

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

**DEFENDANT'S RULE 56.1(a)(2) STATEMENT
OF FACTS IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT**

Defendant, Secretary of the Department of Veterans Affairs, though his attorney, Morris Pasqual, Acting United States Attorney for the Northern District of Illinois, submits in accordance with Local Rule 56.1(a)(2), the following statement of material facts in support of defendant's motion for summary judgment:

I. Background

1. Plaintiff David Bourke was hired by the VA as a transportation clerk at the VA's Edward Hines, Jr. Hospital ("Hines") in October 2009. Ex. 1; Ex. 2 at 7-8.

2. Bourke is also veteran of the U.S. Navy, having been honorably discharged in 1978 as a Seaman Recruit. Ex. 3; Ex. 2 at 22.

3. At some point in 2018, Bourke obtained a personally owned, powered mobility device (scooter) through his VA healthcare provider. Ex. 2 at 21 (testifying that “the VA doctors put me in for a scooter”); *id.* at 24 (testifying that the scooter was his to use at work and at home).

4. By June of 2019, Bourke was employed as an advanced medical support assistant in Patient Administration Service (PAS) at Hines, where he worked in the ambulatory surgery unit (ASU). Ex. 4 at USA000322-23 (describing' Bourke's role as an "AMSA" in the ASU).

5. During the relevant time period, Angela Graham was Bourke's first-line supervisor and Christopher Wirtjes was the chief of PAS. Ex. 5 at 5-6 (testifying that prior to leaving Hines in 2021, she had been Bourke's supervisor for about 2 years); Ex. 6 at 5.

6. In June 2019, Bourke requested a reasonable accommodation in the form of a parking space near the ASU, which was located in the basement of the main hospital building (Building 200). Ex. 4 at USA000323 (requesting, among other things, a "parking reserved slot in the back of Bldg. 200 by outpatient pharmacy area"); Ex. 2 at 35.

7. Bourke requested the accommodation due to claimed limitations on walking. Ex. 4 at USA000323-24.; Ex. 7.

8. The VA's process for requesting a reasonable accommodation involves the employee informing their supervisor or the local reasonable accommodation coordinator (LRAC) of their need for an accommodation and participating collaboratively in the interactive process. Ex. 8 at USA000555.

9. Once the employee makes a request for a reasonable accommodation, the designated management official (in this case, the employee's first-line supervisor) will engage in an interactive process with the employee and make the final decision regarding the employee's request in consultation with the LRAC as expeditiously as possible, considering alternative effective accommodations as necessary. *Id.* at USA000552-53; USA000559.

10. The LRAC's role is to consult with and assist the supervisor in processing requests, provide information to the requesting employee, provide consultation during the interactive process, and coordinate with additional departments as necessary. *Id.* at USA000553-54, USA000559.

11. When there is more than one accommodation that would be equally effective for the employee, the supervisor or other decision-maker “may choose the one that is easier or less expensive to provide,” and while a supervisor should consider the employee’s preferences, the supervisor has the “ultimate discretion to choose between effective accommodations.” *Id.* at USA000543.

12. The process of being assigned a reasonable-accommodation parking space at Hines includes coordination between the employee, the employee’s supervisor, the LRAC, the VA Police Department (which is responsible for identifying available parking spaces that are not already designated as general handicapped spots or as reserved for other employees), and the Engineering Department (which creates the sign identifying the parking spot as reserved for a specific employee). Ex. 9 at 13.

13. Bourke’s reasonable accommodation was approved as of August 30, 2019, and he was assigned a reserved parking space, with a sign posted reserving the spot for him, at the rear entrance to Building 200, near the outpatient pharmacy. Ex. 10; Ex. 11 at 8-9; Ex. 12.

14. Around the time Bourke received his reasonable-accommodation parking space, he also asked the VA to install a lift in his car because he could not physically lift the heaviest pieces of his scooter (some of which weighed about 40 pounds) and he wanted to be able to transport his scooter to and from Hines. Ex. 2 at 21, 24.

15. This request was made as part of Bourke’s veteran’s benefits through the Hines Physical Medicine & Rehabilitation and the Prosthetics & Orthotics Lab Departments. *Id.* at 24; Ex. 13 (confirming order for lift following medical evaluation).

16. While he waited for the lift to be installed, and independent of the reasonable accommodation process, Bourke sought and obtained permission from Diane Cotton (clinical

manager of the ASU) to leave his scooter in the ASU to store and charge overnight and when he was not working. Ex. 2 at 34-35.

17. Bourke did not seek storage of his scooter as part of his request for a reasonable accommodation. Ex. 4 at USA000323 (requesting only a parking space and an exemption for rotational assignment).

18. Prior to May 14, 2020, Bourke had been in the habit of parking in his parking spot reserved as parking space #1011), entering at the back entrance of the main hospital building (Building 200) near the outpatient pharmacy, taking an elevator down to the basement, and walking to the ASU where he had stored his scooter in a corner near his workstation. Ex. 2 at 36.

II. Hines Implements COVID-19 Screening Procedures.

19. In early March 2020, staff at Hines watched as the threat of COVID-19 approached and observed that, with only minimal testing capabilities and without vaccines, hospitals were being overrun. Ex. 14 at 6-7.

20. In light of the growing concerns about COVID-19, the VA central office instructed all VA facilities (including Hines) to implement procedures for screening staff and patients for symptoms of COVID-19 prior to entering the facilities. *Id.* at 6.

21. Hines leadership received the instruction to implement screening procedures over a weekend in early March 2020 and had a short time to decide how to implement the new procedures over a vast, 147-acre medical campus. *Id.* at 6, 8.

22. At Hines, the incident command structure tasked with making all decisions and operational changes related to screening procedures, and COVID-19 generally, consisted of executive leadership, clinical leadership and subject matter experts (including the chiefs and clinical leads for infectious disease, acute medicine, cardiology, respiratory, ICU, and nursing),

and administrative leadership and subject matter experts (including the emergency manager, chief of logistics, and the chief engineer). *Id.* at 7.

23. As part of implementing screening procedures, the incident command determined where they could stand up active screening locations and which entrances would be closed 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 entrances to minimize the inconvenience to veterans and staff. *Id.* at 9-11; 27-28.

24. These limitations meant that the vast majority of entrances had to be closed, though the incident command used qualitative data to identify high-volume entrances to minimize internal barriers for veterans and staff. *Id.* at 8-9, 12-13.

25. The incident command anticipated that the entrance closures would impact some employees with reasonable accommodations and that individual employees would work with their direct supervisors and human resources (in other words, the LRAC) to re-engage in the interactive process if their reasonable accommodation had been impacted. *Id.* at 21-24.

26. On March 12, 2020, Hines leadership notified Hines 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. Ex. 15.

27. The only designated entrances at Building 200 were the main entrance at the front of the building and the emergency room entrance; however, the rear entrance to Building 200 (near Bourke’s designated parking space) was not listed as a designated entrance. *Id.*

28. From March 2020 until about May 14, 2020, Bourke continued to access his workspace and scooter via the undesignated entrance at the rear of Building 200 without first being screened. Ex. 2 at 38, 70.

29. After parking in his usual reserved parking space and accessing his workplace via the undesignated entrance at the rear of 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.* at 38, 41-42.

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

30. 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 enter there. Ex. 16; Ex. 2 at 43.

31. That same day, Bourke emailed VA Police Deputy Chief Eric Ousley, since deceased, and LRAC Shawn Scheirer to have a new, temporary parking space assigned to him “until the back of Bldg. 200 is opened up again.” Ex. 16; Ex. 17 at 9.

32. In his May 14, 2020, email, 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). Ex. 16; Ex. 2 at 58, 71-72; Ex. 9 at 17, 36.

33. Bourke requested that he be able to maintain his original reasonable-accommodation parking space near the rear of Building 200. Ex. 18 at USA000261.

34. Graham and Scheirer re-engaged Bourke in the interactive process to identify a new, temporary reasonable accommodation. Ex. 5 at 18-19; Ex. 9 at 8; Ex. 2 at 70-72; Ex. 6 at 7.

35. The VA assured Bourke that he would retain his parking space near the rear entrance of Building 200. Ex. 2 at 56, 58; Ex. 9 at 8, 16, 37.

36. As part of the interactive process, Hines considered Bourke's request that he be assigned the first handicapped parking space near the entrance to the ER. Ex. 19 at USA000228; Ex. 9 at 36; Ex. 20.

37. 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. Ex. 5 at 33 (Graham testifying that when Bourke "said that he wanted to go through the emergency room, I asked would it be feasible to park the scooter close to the ED."); Ex. 9 at 17-18, 20, 36; Ex. 6 at 19.

38. Additionally, Wirtjes, Graham's chief, did not believe he could get authorization for Bourke to leave his scooter in the area of the ER entrance because it was a "high traffic area on off tour[]" hours when Bourke would need to store his scooter there. Ex. 19 at USA000228; Ex. 6 at 10-11 (Wirtjes testimony explaining that this was "at the very beginning of the COVID pandemic and the emergency room was the heart of the intake of all our COVID patients. There – we were putting up tents and different things to try to mitigate the flow, keep sick people from healthy people, and there was constant rearranging and planning and how to run the emergency room, and any sort of restriction or anything in the way, we were trying to get everything out of there that didn't need to be there. So adding something to that during that environment was just not reasonable for the health and safety of our – of the patients coming in, and staff.").

39. Scheirer testified that an additional complication with Bourke's preferred parking space in front of the ER and main entrances was that it was already designated as a general handicapped space for veteran patient and visitor use, in addition to general employee use. Ex. 9 at 23-24.

40. The VA police explained that they would have had difficulty keeping Bourke's preferred parking space clear for him. Ex. 2 at 54, 72.

41. 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. Ex. 19 at USA000228; Ex. 5 at 10-12.

42. The entrance at Building 1, Section C was staffed for screening and had a secure area in the Patient Advocate Department where Bourke could store his scooter. *Id.*

43. Graham and a doctor had been storing their scooters in the Patient Advocate space when they were not on duty since the COVID-19 screening procedures were implemented in March 2020. Ex. 5 at 10-12.

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. Ex. 5 at 24-25 (Graham describing the Patient Advocate space as "a secluded area. . . . [N]o one was in that area at night when we left. The area was locked down."); Ex. 9 at 16-17 (Scheirer testifying that the Patient Advocate space is "outside the public view and outside of common areas or after-hour traffic"); *id.* at 20 ("the police station is on the same hall corridor" as the Patient Advocate space, and there "is very little if any after-hour traffic that would be putting his scooter at risk.").

45. Graham testified that she had left her keys in her scooter on at least one occasion and that the scooter remained secure and in place. Ex. 5 at 24.

46. The VA police confirmed that there was a parking space directly in front of the entrance to Building 1, Section C available to reserve for Bourke as a temporary reasonable-accommodation parking space. Ex. 20 at USA000271.

47. Scheirer walked both options and determined that considering Bourke's claimed disability, the available parking space in front of Building 1, Section C had less walking and fewer barriers between what would have been Bourke's parking space, an entrance with mandatory screening, and his scooter, than either his original parking space or his preferred parking space in front of the ER. Ex. 9 at 17 (Scheirer testifying that the Building 1, Section C parking space "involved very few steps from the point of the employee parking to the point of the employee getting screened and to having access to his mobility device[.]"); *id.* at 28-29, 36-37 (describing the process LRAC Scheirer took to assess the possible accommodations to determine the distance and possible trip hazards or other risks involved with each option.); *id.* at 37 (describing the walk from the Building 1, Section C parking space as "a shorter distance to travel").

48. Graham concluded that the walk from the handicapped parking space in the front of Building 200 (near the ER or main entrances) would have been a farther walk for Bourke than from the reserved parking space near the entrance to Building 1, Section C. Ex. 5 at 27.

49. Bourke acknowledged that the distance involved in the Building 1, Section C accommodation offered the least amount of walking. Ex. 2 at 53-54.

50. On May 18, 2020, Graham offered Bourke a temporary reasonable-accommodation parking space in front of Building 1, Section C. Ex. 18 at USA000262; Ex. 5 at 12.

51. On June 3, 2020, after meeting with Graham, Bourke declined the offered temporary reasonable accommodation "for safety concerns for the secure storage of my equipment." Ex. 21; Ex. 5 at 19-20.

52. After declining the offered accommodation, Bourke parked in general handicapped parking at another building and walked much farther to his ASU workspace (and scooter). Ex. 21; Ex. 2 at 59.

53. On or around June 29, 2020, the rear entrance of Building 200, near the outpatient pharmacy, was reopened and staffed for COVID-19 screening from 5:00 am until 10:00 am. Ex. 22 at USA000663-64; Ex. 17 at 29-30; Ex. 2 at 63-64; Ex. 23 (confirming reopening of outpatient pharmacy doors).

54. The doors have remained open, and Bourke was able to access this entrance from his original reserved parking space at the rear of Building 200 until he changed positions in late 2022 or early 2023. Ex. 2 at 64-65; Ex. 24 (confirming Bourke's continued access to his original parking space).

IV. Bourke Files an EEO Complaint and Lawsuit.

55. On June 29, 2020, Bourke filed a formal complaint of employment discrimination with the VA's equal employment opportunity (EEO) office, alleging a violation of his reasonable-accommodation parking space (along with a 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). Ex. 25.

56. The claim accepted for investigation was whether Bourke "was discriminated against based on Disability, when [. . .] his requests for Reasonable Accommodations have been denied." Ex. 26 at USA000071.

57. On March 1, 2022, after a hearing before the EEOC administrative judge, the AJ concluded that the VA offered Bourke an effective accommodation but that Bourke ceased participating in the interactive process when he declined to accept the offer and refused to consider any alternative to his accommodation of choice. Ex. 27 at USA000025-26.

58. In arriving at his decision, the AJ specifically found that Bourke’s concerns about security were “highly speculative.” *Id.* at USA000024.

59. The VA’s EEO office adopted the AJ’s decision in a final agency decision issued on March 21, 2022. *Id.* at 1-2.

60. Bourke brought his lawsuit under the Rehabilitation Act, filing the complaint on June 15, 2022. Dkt. 1.

61. Bourke asserts a claim under the Rehabilitation Act, alleging 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.* ¶¶ 9, 12.

62. While the administrative EEO complaint included a claim regarding Bourke’s 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. Dkt. 28.

63. During his deposition in connection with this case, Bourke testified 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 Building 200 through May 14, 2020. Ex. 2 at 43, 48, 70.

64. 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 the parking space and storage for his scooter at Building 1, Section C, and the parking in front of the ER. *Id.* at 70-72.

65. Bourke also testified that his preferred accommodation, and the accommodation he requested, was the first handicapped parking space outside the ER. *Id.* at 58, 71-72 (testifying that he asked for “that first . . . handicapped spot right outside the [ER]”).

66. Bourke testified that he received explanations as to why Hines could not offer him his preferred accommodation, including that the VA police would be unable to keep his requested parking space in front of the ER clear. *Id.* at 54, 72-73.

67. Bourke testified 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.* at 52-53.

68. Bourke neither requested nor produced any documents (nor did he disclose any witnesses who could offer first-hand testimony) relating to the alleged thefts. Ex. 28-30.

69. Bourke testified that he declined the offered temporary reasonable accommodation because his scooter was smaller than Graham's scooter and easier to steal. Ex. 2 at 50.

70. During his deposition, Bourke acknowledged that he regained access to the rear entrance to Building 200 (near the outpatient pharmacy and his original reasonable-accommodation parking space), on or around June 29, 2020, when a screener was placed at that door. Ex. 2 at 63-64.

71. 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.*

Respectfully submitted,

MORRIS PASQUAL
Acting United States Attorney

By: s/ Nicole Flores

NICOLE FLORES
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 886-9082
nicole.flores3@usdoj.gov