brief about the third and fourth actions. It was the Board, not Spiller, that decided to declare Whitfield a supervised-release violator. There is no evidence that suggests that Spiller was personally involved in the Board's hearing process. The fourth fails because it is a newcomer in this court. Whitfield waived any argument about alleged delays in finding a new release site by failing to raise it before the district court. But we conclude that Whitfield has created a triable issue of fact regarding Spiller's involvement in his placement in segregation and the disciplinary ticket that prompted it.

As we now detail, a jury reasonably could find that during the time that Spiller and Whitfield met in Menard's reception center, Spiller pushed Whitfield to sign the Agreement by threatening him with placement in segregation. Her deposition testimony admitted as much. Throughout, Spiller knew that Whitfield was withholding his signature because he feared signing away certain post-release rights. Spiller

testified that this was the first time she had seen a prisoner raise concerns about the release paperwork and refuse to sign. Nonetheless, Spiller did not inform Warden Gaetz of the situation or seek legal clarification from another authority inside or outside Menard.

Instead, Spiller personally directed Howie to write and file a disciplinary ticket against Whitfield.[3] Shortly after Howie issued that ticket, security staff escorted Whitfield from the reception center to the segregation unit. Spiller admitted that she knew that the issuance of a disciplinary ticket would block Whitfield from leaving the prison that day. She recognized that the consequence of the ticket for Whitfield would be placement in segregation on "temporary confinement" status until the Adjustment Committee could hear his case. Crucially, as Whitfield pointed out at oral argument, even if Spiller was not authorized to permit him to leave Menard under supervised release until he signed all his release paperwork, she still had the option of returning him to general population until his legal questions could be answered. Spiller chose not to take this non-punitive route. And she doubled down on this position in her response to Whitfield's January 11th grievance, which she summarily denied. The record thus supports the inference that Spiller responded to Whitfield's refusal to sign by threatening him with placement in segregation.

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[3] The dissent takes issue with this characterization of Spiller's action, see *post* at 35–36, but in so doing, it is not taking the facts in the record in the light most favorable to Whitfield. We are reviewing a grant of summary judgment, and so that is the perspective we must take. We freely concede that at trial, a jury might adopt the dissent's view of these events.

Note that we are not saying that the record would permit a finding that Spiller was personally responsible for the entire 18 months of Whitfield's reincarceration. Her role in these events was overtaken by other actors in the Illinois prison system, to whom the baton had been passed. The Adjustment Committee, for example, assigned Whitfield to segregation for another three months. And the Board then held a hearing and declared Whitfield in violation of his supervised release conditions. As a result, the Adjustment Committee functionally ended Spiller's personal involvement in Whitfield's case on January 12, 2010, when the Committee held its first hearing on Whitfield's disciplinary ticket. But this was the sixth day of Whitfield's reincarceration in the segregation unit. We do not shrug off six days as a meaningless time, nor does our dissenting colleague, *post* at 35. Even a brief period of incarceration—not to mention time in segregation—is severe enough to support a *prima facie* case of First Amendment retaliation. See, *e.g.*, *Pieczynski v. Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989) (explaining that a deprivation in response to protected conduct is cognizable under the First Amendment unless it is "so trivial that a person of ordinary firmness would not be deterred"). On this record, the evidence of Spiller's responsibility for that initial phase of reincarceration is more than sufficient to survive summary judgment.

B. *Prima Facie* Case of First Amendment Retaliation

Having proffered evidence of Spiller's personal involvement, Whitfield's next hurdle is to establish a *prima facie* case of retaliation in violation of the First Amendment. This requires a plaintiff to show that "(1) he engaged in activity protected by the First Amendment; (2) he suffered a deprivation that would likely deter First Amendment activity in the

future; and (3) the First Amendment activity was 'at least a motivating factor' in the Defendants' decision to take the retaliatory action." *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009) (quoting *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008)).

The summary judgment record easily raises a triable issue of fact with respect to the second and third of these criteria. As we just noted, Whitfield's first six days of disciplinary segregation qualify as a serious enough deprivation to deter the exercise of First Amendment rights (as it apparently did—Whitfield gave up on his effort to see the full document he was signing). And, for element three, Whitfield has furnished evidence to suggest that he was sent to segregation because he refused to sign the Agreement, meaning that his refusal was a motivating factor in the deprivation. Spiller admitted "that Plaintiff was issued a disciplinary report on January 7, 2010 for refusing to sign his release papers." Though there remain some questions about Spiller's state of mind and whether her conduct towards Whitfield was reasonable in light of her understanding of the governing law, we consider those matters more fully below, where we examine whether Spiller was able conclusively to rebut Whitfield's *prima facie* case.

The only element requiring a more thorough discussion is the first one: whether Whitfield's communications were protected by the First Amendment. The district court assumed that his refusal to sign was protected. And though the parties conceded that point in the initial round of briefing, the defendants backtracked in their supplemental briefs and at oral argument, newly taking the position that his refusal to sign was not protected. Having invited the supplemental briefs,

we think it proper to engage in this issue. We look first at to what extent (if at all) the penological context limits Whitfield's First Amendment rights, and then we examine whether Whitfield's allegedly mistaken motivations for refusing to sign undercut his theory of liability.

1. The Scope of First Amendment Protection

To determine whether Whitfield's speech was protected, we ask whether "he engaged in this speech in a manner consistent with legitimate penological interests." *Watkins v. Kasper*, 599 F.3d 791, 796 (7th Cir. 2010). The prison setting is distinctive, and it affects many constitutional rights. Relevant here, we have held that an inmate's speech is not protected where it is "disruptive" and "confrontational." *Id*. at 798, 799. Similarly, "speech that violates prison [disciplinary policies]," like "backtalk," is unprotected. *Kervin v. Barnes*, 787 F.3d 833, 835 (7th Cir. 2015). But unlike public employee speech, inmate speech "can be protected even when it does not involve a matter of public concern." *Bridges*, 557 F.3d at 551.

Taking the facts in the light most favorable to Whitfield, this record does not indicate that he was hostile or disruptive in his interactions with Menard officials, or otherwise crossed those lines. We are not dealing with a case in which an inmate threatened to encourage other inmates to thwart the prison's ordinary practice with respect to forms and signature requirements. Something like that potentially would have interfered with Menard's legitimate penological interests. But Spiller's own testimony indicated that actions were taken against Whitfield because he refused to sign the Agreement and not for any other disciplinary infraction. Although Whitfield's ticket shows that he was disciplined for disobeying a direct order, that order was for Whitfield to sign the Agreement.

Thus, there is no basis for a distinct disciplinary infraction, separate and apart from Whitfield's refusal to sign.

Spiller encourages us to look to the Supreme Court's test from *Turner v. Safley*, which directs courts to evaluate whether a prison regulation imposes a reasonable restraint on the constitutional rights of those who are incarcerated. 482 U.S. 78, 89–91 (1987). Spiller asserts that "[r]equiring inmates to sign the electronic monitoring document serves the legitimate penological interest of confirming the inmate's understanding of, and guaranteeing their compliance with, the rules and regulations of electronic monitoring prior to their release."

But these considerations do not leave Whitfield's conduct completely unprotected by the First Amendment. Spiller has offered a reason why Menard has an interest in requiring a signature before release. Contrary to our dissenting colleague, we do not think that this penological interest directly implicates the First Amendment, because it explains only why Menard officials could not release Whitfield. And indeed, Whitfield has conceded that Menard could have held him in custody and delayed his supervised release until officials received his signed consent to all the terms and conditions of his release.

For Whitfield's speech to lack all protection under the First Amendment, it must be inconsistent with legitimate penological interests. *Watkins* met that standard because the speech at issue undermined the authority of prison officials and their ability to implement policy and maintain discipline. See 599 F.3d at 797–98. This case is different because the record (again in the light most favorable to Whitfield) does not compel the conclusion that Whitfield's refusal to sign threatened the penological setting. Spiller has not explained what penological

interests were served by *punishing* Whitfield's refusal to sign or why Menard has an interest in forcing an inmate to sign release paperwork when he has not received a complete copy of the document. Nor does it appear that there is any legitimate penological interest that forbids an inmate from clarifying whether a release document properly applies to him, especially when he is not a sex offender yet the document purports to apply only to that group. This distinguishes Whitfield's appeal from cases where prison officials provided evidence that permitting certain speech would have a negative effect on prison security or inmate wellbeing. Compare *Garner v. Brown*, 752 F. App'x 354, 357 (7th Cir. 2018) (permitting a prison to forbid group petitions because prison officials testified that such petitions could cause riots, disrespect, and violent confrontations). The Menard defendants have supplied no analogous evidence here, and we find the dissent's efforts to supply that evidence on their behalf speculative. Whitfield's refusal to sign the Agreement (and thereby to endorse its contents) was protected by the First Amendment.

2. The Effect of "False Speech"

Spiller's next argument is a surprising one: she contends that Whitfield had no First Amendment rights because his assertions about his exemption from electronic monitoring were false or mistaken. But we do not live in a country in which the only speech that is protected is speech that a Board of Censors deems true and accurate. The Supreme Court has made this clear: even false speech enjoys some First Amendment protection. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."). Closer to Whitfield's case, neither the Supreme Court nor we have ever

suggested that incorrect legal claims—whether made inside or outside the prison—are categorically unprotected speech. Such a proposition is inconsistent with the Supreme Court's robust protection of speech. See, *e.g.*, *United States v. Alvarez*, 567 U.S. 709 (2012) (holding that the First Amendment prohibits prosecution for a false claim that the speaker held a congressional medal of honor); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 129, 137–38 (1961) (holding that a lobbying campaign replete with "vicious, corrupt, and fraudulent" statements fell outside the scope of the antitrust laws, and noting that a contrary interpretation would raise serious constitutional problems because the speech was presumably protected).

Though the penological setting changes the calculus somewhat, there is no reason to characterize Whitfield's allegedly mistaken view of the law as being inconsistent with legitimate penological interests, where his beliefs were communicated through appropriate grievance channels, without hostility, and without insubordination. *Cf. Watkins*, 599 F.3d at 798 (holding that the First Amendment did not protect the plaintiff's complaint because, rather than rely on a "formal, written grievance or a courteous, oral conversation," the plaintiff complained in a "confrontational, disorderly manner"); *Smith v. Mosley*, 532 F.3d 1270, 1277 (11th Cir. 2008) (deciding that "false and insubordinate remarks" were not protected by the First Amendment and violated a "legitimate prison regulation"). If it did not produce the kind of unprotected conduct we just identified, why should it matter if Whitfield mistakenly believed that he was exempt from electronic monitoring while on supervised release? If he had resisted monitoring or tried to defeat it, he would have faced revocation of his parole.

It is also debatable whether Whitfield's speech can be characterized as false. His refusal to sign the last page of the Agreement without seeing the rest of the text is not a "statement" that can be shown to be true or false. Since we have decided that the refusal to sign is itself protected, it is an impossible task at summary judgment to ferret out what precisely motivated Whitfield's refusal and then use those motivations as a reason to constrict First Amendment protections. In addition to Whitfield's belief about his exemption from electronic monitoring, what about his desire to read a full copy of the Agreement? Or his questions about why the form he had been given was designated exclusively for sex offenders? Or his unanswered request that a Menard official provide him with the legal basis for requiring his signature? (Forms issued by the U.S. government routinely include, in the fine print, the statutory basis for the government's right to request the specified information.) Whitfield had several overlapping reasons for withholding his signature; not every reason was premised on a mistake.

The state suggests that Spiller properly disciplined Whitfield for his allegedly false speech because his "incorrect" assertion that he was exempt from electronic monitoring raised concerns that he was trying to avoid his rightfully imposed supervised release conditions. But that is pure speculation. And there is no contemporaneous support for that hypothesis. The evidence in the record indicates that Spiller was responding to Whitfield's refusal to sign and not to his statements about Illinois law. She testified that she told Whitfield that a failure to sign was a discipline-worthy infraction; and she wrote in response to his grievance that his failure to sign was a violation of his supervised release conditions. Nowhere does Spiller even hint that Whitfield's mistaken contentions

about 730 ILCS 5/5-8A-5 were what motivated her. At the very least, there are questions of fact about what motivated both Whitfield and Spiller to do and say what they did. We cannot resolve them on summary judgment.

Spiller's next gambit takes us to a different line of Supreme Court cases, all from the public employment context. Under *Pickering v. Board of Education of Township High School District 205*, courts must balance the interests of the government against the interests of the speaker to determine whether the speech is protected. 391 U.S. 563, 573 (1968). Applying *Pickering*, we have explained that "if an employer takes action against an employee for speech that the employer, *based on an adequate investigation*, reasonably believes to be false, the employer's interests outweigh the speaker's interests." *Swetlik v. Crawford*, 738 F.3d 818, 825 (7th Cir. 2013) (emphasis added). Spiller asks us to extend this rule to the present setting, and then to find that, because she reasonably believed Whitfield's speech to be false, his speech cannot be protected.

We need not decide here how well the *Pickering* framework maps onto the prison context, because the reasonableness of Spiller's beliefs is contested. Construed favorably to Whitfield, the facts here show that Spiller did not conduct an adequate investigation into Whitfield's objections. Nor do the facts suggest that Whitfield was doing anything beyond seeking an explanation for the demands that were being placed upon him. Without a reasonable belief that Whitfield's speech was unprotected, *Pickering* does not help her. See also *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (rejecting lawsuit by father of deceased military service member against anti-LGBTQ+ demonstrators because the offensive picketing at service

member's funeral was protected by the First Amendment, regardless of perceived falsity).

C. Spiller's Defense

Finally, we must decide whether defendants have pointed to any legal reason that would require a judgment now for Spiller. Spiller has not raised qualified immunity as a defense to the alleged First Amendment violations and so we consider only her defenses on the merits. The central question is causation: can Spiller show beyond dispute that something other than Whitfield's protected activity motivated her actions against him? And what evidence is she allowed to marshal to prove the absence of causation as a matter of law?

Spiller argues first that Whitfield cannot prevail because Spiller subjectively lacked any retaliatory intent—a type of "clean heart" defense. Related to this, she contends that she sincerely believed that Illinois law and Menard policy prohibited Whitfield's discharge without a signature on the Agreement and mandated his punishment for refusing to sign, and that is enough to defeat the causation element of Whitfield's case. We will refer to the latter as her good faith defense.

The Supreme Court has instructed that, when rebutting a plaintiff's *prima facie* case, a defendant must show "by a preponderance of the evidence that [she] would have reached the same decision … even in the absence of the protected conduct." *Mt. Healthy City School District Board of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). *Mt. Healthy* establishes that the question in First Amendment retaliation cases is about cause, not intent: did the officer impose the adverse action in response to the protected activity? We must ensure that "the protected activity and the adverse action are not wholly unrelated."

Kidwell v. Eisenhauer, 679 F.3d 957, 966 (7th Cir. 2012) (quoting *Sauzek v. Exxon Coal USA, Inc.*, 202 F.3d 913, 918 (7th Cir. 2000)).

At times, it is necessary to determine what exactly motivated a defendant. But the relevant evidence must shed light on causation, not on subjective intent. For instance, when a prisoner alleged that a search of his cell was conducted as retaliation for grievances he previously had filed, we examined whether the officers sought to punish the prisoner for having filed grievances or were instead motivated by their belief that the cell contained contraband. See *Manuel v. Nalley*, 966 F.3d 678, 680–81 (7th Cir. 2020). We asked these questions not to establish the *mens rea* of the officer, but to ensure that there was in fact a causal connection between the constitutionally protected conduct and the adverse action. If it turns out that an officer imposed the adverse action in response to the protected conduct, then that is the end of the "retaliatory motive" analysis. Whether the officer liked or disliked the prisoner, had a history of hostility with the prisoner, sought to impress a superior, or sincerely misread the law is beside the point.

Turning first to Spiller's "clean heart" argument, we note that this idea seems to have arisen from various cases in which we have interchangeably used the phrases "retaliatory animus," "retaliatory intent," and "motivating factor" to evaluate the causal relationship between the plaintiff's protected speech and the defendant's harmful action. See, *e.g.*, *Thayer v. Chiczewski*, 705 F.3d 237, 253 (7th Cir. 2012) ("[T]he record is void of evidence showing that the officers acted with *retaliatory animus* in arresting [the plaintiff]." (emphasis added)); *Wallscetti v. Fox*, 258 F.3d 662, 667–68 (7th Cir. 2001) ("[I]n order to create a triable issue on whether her protected

statements were a *motivating factor* in her discharge, [the plaintiff] must produce sufficient evidence for a reasonable factfinder to decide that [the defendant] harbored a *retaliatory intent*." (emphasis added)). Given that the Supreme Court has described retaliatory animus as "a subjective condition," see *Hartman v. Moore*, 547 U.S. 250, 257 (2006), one might think that we have created a "clean heart" exception to First Amendment violations.

Our decision in *Holleman v. Zatecky* could lend further support to this "clean heart" exception. 951 F.3d 873 (7th Cir. 2020). There, a prisoner was transferred from one Indiana prison to another in response to several grievances and complaints he filed. Though we acknowledged that "the transfer was *caused* by [] protected activity," we explained that the transfer would violate his rights if it was "initiated to punish a prisoner for engaging in protected activity" rather than "initiated as a rational, justifiable response to the substance of the prisoner's complaints." *Id.* at 878–79. Because uncontroverted evidence showed that the warden initiated the transfer in the hopes that the new facility might address and assuage some of the prisoner's complaints, we held that summary judgment was proper. *Id.* at 880.

What *Holleman* ultimately turned on, therefore, was a finding that the reason for the transfer was a permissible one—better treatment for the prisoner. No mind-reading was necessary; just a determination about the true cause of the transfer decision. Spiller can insist that she bore no ill will towards Whitfield, but that does not answer the question whether she can identify a permissible justification for her action. It is entirely possible that, at trial, Spiller might convince a jury that she permissibly relied on prison policy or was motivated by

something other than Whitfield's refusal to sign. If Spiller makes such a showing, she can undermine the causal link between Whitfield's protected conduct and her decision to discipline him. The dissent believes that she already has established this as a matter of law by pointing to her asserted belief that Whitfield violated the terms of his supervised release. But Whitfield has created a material dispute of fact on this front by showing that his disciplinary ticket was issued for disobeying a direct order (*i.e.*, for refusing to sign) and by demonstrating that Illinois law did not require his signature on the Agreement prior to release. This dispute makes summary judgment improper. We note as well that even if *Holleman* demands punitive intent, that demand is met in Whitfield's case. Spiller literally arranged for Whitfield to be punished. She had a disciplinary ticket issued, knowing that the result of that ticket would be Whitfield's transfer to disciplinary segregation as punishment for his refusal to sign. She has never suggested that Whitfield was sent to segregation for his own good.

Turning next to Spiller's alleged good faith, she insists that her commitment to enforcing her mistaken view of 730 ILCS 5/5-8A-5 provides an independent reason for Whitfield's punishment, distinct from his refusal to sign. There are two problems with this line of argument. First, Spiller's mistaken understanding of the law does not explain why Whitfield had to be punished; there is no text in 730 ILCS 5/5-8A-5 suggesting that failure to sign the Agreement is a punishable offense, nor has Spiller pointed to any Menard policy that mandated a disciplinary ticket. Second, an officer's misunderstanding of the law is not a legal defense to a First Amendment claim. Just as the officials in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), could not excuse their sign policy by explaining that they did not

realize that it was content-based, so too a retaliating officer cannot cast their legal misunderstanding as an excuse.

Spiller is no better off if we were to analogize this situation to other contexts that permit a good-faith defense. Take the Eighth Amendment, for example. For those purposes, "prison officials are permitted to rely upon 'a *reasonable interpretation* of a state statute,' even if they are ultimately mistaken." *Armato v. Grounds*, 766 F.3d 713, 721 (7th Cir. 2014) (emphasis added) (quoting *Campbell v. Peters*, 256 F.3d 695, 701 (7th Cir. 2001)). Even where this concept applies, the mistaken interpretation must be *reasonable*, based on the text of the statute and the investigation of the prison official. In *Armato*, for example, we determined that the officers' legal interpretation was supported by the state statute; we also emphasized that "[t]he record amply demonstrate[d] that IDOC officials were actively pursuing assistance from the AG's Office from the moment they discovered that [the prisoner's] release appeared contrary to state law." *Id*. By contrast, Spiller made *no* attempt to clarify her legal obligations. She failed to seek legal advice from other staff or from authorities outside the prison and even failed to inform the Warden of the situation.

If we needed more, we find it in 730 ILCS 5/5-8A-5, which states that it "does not apply to persons subject to electronic monitoring or home detention as a term or condition of … mandatory supervised release." That language exempts Whitfield from the signature requirement. Even on the assumption that there is some room for a good-faith exception in First Amendment cases, a jury could find that Spiller's interpretation and investigation were not objectively reasonable, given the way the encounter unfolded. As a result,

Spiller's defenses are not sufficient to defeat Whitfield's theory of First Amendment retaliation as a matter of law.

Finally, it is worth considering whether this case implicates *Edwards v. Balisok*, which holds that money damages under section 1983 are not available to inmates when the alleged constitutional violations "necessarily imply the invalidity of the punishment imposed." 520 U.S. 641, 648 (1997). *Balisok* was premised on the holding in *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994), which said that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been [overturned]." *Balisok* reasoned that, if an inmate wanted to challenge the procedural protections at a hearing where good-time credits were revoked, then the inmate would have to procure a ruling invalidating the hearing's outcome because the due-process allegations implicated the validity of the sentence extension. 520 U.S. at 646.

Here, the defendants never argued that Whitfield's lawsuit might be barred by *Balisok*. Any argument based on it is therefore, at a minimum, forfeited, if not waived. And it is by no means clear that *Balisok* applies to Whitfield's claims under the First Amendment. Under our narrowed view of Whitfield's theory of retaliation, he is not questioning his length of time in custody (though that may have been part of his successful claims against the Board defendants under the Due Process Clause). Instead, Whitfield is challenging only the retaliatory use of disciplinary segregation. This makes our case more like *Muhammad v. Close*, where an inmate alleged that he was charged with violations of prison rules in retaliation for

lawsuits and grievances he had filed. 540 U.S. 749, 753 (2004) (*per curiam*). The Supreme Court explained that the inmate was not trying "to expunge the misconduct charge from his prison record" or "seek[] a judgment at odds with his conviction or with the State's calculation of time to be served." *Id.* at 754–55. Therefore, as in *Muhammad*, "*Heck*'s favorable termination requirement [is] inapplicable." *Id.* at 755.

III. Eighth Amendment

Whitfield also alleges that his prolonged incarceration violated his rights under the Eighth Amendment. Prison officials may not act with deliberate indifference toward a known risk that a prisoner is being held beyond his term of incarceration without penological justification. See *Armato*, 766 F.3d at 721. Deliberate indifference requires more than negligence or even gross negligence; instead, Whitfield must show that each defendant was "subjectively aware of the risk" of Whitfield's unjustified incarceration, which amounts to a standard of criminal recklessness. See *Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

There are a few ways in which Whitfield's theories under the Eighth Amendment might fall short, but we focus on two. Gaetz's lack of involvement and lack of knowledge regarding the actions taken against Whitfield mean that the claims against him must fail as a matter of law. As to Spiller, Whitfield's evidence ultimately falters against this heightened state-of-mind requirement. Spiller testified that she believed Whitfield was required to sign the release agreement and that failure to sign was a punishable infraction. Unlike the First Amendment analysis above, these subjective and genuine beliefs *do* exculpate Spiller from liability under the Eighth Amendment. Whitfield has not proffered evidence that

would call into question Spiller's avowedly genuine beliefs. As a result, her interpretation of 730 ILCS 5/5-8A-5 and her refusal to seek further guidance may have been unreasonable but those actions were not criminally reckless. Summary judgment in Spiller's favor with respect to Whitfield's Eighth Amendment theory was therefore proper.

IV. Conclusion

For these reasons, we AFFIRM IN PART and REVERSE IN PART. We affirm the district court's grant of summary judgment with respect to all claims against Gaetz. We also affirm its judgment with respect to the Eighth Amendment theory against Spiller. We reverse on Whitfield's claim against Spiller under the First Amendment. The case is remanded for further proceedings. Each side is to bear its own costs.

BRENNAN, *Circuit Judge*, concurring in part and dissenting in part. I agree with the majority opinion's resolution of the claims against Gaetz and the Eighth Amendment claim against Spiller. But I part ways with my colleagues on the First Amendment retaliation claim against Spiller. She did not personally participate in placing Whitfield in segregation, and, even if she did, Whitfield did not engage in protected activity when he refused to sign the Agreement. So, I would affirm the district court's grant of summary judgment in Spiller's favor.

I. Background

My review of the record differs in some ways from that relayed in the majority opinion, so I recount what I understand to be the relevant factual and procedural background.

A. Whitfield's Incarceration

In 1996, following a jury trial on charges arising from a home invasion, Whitfield was convicted and sentenced in Illinois state court to 40 years' imprisonment. His prison term was later reduced to 25 years, and the Circuit Court of Cook County amended Whitfield's sentencing order to include three years of mandatory supervised release ("MSR"). Beginning in September 2008, Whitfield was incarcerated at Menard Correctional Center in Chester, Illinois.

After reviewing Whitfield's case in September 2009, the Illinois Prisoner Review Board approved him for MSR. The Board's order listed several conditions, including electronic monitoring, which the order specified "shall not be removed … unless approved by the Prisoner Review Board." The state court issued a corresponding amended sentencing order, requiring Whitfield to serve a three-year term of MSR. Following these orders Whitfield was scheduled to be

released on MSR, and he was approved for placement at a host site in Chicago known as Henry House.

Before release on MSR, inmates at Menard were presented several documents, including the Agreement. That document requires prisoners moving to MSR to acknowledge they "will be participating in the Electronic Detention Program where all movement will be monitored through the use of electronic detention equipment." The Agreement also lists several other terms and conditions, such as prohibiting access to computers and the internet, which it expressly states apply only to sex offenders.

The day Whitfield was scheduled for release on MSR, January 7, 2010, he met with prison counselors to sign paperwork for his release. When presented with the Agreement, Whitfield told counselors that signing the Agreement was not required for his release on MSR. Whitfield said, "according to the law, [he] was not required to sign that document and that [he] wasn't going to sign it." He believed that prison officials were "trying to set [him] up" and get him sent back to prison by requiring him to sign.

Whitfield turned out to be correct that he was not required to sign the Agreement, but not for the reasons he asserted. He was lawfully subject to an electronic-monitoring requirement, but his consent was not required. *See* 730 ILL. COMP. STAT. ANN. 5/5-8A-5(D) (2000) (amended 2017) (specifying that consent is not required for "persons subject to Electronic Home Monitoring as a term or condition of … mandatory supervised release").

In this appeal Whitfield's arguments primarily target Spiller, the clinical services supervisor at Menard. Spiller met

with Whitfield on January 7 and informed him he was required to sign the Agreement. Though she did not recall precisely what she said to Whitfield (having worked for IDOC in numerous positions over 24 years, and undoubtedly with countless inmates), she testified she would have told him that electronic monitoring was required during his MSR term. She also testified she would have told Whitfield that not signing the Agreement would be considered a violation of his MSR. This would result, according to Spiller, in Whitfield getting a disciplinary ticket and being sent to segregation. Whitfield says he asked Spiller to provide the specific legal basis for requiring him to sign the Agreement, but she responded she did not know.

Whitfield was not released on MSR that day. Instead, Vicki Howie, a clinical services counselor, issued Whitfield a disciplinary ticket for disobeying a direct order. In the ticket Howie specified that she tried to explain the Agreement to Whitfield, but he responded he did not have to sign it. Howie replied that if Whitfield did not sign the Agreement, he would not be released on MSR and instead he would be given the ticket and sent to segregation. Howie did not persuade Whitfield, who continued to maintain he did not have to sign. Howie recommended temporary confinement as punishment for Whitfield's offense.

Spiller did not sign Whitfield's disciplinary ticket, which does not reference her. Spiller testified that she "would have" directed a staff member to write a disciplinary ticket after Whitfield persisted in his refusal to sign the Agreement. But she also testified that she had no role in deciding which inmates at Menard would be held in segregation and for how long. The shift commander's office, or security staff, initially

made those decisions. The Adjustment Committee later held a hearing and meted out the discipline.

Four days later, on January 11, Whitfield submitted a grievance regarding his continued detention at Menard. He wrote that there was "no clearly established legal authority which authorizes an IDOC official to detain an inmate in prison, past his/her release date, because he/she refuses to sign a document, on the day of his/her release, agreeing to be placed on electronic detention." According to his grievance, Whitfield believed electronic monitoring was required only for inmates who had been convicted of certain offenses against children, such as sex offenses. The next day Spiller denied Whitfield's January 11 grievance. In the denial Spiller wrote that Whitfield's "parole term was violated in accordance with IDOC directions. [Whitfield] was afforded 4 opportunities to sign his MSR agreement and refused to do so."

On January 12, the Adjustment Committee held a hearing on Whitfield's disciplinary ticket. It found that Whitfield disobeyed a direct order and assigned him to segregation for three months. The Board then held a hearing to consider whether to revoke Whitfield's MSR on February 24. Whitfield had signed the Agreement by then, so his MSR term was kept in place. But the Board declared Whitfield an MSR violator. The Board held another hearing on September 15. This time, it found that Whitfield's refusal to sign the Agreement violated the conditions of his MSR, so it was revoked. Whitfield was discharged from IDOC custody on July 7, 2011, 18 months after his originally scheduled release date. He never served an MSR term.

B. Procedural History

In July 2013, Whitfield sued IDOC, the Board, and various individuals under 42 U.S.C. § 1983, alleging numerous constitutional violations. Following discovery, Whitfield dismissed his earlier claims against IDOC and the Board but alleged violations of his rights under the First, Eighth, and Fourteenth Amendments by several individual defendants, including Spiller, then-warden Gaetz, and certain Board members.

The defendants moved for summary judgment. The district court found insufficient evidence of personal involvement of the individual defendants not on the Board (including Gaetz and Spiller) and granted them summary judgment. But the court denied the motion as to the three Board members, and Whitfield's claims against them proceeded to trial. A jury found for the Board members on the First Amendment retaliation claims and for Whitfield on his Eighth Amendment deliberate-indifference claims. The jury awarded Whitfield $50,000 in damages, and judgment was entered for him in that amount. Whitfield's remaining claims were dismissed with prejudice.

The Board-member defendants unsuccessfully sought to vacate the judgment against them in the district court. They appealed, and Whitfield renewed a notice of appeal he had filed earlier from the district court's grant of summary judgment to the non-Board-member defendants, again including Gaetz and Spiller. Our court severed the appeals. The Board-member defendants then settled with Whitfield and voluntarily dismissed their appeal. So, before us now is Whitfield's appeal from the district court's grant of summary judgment to only two of the original defendants—non-Board-members Gaetz and Spiller.

After hearing oral argument from the parties on January 5, 2022, we asked for supplemental briefing on the role of a prisoner's false speech and a defendant's good faith in a First Amendment retaliation claim.

II. First Amendment Claim

Whitfield challenges the grant of summary judgment to Spiller on his First Amendment retaliation claim. For such a claim to succeed, a plaintiff must first make out a prima facie case, which requires him to show: "(1) he engaged in protected activity; (2) he suffered a deprivation likely to deter future protected activity; and (3) his protected activity was a motivating factor in the defendants' decision to retaliate." *Daugherty v. Page*, 906 F.3d 606, 610 (7th Cir. 2018) (citing *Perez v. Fenoglio*, 792 F.3d 768, 783 (7th Cir. 2015)). These three elements apply regardless of whether the plaintiff is a prisoner, a public employee, or any other individual, though "the specific contours of each element can vary depending on the context." *Douglas v. Reeves*, 964 F.3d 643, 646 (7th Cir. 2020). If a prima facie case is made, a burden-shifting framework applies, *Kidwell v. Eisenhauer*, 679 F.3d 957, 965 (7th Cir. 2012), which I detail later.

Here, the parties dispute the first element and the third element. I first address whether a reasonable jury could find that Spiller was personally involved in placing Whitfield in segregation. Then, I examine the first element of a First Amendment retaliation claim, the scope of the protected activity, and the third element, whether there was sufficient evidence that Spiller acted with a retaliatory motive.

A. Spiller's Personal Involvement

At issue is whether Spiller personally participated in placing Whitfield in segregation for the six days from when Howie issued Whitfield a disciplinary ticket to when the Adjustment Committee held a hearing on that ticket.[1] In my view, no reasonable jury could find on this record that Spiller was personally involved in Whitfield's placement in segregation.

To hold an official liable under § 1983, the official must have had personal involvement in the alleged deprivation of the plaintiff's constitutional rights. *Williams v. Shah*, 927 F.3d 476, 482 (7th Cir. 2019). "Prison officials may satisfy the personal responsibility requirement of section 1983 if the conduct causing the constitutional deprivation occurs at the official's direction or with his or her knowledge and consent." *Id.* (citing *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995)).

Crucial to Whitfield's retaliation claim against Spiller is his assertion that when she instructed Howie to write a disciplinary ticket for his refusal to sign the Agreement, Spiller set in motion a chain of events that resulted in his placement in segregation. On this point Whitfield relies heavily on Spiller's deposition testimony. Per Spiller, she likely "would have" informed Whitfield "that he would get a ticket and be sent to segregation if he didn't sign his MSR paperwork," and she "would" have directed a staff member to write a disciplinary

[1] I agree with my colleagues that six days of additional incarceration is not meaningless time. It would qualify as a cognizable deprivation under the First Amendment. I disagree, though, that the six-day period can be sufficiently connected to any allegedly retaliatory actions by Spiller.

ticket after Whitfield persisted in his refusal to sign the Agreement.

These statements do not bear out that Spiller was personally involved in sending Whitfield to segregation. Viewing the facts in the light most favorable to Whitfield, Spiller did direct Howie to write a disciplinary ticket. Even so, Spiller's unrebutted testimony provides that she had nothing to do with Whitfield's placement in segregation. Howie, not Spiller, recommended temporary confinement when Howie issued the ticket. And according to Spiller's testimony, the shift commander's office or security staff decided whether an inmate who had received a disciplinary ticket should immediately be sent to segregation. Spiller played no part in that decision.[2] She also had no role in the Adjustment Committee's later decision to assign Whitfield to segregation for an additional three months after it held a hearing on his disciplinary ticket.

Viewing the facts in the light most favorable to Whitfield, we assume Spiller told him that if he did not sign the Agreement he would go to segregation. That predictive statement was a forecast of what would occur, not a description or a threat of an action she would take. Whitfield and my colleagues in the majority do not account for this important distinction. Whitfield implies that a prison official's statement about a punishment likely to be imposed on an inmate is the same as the official pronouncing that she will carry out that punishment. In contrast, though, prison administrative

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[2] The majority opinion states Spiller "still had the option of returning [Whitfield] to [the] general population." Of course, that would not be the case if Spiller played no role in deciding where an inmate is housed after receiving a disciplinary ticket.

systems like at Menard are entitled to and do separate the responsibilities of each employee. *See Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009). There is a critical distinction between a prison staff member predicting consequences likely to be imposed on a prisoner and a staff member's declaration of intent to personally impose those consequences.[3]

Even though Spiller's role at Menard did not involve imposing specific punishments, Whitfield asks us to infer from Spiller's testimony that she could override the established decision-making channels and impose segregation on Whitfield. But Spiller testified she "had no role" in determining which inmates would be held in segregation and for how long. Because the inference Whitfield asks us to make is not grounded in the record, it is not reasonable, and I decline to draw it. *See MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 994 F.3d 869, 876 (7th Cir. 2021) ("An inference is not reasonable if it is directly contradicted by direct evidence provided at the summary judgment stage, nor is a 'conceivable' inference necessarily reasonable at summary judgment.").

B. Scope of Protected Activity

In addition to Spiller's lack of personal involvement, Whitfield fails, in my view, to establish a prima facie case of First Amendment retaliation. To do so, Whitfield must first show that "he engaged in protected activity." *Daugherty*, 906 F.3d at 610. As in any First Amendment retaliation case, the question of what portion (if any) of Whitfield's statements and actions qualifies as protected activity is central to this dispute.

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[3] Further, it does not follow from a threatening statement, anymore than a predictive statement, that Spiller had any personal involvement in placing Whitfield in segregation.

Under the lawful orders of the Board and the Illinois court, Whitfield was subject to electronic monitoring as a condition of his release on MSR. His erroneous beliefs and resulting statements to the contrary—including that electronic monitoring could be required only for sex offenders and inmates convicted of crimes against children—are, in my judgment, distinct from his refusal to sign the Agreement.

Our court has cautioned that not everything a prisoner says or writes to a corrections employee—in other words, not all prisoner speech—is protected by the First Amendment. *See Watkins v. Kasper*, 599 F.3d 791, 797–98 (7th Cir. 2010); *cf. also Zimmerman v. Bornick*, 25 F.4th 491, 493 (7th Cir. 2022) (citing *Watkins* and noting the continued tension in this court's case law applying the First Amendment to prisoners' claims). Prison walls do not "form a barrier separating prison inmates from the protections of the Constitution." *Bridges v. Gilbert*, 557 F.3d 541, 548 (7th Cir. 2009) (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)). Yet "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Id.* (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

The Supreme Court in *Turner* developed a test to assess whether a prison regulation validly, or constitutionally, "impinges on prisoners' constitutional rights." *Watkins*, 599 F.3d at 794 (citing *Turner*, 482 U.S. at 89). A prison regulation "is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. In "determining the reasonableness of the regulation at issue," a court should consider: (1) whether there is a rational connection between the regulation and a valid and neutral government interest; (2) whether

there are alternative means of exercising the constitutional right at issue, (3) the impact that accommodation of the asserted right will have on guards, inmates, and the allocation of prison resources; and (4) whether the regulation is an exaggerated response to prison concerns. *Id.* at 89–90. The standard articulated in *Turner* governs "whether a prisoner's speech is protected" in a First Amendment retaliation claim. *Watkins*, 599 F.3d at 794.

So, to determine whether Whitfield's speech is protected, we "examine whether [he] engaged in speech in a manner consistent with legitimate penological interests." *Id.* at 794–95 (citing *Bridges*, 557 F.3d at 551). "Such legitimate penological interests might include crime deterrence, prisoner rehabilitation, and protecting the safety of prison guards and inmates." *Van den Bosch v. Raemisch*, 658 F.3d 778, 785 (7th Cir. 2011). When prisoner speech is inconsistent with legitimate penological interests, prison officials have "broad discretion" to regulate it. *Watkins*, 599 F.3d at 796; *see also Kervin v. Barnes*, 787 F.3d 833, 835 (7th Cir. 2015) (stating that any "speech that violates prison discipline" is not protected).

The Supreme Court has repeatedly upheld prison regulations that sharply curtail the speech rights of inmates. *See Beard v. Banks*, 548 U.S. 521, 525–26, 533 (2006) (upholding regulations barring certain prisoners from accessing *any* newspapers, magazines, or personal photographs); *Thornburgh v. Abbott*, 490 U.S. 401, 412–16 (1989) (upholding regulations authorizing prison officials to reject incoming publications found to be detrimental to institutional security); *Turner*, 482 U.S. at 91 (upholding a regulation barring inmate-to-inmate correspondence). On these occasions, the Court has forthrightly observed that analogous regulations would be invalid

under the First Amendment if they were promulgated outside the prison context. *Beard*, 548 U.S. at 528; *Thornburgh*, 490 U.S. at 407.

My colleagues in the majority focus on Whitfield's refusal to sign the Agreement and conclude that such conduct is protected by the First Amendment. By refusing to sign the Agreement, Whitfield communicated the message that he did not need to consent to the statutory electronic-monitoring requirement. So, his conduct is arguably expressive. But to me, Whitfield's refusal to sign the Agreement was inconsistent with Menard's legitimate penological objectives and therefore falls outside the First Amendment's protection.

As Spiller argues, requiring Whitfield to sign the Agreement "was consistent with Menard's legitimate penological interest in enforcing the statutory electronic monitoring requirement." It served to confirm Whitfield's understanding of—and therefore compliance with—the rules, regulations, and conditions of electronic monitoring prior to his release on MSR. IDOC has a legitimate interest in deterring inmates from committing the crime of violating the terms of their MSRs, which Whitfield's refusal to sign negatively impacted. *See Watkins*, 599 F.3d at 797; *Van den Bosch*, 658 F.3d at 785 (listing crime deterrence as a legitimate penological objective); 730 ILL. COMP. STAT. ANN. 5/5-8A-4.1 (2009) (amended 2021) (enumerating the knowing violation of a condition of the electronic-monitoring program as a felony). Such a requirement is not an exacerbated response to prison concerns. *See Turner*, 482 U.S. at 89–90. Because Whitfield's refusal to sign the Agreement was inconsistent with his "status as a prisoner or with the legitimate penological objectives of the corrections

system," *id.* at 95 (citations omitted), it is not protected by the First Amendment.[4]

The majority opinion agrees that Spiller provided a reason why Menard has an interest in requiring a signature from prisoners before release. But it faults Spiller for not explaining what penological interest is served by "*punishing* Whitfield's refusal to sign," "forcing an inmate to sign release paperwork when he has not received a complete copy of the document," or forbidding an inmate from "clarifying whether a release document properly applies to him."

Whether Menard had a penological interest in punishing Whitfield for his refusal to sign the Agreement does not affect the protected-activity analysis. In *Watkins*, an inmate argued that a prison employee retaliated against him for criticizing library policies by filing conduct reports, disposing of his personal materials, and denying him library access. 599 F.3d at 794. Watkins's criticisms were inconsistent with the prison's "legitimate interests in discipline and library administration" and therefore unprotected under *Turner*, dooming his First Amendment retaliation claim. *Id.* at 797. This court acknowledged that "not all of [the employee]'s alleged responses to Watkins's … speech were rationally related to the legitimate penological interests … identified." *Id.* Still, "the particular nature of the adverse actions cited by Watkins [did] not affect [this court's] analysis of his retaliation claim." *Id.*

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[4] "[T]he burden of persuasion is on the prisoner to disprove the validity of a regulation," although "defendants must still articulate their legitimate governmental interest." *Van den Bosch*, 658 F.3d at 786 (citing *Turner*, 482 U.S. at 89). Here, Spiller has articulated a legitimate penological interest for requiring Whitfield to sign the Agreement.

Likewise, the nature of Whitfield's adverse action—placement in segregation—does not affect our analysis of whether he engaged in protected activity. To determine whether Whitfield's speech is protected, we "examine whether [he] engaged in speech in a manner consistent with legitimate penological interests." *Id.* at 794–95. Whitfield's refusal to sign the Agreement was not consistent with Menard's legitimate penological interests in enforcing the electronic-monitoring requirement. So, under *Turner*, his speech is unprotected, and his First Amendment retaliation claim fails. It matters not whether his subsequent placement in segregation was rationally related to the legitimate penological interests identified here.

Citing Whitfield's contention that he was presented with only the Agreement's signature page, as well as the fact that Whitfield was not serving a sentence for a sex offense, the majority opinion concludes that on January 7, 2010, he reasonably thought the Agreement was the wrong form. Though we view the facts in the light most favorable to Whitfield, I cannot agree that the record together with reasonable inferences supports this conclusion.

Whitfield's opening brief on appeal asserts he received only the Agreement's signature page, but that is not evidence. At his deposition Whitfield did not testify that he was presented with only the signature page on January 7. When asked to explain why he would not sign the Agreement, he said, "I bec[a]me familiar with the statute governing electronic monitoring and when I read the statute [it] stated that I was not required to sign – or people who were released on MSR were not required to agree to the conditions of MSR – I mean of electronic monitoring." Nor on January 7 (according

to his testimony) did he discuss his concern about any requirements listed applying only to sex offenders. On that date, again according to Whitfield's testimony, his position was simply that "according to the law, I was not required to sign that document … I wasn't going to sign it."

Whitfield's statements purporting to explain *why* he was not lawfully subject to an electronic-monitoring requirement may very well be protected activity. As the majority opinion notes, Whitfield communicated these beliefs "through appropriate grievance channels, without hostility and without insubordination."

Yet, the false nature of Whitfield's statements may be relevant to whether his statements are consistent with Menard's penological interests. *See Watkins*, 599 F.3d at 799 (citing *Smith v. Mosley*, 532 F.3d 1270, 1277 (11th Cir. 2008)) (emphasis added) (noting that "speech found to be *false* and *insubordinate* under a valid prison regulation" is unprotected). Whitfield claimed the Board had no authority to impose the electronic-monitoring condition, which the law provided it did. In doing so, he challenged the authority of Spiller and other corrections employees to carry out the lawful orders of the Board and the state court. From these statements it is highly likely that Whitfield would not have complied with the conditions of electronic monitoring while on MSR. And his declarations, if passed on to other inmates, could have negatively impacted prison discipline. *See Watkins*, 599 F.3d at 799; *Smith*, 532 F.3d at 1279; *cf. also Kervin*, 787 F.3d at 835. This court need not resolve the extent to which Whitfield's false and potentially insubordinate statements are protected activity. It is enough to conclude that the precise conduct at issue—Whitfield's refusal to sign the Agreement—is not.

C. Motivating Factor

The third element for a prima facie case, contested here, requires that a plaintiff demonstrate that "his protected activity was a motivating factor in the defendants' decision to retaliate." *Daugherty*, 906 F.3d at 610. The "motivating factor" requirement demands a causal link between a plaintiff's protected conduct and a defendant's allegedly retaliatory action. *Manuel v. Nalley*, 966 F.3d 678, 680 (7th Cir. 2020); *Kidwell*, 679 F.3d at 964–65. Even if one concedes that Whitfield engaged in protected activity by expressing his mistaken beliefs that he was not subject to electronic monitoring, those beliefs did not motivate Spiller's alleged decision to direct Howie to write the disciplinary ticket.

A motivating factor is "a consideration present to [the defendant's] mind that favors, that pushes [him or her] toward, the action." *Hasan v. U.S. Dep't of Labor*, 400 F.3d 1001, 1006 (7th Cir. 2005). It "is a sufficient condition, but never a necessary one," meaning "if it is present, something else is bound to happen." *Greene v. Doruff*, 660 F.3d 975, 978 (7th Cir. 2011). To be a motivating factor, then, the plaintiff's protected activity must invariably produce the allegedly retaliatory action by the defendant. *See Browning-Ferris Indus. of Ill., Inc. v. Ter Maat*, 195 F.3d 953, 958 (7th Cir. 1999) ("If A is a sufficient condition of B, this means that, if A occurs, B will occur.").

Whitfield's core allegation is that when Spiller allegedly directed Howie to write the disciplinary ticket, she set in motion a chain of events resulting in his continued incarceration. But critically, nothing in the record indicates that Spiller directed Howie to issue the disciplinary ticket because of Whitfield's beliefs about the electronic-monitoring requirement, rather than his refusal to sign a release document.

I read our court's law as concluding that a defendant's intent, or state of mind, may be relevant to adjudicating causation. A plaintiff claiming retaliation must show that a defendant acted with a "retaliatory motive." *Manuel*, 966 F.3d at 681; *Thomas v. Anderson*, 912 F.3d 971, 975–76 (7th Cir. 2018); *Daugherty*, 906 F.3d at 610. "Retaliation" is defined as "[t]he act of doing someone harm in return for actual or perceived injuries or wrongs; an instance of reprisal, requital, or revenge. *See* RETALIATION, BLACK'S LAW DICTIONARY (11th Ed. 2019). Indeed, in the context of a First Amendment retaliation claim, we have used "revenge" to characterize the nature of a defendant's required state of mind. *Thomas*, 912 F.3d at 976; *Holleman v. Zatecky*, 951 F.3d 873, 879 (7th Cir. 2020). If a prisoner-plaintiff fails to identify evidence showing that the defendant's conduct "was motivated by a desire to chill [the prisoner-plaintiff's] speech or otherwise dissuade him from complaining about … his confinement," there is no motivating factor, and the defendant is entitled to summary judgment. *Daugherty*, 906 F.3d at 610. Nothing in the record suggests Spiller sought to chill Whitfield's speech about whether he was subject to electronic monitoring.

Rather, there was "[ano]ther, non-retaliatory motive" for Spiller directing the disciplinary ticket to be written. *Manuel*, 966 F.3d at 681. Spiller's proffered motive, which Whitfield fails to effectively contest, was that she believed Whitfield had violated the terms of his MSR by refusing to consent to the electronic-monitoring requirement. According to Spiller, inmates who refused "to sign MSR orders" and "paperwork" violated their MSR. And no evidence shows that prisoners who withheld their signatures from documents required for release on MSR were subsequently released. *Cf. Casanova v. Am. Airlines, Inc.*, 616 F.3d 695, 697–98 (7th Cir. 2010) (noting

the plaintiff had not "identified any other worker who behaved in a similar fashion and … was *not* fired"). So, Spiller believed that Whitfield, in refusing to sign his paperwork, failed to satisfy the requirements necessary for his release and was consequently subject to discipline.[5] She did not retaliate against Whitfield due to his beliefs—whether true or false—about whether he was lawfully subject to electronic monitoring. Instead, she believed Whitfield had violated the terms of his MSR.

Even if Whitfield engaged in protected activity when stating his reasons for not signing the form, those reasons did not form a "sufficient condition" for Spiller's alleged decision to direct Howie to write the disciplinary ticket. So, there was no motivating factor. *See Greene*, 660 F.3d at 978; *Casanova*, 616 F.3d at 697–98.

Although I would resolve this case on Whitfield's failure to establish a prima facie case of First Amendment retaliation, I disagree with the majority opinion's discussion of Spiller's "clean heart" defense. If Whitfield established a prima facie case, the burden shifts to Spiller to show that the allegedly retaliatory act—placing Whitfield in segregation—"would have occurred regardless of the protected activity." *Manuel*, 966 F.3d at 680; *see also Kidwell*, 679 F.3d at 965. If Spiller successfully rebuts the causal inference, the burden shifts back to Whitfield to show that Spiller's given reason was pretextual, *Manuel*, 966 F.3d at 680, and that "the real reason was

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[5] If Spiller was motivated to retaliate against Whitfield because of his refusal to sign, Whitfield cannot succeed in his First Amendment retaliation claim because his refusal to sign, as discussed, is not protected activity under the First Amendment.

retaliatory animus," *Thayer v. Chiczewski*, 705 F.3d 237, 252 (7th Cir. 2012). *See also McGreal v. Vill. of Orland Park*, 850 F.3d 308, 313 (7th Cir. 2017). So, while the focus remains on causation throughout this burden-shifting framework, inquiries into the defendant's subjective "motive" or "retaliatory animus" remain relevant, as they may shed light on causation.

As discussed, Whitfield failed to show that any protected activity in which he engaged motivated Spiller. For similar and overlapping reasons, no reasonable jury could find that the reasons Spiller gave for her actions—her belief that Whitfield's continued refusal to sign the Agreement and agree to electronic monitoring made him ineligible for release—were pretextual. The record does not undermine the sincerity of her belief that Whitfield became legally ineligible for release on MSR as long as he refused to sign the Agreement. Whitfield has not cast doubt on that explanation nor offered any evidence to show that it was "anything but true." *McGreal*, 850 F.3d at 314. When a plaintiff fails to show that a defendant's proffered reason is pretextual, we have affirmed the district court's grant of summary judgment. *See Holleman,* 951 F.3d at 879–80 (affirming a grant of summary judgment to the defendant when the plaintiff failed to show the defendants' proffered motive was pretextual); *see also Thayer*, 705 F.3d at 252–53 (affirming a grant of summary judgment to the defendants when the record was "void of evidence showing that [the defendants] acted with retaliatory animus"); *Wallscetti v. Fox*, 258 F.3d 662, 666–69 (7th Cir. 2001) (affirming a grant of summary judgment to the defendant when the plaintiff failed to show the defendants "harbored a retaliatory intent"). Whitfield has not shown a genuine dispute of material fact as to pretext. Spiller is thus entitled to summary judgment. *Id.*

* * *

For these reasons, I would uphold the district court's grant of summary judgment to Spiller on Whitfield's First Amendment retaliation claim. Spiller was not personally involved in placing Whitfield in segregation, and Whitfield did not engage in protected activity when he refused to sign the Agreement. To the extent that Whitfield engaged in protected activity when he expressed his reasons for not signing the Agreement, those reasons did not motivate Spiller's actions. So, Whitfield's First Amendment retaliation claim fails.