UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID BOURKE, Plaintiff, v. DENIS McDONOUGH, Secretary, U.S. Department of Veterans Affairs, Defendant.	)	No. 22 C 3164 Judge Kennelly

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Introduction

At issue in this case is whether a hospital, during the height of the COVID-19 pandemic, was required to provide the plaintiff, David Bourke, the parking space of his choice after his usual entrance was closed due to COVID-19 screening protocols. Bourke alleges that the VA's Edward Hines, Jr. Hospital (VA or Hines) violated the Rehabilitation Act by failing to re-accommodate him with a suitable parking space when it closed certain hospital entrances due to COVID. To the contrary, when Bourke notified Hines staff of the access problem, the VA quickly offered Bourke a reasonable accommodation, albeit not the accommodation of his choosing, and he regained access to his original accommodation about six weeks later. Because the evidence shows that the VA offered Bourke an accommodation that was reasonable under the circumstances (while allowing Bourke to revert to his original accommodation as the shifting landscape of the pandemic allowed), the VA is entitled to summary judgment. Further, in rejecting the VA's offer of a reasonable accommodation, Bourke caused the breakdown of the interactive process and cut off his access to relief under the Rehabilitation Act.

Facts

I. Background

Bourke was hired by Hines as a transportation clerk in 2009. Defendant's Local Rule 56.1 Statement of Material Facts (DSMF) ¶ 1. Bourke is also a veteran of the U.S. Navy. *Id.* ¶ 2. At some point in 2018, Bourke obtained a personally owned, powered mobility device (scooter) through his VA healthcare provider. *Id.* ¶ 3. By June of 2019, Bourke was employed as an advanced medical support assistant in Patient Administration Services (PAS) and was working in the ambulatory surgery unit (ASU). *Id.* ¶ 4. During the relevant time, Angela Graham was Bourke's first-line PAS supervisor and Christopher Wirtjes was the chief of PAS. *Id.* ¶ 5.

In August of 2019, Bourke received a reasonable-accommodation reserved parking space near the ASU, at the entrance to the outpatient pharmacy at the rear of Building 200. *Id.* ¶¶ 6, 13. Bourke had requested the accommodation due to claimed limitations on walking. *Id.* ¶ 7. At around the same time, Bourke was also awaiting the installation of a lift in his car, requested as a veteran's benefit, so that he could transport his scooter from his home to Hines using his vehicle. *Id.* ¶¶ 14-15. At the time, he could not dismantle and load the heaviest pieces of his scooter into his vehicle (some of which weighed about 40 pounds), and so he obtained permission from the clinical manager of the ASU to leave his scooter to charge after hours in the ASU space. *Id.* ¶¶ 14, 16. Bourke's routine consisted of parking his vehicle in his reserved parking space, entering at the rear of Building 200 (near the outpatient pharmacy), taking an elevator down the basement, and retrieving his scooter from a corner near his workstation, where he would leave it to charge overnight. *Id.* ¶ 18.

II. Hines Implements COVID-19 Screening Procedures.

This arrangement worked well for Bourke until his (and the medical center's) routine was disrupted by the COVID-19 pandemic. In March 2020, Hines staff, like the rest of the world, observed COVID-19 spread across the globe and overrun local hospitals. *Id.* ¶ 19. In mid-March 2020, a time with limited testing and prior to any vaccines, the VA instructed all VA facilities, including Hines, to implement screening procedures to help protect veteran patients and employees. *Id.* ¶¶ 19-20. Over the course of a weekend, Hines leadership had to determine how to implement the VA-mandated screening procedures over their vast, 147-acre medical campus. *Id.* ¶ 21.

Hines leveraged their incident command structure to make decisions related to operational changes at Hines related COVID-19 generally, and to screening procedures specifically. *Id.* ¶ 22. The incident command structure at Hines consisted of executive leadership, clinical and administrative leadership, and subject matter experts. *Id.* As part of implementing screening procedures, the incident command understood that they would have to close most entrances due to limitations on resources. *Id.* ¶¶ 23-24. Hines incident command determined where to stand up active screening locations based on limiting factors, including the number of staff available to screen patients and staff, the limited quantity of thermal handheld thermometers and personal protective equipment available, proximity to private rooms for secondary screening, and geographic disbursement of the available entrances. *Id.* ¶ 23. To minimize the inconvenience to veterans and staff, the incident command identified high-volume entrances to try to maintain access and minimize internal barriers. *Id.* ¶¶ 23-24.

While the incident command anticipated that the entrance closures would impact some employees with reasonable accommodations, they expected that employees would work with their

direct supervisors and the local reasonable accommodations coordinator (LRAC) to re-engage the interactive process as necessary. *Id.* ¶ 25. And so, on March 12, 2020, Hine leadership notified employees that starting on March 16, 2020, all employees would "be required to enter through designated entry points" for screening (providing a list of entrances that would be open and staffed for screening). *Id.* ¶ 26.

As it turned out, Bourke's usual entrance, at the rear of Building 200, was not one of the designated entrances. *Id.* ¶ 27. But from March 16, 2020, until May 14, 2020, Bourke continued to access his workplace and scooter via the undesignated entrance at the rear of Building 200 without first being screened. *Id.* ¶ 28. After parking in his usual reserved parking space near the rear entrance to Building 200, Bourke would enter the building, access his scooter, and then use his scooter to go through the facility to the main or ER entrances to be screened. *Id.* ¶ 29.

III. Hines Offers Bourke a Temporary Reasonable Accommodation, Which He Rejects.

On May 14, 2020, Hines locked the door at the rear entrance to Building 200, and the VA police informed Bourke that he could no longer access an entrance without screening. *Id.* ¶ 30. That same day, Bourke emailed VA Police Deputy Chief Eric Ousley and LRAC Shawn Scheirer to have a new, temporary parking space assigned to him "until the back of Bldg. 200 is opened up again." *Id.* ¶ 31. Bourke specifically requested a new reserved parking space and an unidentified locked room or closet in or near the ER for storing his scooter (with a key to be issued to him). *Id.* ¶ 32. Bourke also requested that he be allowed to maintain his original reasonable-accommodation parking space near the rear entrance to Building 200. *Id.* ¶ 33.

Graham and Scheirer re-engaged Bourke in the interactive process to identify a new, temporary reasonable accommodation. *Id.* ¶ 34. Hines staff assured Bourke that he would retain his parking space near the rear entrance to Building 200. *Id.* ¶ 35. As part of the interactive

process, Hines considered Bourke's request that he be assigned the first handicapped parking space near the ER entrance, but while Graham was able to identify a wall in the ER waiting area with an outlet for charging, there was no secure space for Bourke to store his scooter near the ER or main entrances. *Id*. ¶¶ 36-37. Additionally, Wirtjes did not believe he could get authorization for Bourke to leave his scooter in the area of the ER because it was a "high traffic area on off tour[]" hours when Bourke would need to store his scooter there. *Id*. ¶ 38. Another complication was the fact that the parking space Bourke requested was designated as a general handicapped space. *Id*. ¶¶ 39-40.

Graham identified the entrance at Building 1, Section C (where she had been temporarily parking and storing her reasonable-accommodation scooter overnight and on weekends), as a possible temporary reasonable accommodation for Bourke. *Id*. ¶ 41. The entrance there was staffed for screening and had a secure area in the Patient Advocate Department where Bourke could store his scooter. *Id*. ¶ 42. Graham and a doctor had been storing their scooters in this space since the COVID-19 screening procedures were implemented. *Id*. ¶ 43. As opposed to the ER and main hospital entrances, there were no patients present in the area when Bourke would be storing his scooter there. *Id*. ¶ 44.

While the Patient Advocate Department space did not offer a dedicated, locked room for Bourke to store his scooter, the Patient Advocate space was outside of the public view and common areas, was near the VA Police Department, and was not a space with after-hours traffic. *Id*. Graham testified that she had left her keys in her scooter on at least one occasion and that nothing happened to it. *Id*. ¶ 45. The VA police confirmed that there was a parking space in front of Building 1, Section C available to reserve for Bourke. *Id*. ¶ 46. Additionally, Scheirer walked both options and determined that considering Bourke's claimed disability, the parking space in

front of Building 1, Section C had less walking and fewer barriers to an entrance with screening and his scooter, than either his original parking space or his preferred parking space in front of the ER. *Id.* ¶ 47. Graham also concluded that the walk from a handicapped parking space near the ER or main entrances would have been farther for Bourke than from the parking space at Building 1, Section C, a fact that Bourke has acknowledged. *Id.* ¶¶ 48-49.

As a result of these assessments, on May 18, 2020, just four days after Bourke notified Hines staff that he needed to be re-accommodated, Graham offered Bourke a temporary reasonable-accommodation parking space in front of Building 1, Section C. *Id.* ¶ 50. On June 3, 2020, after meeting with Graham, Bourke declined the offered temporary accommodation "for safety concerns for the secure storage of my equipment." *Id.* ¶ 51. After declining the offered accommodation, Bourke parked in general handicapped parking at another building and walked much farther to his ASU workspace (and scooter). *Id.* ¶ 52. But by June 29, 2020, just over six weeks after Bourke asked to be re-accommodated, the rear entrance to Building 200, near the outpatient pharmacy, was staffed for COVID-19 screening from 5:00 am until 10:00 am, and Bourke was able to resume his original accommodation. *Id.* ¶ 53. Those doors have remained opened, and Bourke was able to access this entrance from his original reasonable-accommodation parking space until he changed positions in late 2022 or early 2023. *Id.* ¶ 54.

IV. Bourke Files an EEO Complaint and Lawsuit.

Coincidentally, on the same date on which Hines staffed and reopened the entrance at the rear of Building 200 (returning Bourke to his original spot), Bourke filed a formal complaint of employment discrimination, alleging a violation of his reasonable-accommodation parking space (along with an claim that is not at issue in the current litigation, related to his veteran's benefit request for a lift to be installed in his car). *Id.* ¶ 55. The claim accepted for investigation was

whether Bourke "was discriminated against based on Disability, when . . . his requests for Reasonable Accommodations have been denied." *Id.* ¶ 56. On March 1, 2022, after a hearing before the EEOC administrative judge, the AJ concluded that the VA had offered Bourke an effective accommodation but that Bourke had ceased participating in the interactive process when he declined to accept the offer and refused to consider any alternative to his accommodation of choice. *Id.* ¶ 57. In arriving at his decision, the AJ specifically found that Bourke's concerns about security were "highly speculative." *Id.* at ¶ 58. The VA's EEO office adopted the AJ's decision in a final agency decision issued on March 21, 2022. *Id.* ¶ 59.

This lawsuit followed when, on June 15, 2022, Bourke filed his complaint alleging violation of the Rehabilitation Act. *Id.* ¶ 60. Bourke alleges that the VA failed to accommodate his disability when it "rescinded" his reasonable-accommodation parking space as a result of COVID-19-related door closures. *Id.* ¶ 61.[1] The parties conducted discovery, and Bourke testified at his deposition that he was able to park in his original reasonable-accommodation parking space behind Building 200 and to access his scooter via the entrance at the rear of the building through May 14, 2020. *Id.* ¶ 63. And while Bourke claimed that Hines "really didn't interact" with him to find a new, temporary reasonable-accommodation parking space, he also testified to having meetings and conversations with his supervisor and others regarding possible temporary accommodations, including at Building 1, Section C and the ER entrance. *Id.* ¶ 64. Further, Bourke testified that he received explanations from Hines staff as to why his preferred accommodation at the ER entrance was not feasible or reasonable, including that the VA police

[1] While Bourke's administrative EEO complain included a claim regarding his request for a lift to be installed in his car, his current lawsuit does not claim that any failure or delay relating to the installation of the lift was a violation of the Rehabilitation Act. *Id.* ¶ 62.

would be unable to keep his requested parking space (the first handicapped space in front of the ER) clear. *Id*. ¶¶ 65-66.

Regarding his stated concerns about the security of his scooter, Bourke provided hearsay testimony that another employee's scooter charger was stolen from a different department (not the Patient Advocate space) and that he had heard (but "couldn't confirm") that someone's scooter was stolen from a hallway. *Id*.¶ 67. Bourke neither requested nor produced any documents (nor did he disclose any witnesses who could offer first-hand testimony) relating to the alleged thefts. *Id*.¶ 68. Additionally, during his deposition, Bourke admitted that he rejected the offered accommodation, though he claimed the reason was because his scooter was smaller than Graham's and easier to steal. *Id*. ¶ 69. He also acknowledged that he regained access to the entrance near his original reasonable-accommodation parking space after that entrance was staffed for screening on or around June 29, 2020. *Id*. ¶ 70. While Bourke testified that he "thought" it was longer than that, he did not testify that he regained access to the rear entrance at Building 200 on any other date. *Id*. ¶71.

Argument

I. Legal Standards

Summary judgment is appropriate when the evidence of record shows there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A genuine issue of fact exists only when a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must view all evidence in the light most favorable to the nonmoving party and draw all inferences in their favor. *Santiago v. Lane*, 894 F.2d 218, 221 (7th Cir. 1990).

Once the moving party has produced evidence to show that it is entitled to summary judgment, it is up to the nonmoving party to affirmatively demonstrate that a genuine issue of material fact remains for trial. *Johnson v. City of Fort Wayne*, 91 F.3d 922, 931 (7th Cir. 1996). The nonmovant must establish that such a genuine factual dispute necessitates trial with more than mere conclusions, allegations, or speculation. *Anderson*, 477 U.S. at 247-48 ("mere existence of *some* alleged factual dispute" not enough) (emphasis in original); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmovant must show more that "some metaphysical doubt as to the material facts"); *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008) (speculation cannot be used "to manufacture a genuine issue of fact").

II. The VA Did Not Discriminate Against Bourke Because of His Disability.

Bourke cannot show that that the VA discriminated against him due to his disability because the record evidence demonstrates that the VA offered Bourke an accommodation that was reasonable in light of the circumstances and that Bourke rejected that accommodation and refused to consider anything other that his preferred accommodation. To prevail on his reasonable accommodation claim, Bourke must present evidence that (1) he is a qualified individual with a disability; (2) the employer was aware of his disability; and (3) the employer failed to reasonably accommodate the disability." *Preddie v. Bartholomew Consolidated School Corp.*, 799 F.3d 806, 813 (7th Cir. 2015); *Hooper v. Proctor Health Care Inc.*, 804 F.3d 846, 852 (7th Cir. 2015).

A qualified individual is someone who, with or without a reasonable accommodation, can perform the essential functions of his position. *Hooper*, 804 F.3d at 852 (citing 42 U.S.C. § 12111(8)). As an ancillary to its obligations to accommodate an employee's disability, "an employer often engage[s] with the employee in an 'interactive process' to determine the appropriate accommodation under the circumstances." *Igasaki v. Ill. Dept. of Financial and*

Professional Regulation, 988 F.3d 948, 961 (7th Cir. 2021) (quotation marks and citation omitted). Both employer and employee must participate in the interactive process in good faith, and if an employee is not accommodated following that process, "responsibility will lie with the party that caused the breakdown." *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 805 (7th Cir. 2005).

Crucially, however, it "is the employer's prerogative to choose a reasonable accommodation; an employer is not required to provide the particular accommodation that an employee requests." *Id*. at 802 (quoting *Jay v. Intermet Wagner Inc.*, 233 F.3d 1014, 1017 (7th Cir. 2000)). And because "the interactive process is not an end in itself," an employer is not liable for a breakdown in the interactive process so long as it offered the employee an accommodation that was reasonable. *Rehling v. City of Chicago*, 207 F.3d 1009, 1015-16 (7th Cir. 2000). The same analysis of the reasonableness of an accommodation and good-faith participation in the interactive applies whether the issue is an initial or subsequent accommodation. *See Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731 (5th Cir. 1999) (applying *Beck v. Univ. of Wisc. Bd. Of Regents*, 75 F.3d 1130 (7th Cir. 1996) in determining which party was responsible for breakdown of interactive process where employee claimed that employer had withdrawn an existing accommodation).

For purposes of the present motion, the only issue is whether Bourke has evidence that the VA failed to offer a reasonable accommodation for his disability. This court should grant the VA's motion for summary judgment because there is no material issue of fact as to whether the VA offered Bourke a reasonable accommodation, which he declined.

A. The VA Offered Bourke an Accommodation That Was Reasonable in Light of the Circumstances.

The beginning of the pandemic in early-to-mid 2020 posed unprecedented challenges for hospitals and healthcare workers, and Hines was no exception. Almost overnight, Hines implemented screening procedures to help keep veterans and employees safe from COVID-19, a

daunting task for a medical campus as large as Hines. DSMF ¶ 21. Bourke was one of many employees who were called to adjust their routines to best serve the veterans seeking care at the Hines during the pandemic. But instead of adjusting to the new procedures, Bourke insisted, first, on ignoring the screening procedures designed to protect veterans and staff, and then, on rejecting anything but his one preferred accommodation, which was not then feasible.

Bourke admits that he was able to utilize his original reasonable accommodation to access his workspace and scooter until May 14, 2020, even though he was not authorized to do so. It was only on May 14, 2020, when he could no longer enter through his usual entrance that Bourke asked to be temporarily re-accommodated. As a result, the re-accommodation process began on May 14, 2020, when Bourke notified his supervisor and the LRAC that he needed a new, temporary parking space. *Cloe v. City of Indianapolis*, 712 F.3d 1171, 1178 (7th Cir. 2013), *overruled on other grounds by Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016) (finding accommodation process begins when the employee specifically requests an accommodation).

Once Bourke requested to be re-accommodated, the undisputed evidence shows that the VA acted swiftly, and four days later offered Bourke a temporary reasonable-accommodation parking space in front of the entrance to Building 1, Section C, where a screener was stationed, and where there was access to an area where Bourke could store his scooter. But Bourke preferred a different accommodation. He preferred a parking space in front of the public-facing entrance to the ER. Not only was that parking space already designated as a general handicapped space (for patients and visitors), but it was a longer walk (with more barriers) to the entrance and screening. And Bourke preferred that the VA put aside space in the very busy ER for storing his scooter, despite that space being open to the public 24 hours a day. As PAS Chief Wirtjes testified, "the

emergency room was the heart of the intake of all our COVID patients" and accommodating Bourke there "was just not reasonable for the health and safety" of the patients. DSMF ¶ 38.

The accommodation at Building 1, Section C was reasonable on its face because it was the option that offered the least amount of walking; it afforded space for securely storing Bourke's scooter; and there was an undesignated parking space available to be reserved. Graham and Scheirer were rightly focused on finding a temporary accommodation that minimized the amount Bourke would have to walk, and Bourke's own testimony acknowledges that the offered accommodation would have involved less walking than the option he preferred. DSMF ¶ 49. Given this undisputed fact, and in light of the limited resources for staffing entrances for screening due to the COVID-19 pandemic, there is no evidence on which a jury could find that the accommodation offered to Bourke was not reasonable.

And while Graham and Scheirer considered Bourke's preferred accommodation, it was the VA's prerogative, not Bourke's, to select an accommodation that was appropriate under the circumstances. *Igasaki* 988 F.3d at 961; *Hoppe v. Lewis Univ.*, 692 F.3d 833, 840 (7th Cir. 2012) ("An employer need only provide a qualified individual with a reasonable accommodation, not the accommodation [the employee] would prefer.") (quotation marks and citation omitted). There is no evidence to dispute the fact that the VA acted quickly to find a temporary solution for Bourke that would minimize his walking, thereby meeting the requirements of the Rehabilitation Act. *Hoppe*, 692 F.3d at 840 ("An employer satisfies its duty to reasonably accommodate an employee with a disability when the employer does what is necessary to allow the employee to work in reasonable comfort.") (citation omitted).

B. Bourke's Rejection of the VA's Offered Accommodation Caused the Breakdown in the Interactive Process, Barring Relief.

Because Bourke does not have any evidence to show that the VA's offered accommodation was not reasonable, his rejection of that accommodation disqualifies him from relief under the Rehabilitation Act as a matter of law. *Gratzl v. Office of Chief Judges*, 601 F.3d 674, 682 (7th Cir. 2010) ("By rejecting the proposed accommodations, [the employee] was responsible for terminating the interactive process and hence not entitled to relief under the [Rehabiltiation Act].").[2] Not only did Bourke's flat rejection of the VA's offer cause the breakdown of the interactive process, the evidence indicates that Bourke was not willing to engage in good faith with the VA to identify a different temporary accommodation. Confusingly, Bourke's reason for rejecting the offered accommodation (concern over the security of his scooter) is inconsistent with the fact that his own preferred accommodation did not include a secure space in which to store his scooter. Bourke stated that he wanted access to a "room or closet" in the ER but never identified any such space there that he believed should have been made available to him. DSMF ¶ 32.

Neither Graham nor Scheirer was able to locate a secure space *within* the ER. *Id*. at ¶¶ 37-38. Graham identified only an area along the back wall in the ER waiting area where there was an outlet for charging, *id*. at ¶ 37, hardly a secure space in an area with 24-hour public access. And while Bourke was specific as to which parking space he wanted ("that first . . . handicapped spot right outside the [ER]," *id*. at ¶ 65), he never identified a secure location near the ER for storing his scooter nor even claimed one existed. That Bourke's requested accommodation did not include storage space for his scooter flies in the face of his claim that he rejected the offered

[2] Though *Gratzl* was brought under the Americans with Disabilities Act, the Rehabilitation Act has adopted the standard for determining whether a violation has occurred from the ADA. *Ozlowski v. Henderson*, 237 F.3d 837, 839 (7th Cir. 2001).

accommodation due to concerns about security. In fact, Bourke's security concerns appear to be entirely speculative. Certainly, he has neither produced nor sought evidence to show that his concerns had a sufficient basis such that the VA's offer was ineffective or unreasonable such that he was required to reject it.

Bourke claimed during his deposition to have heard — second- or third-hand — of employees having issues with the security of their scooters and accessories, but he neither sought nor produced any evidence of the alleged thefts (such as police reports or other formal complaints). As a result, there is no admissible evidence to corroborate Bourke's hearsay statements regarding security concerns. However, even assuming *arguendo* that there were security concerns in *some* areas of the vast Hines facility, Bourke has failed to produce evidence to support his claim that the Patient Advocate space was insufficiently secure such that the offered accommodation was unreasonable. To the contrary, Graham testified that she and another doctor had been storing their own scooters in that space without incident since they had been re-accommodated in March 2020, a period of about two months as of mid-May 2020. *Id*. at ¶ 43. And while Bourke claims his scooter was smaller and capable of being broken down (though he testified the largest pieces still weighed around 40 pounds, *id*. at ¶ 14), Graham testified that on at least one occasion she had left the starter key in her scooter and that no one had stolen or moved it. *Id*. at ¶ 45.

In rejecting the VA's offered accommodation without providing plausible or consistent reasoning, Bourke effectively ceased participating in the interactive process in good faith. The breakdown was not caused by the VA simply because Bourke did not get the result he wanted. *Yochim v. Carson*, 935 F.3d 586, 591 (7th Cir. 2019) ("This is not a case where an employee's requests for accommodations fell on deaf ears. . . . The communication process did not break down simply because [the employee] did not receive the answers she had hoped for."). By

rejecting the VA's reasonable offer and terminating the interactive process, Bourke cut off relief under the Rehabilitation Act. *Cloe*, 712 F.3d at 1178 ("If [the interactive] process fails to lead to a reasonable accommodation of the disabled employee's limitations, responsibility will lie with the party that caused the breakdown.")

Conclusion

For the foregoing reasons, the court should grant summary judgment in the VA's favor.

Respectfully submitted,

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