

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

David P. Bourke,)	
<i>Plaintiff,</i>)	
)	No. 22-cv-03164
-vs-)	
)	<i>(Judge Kennelly)</i>
Denis Richard McDonough, in his)	
official capacity as Secretary of)	
Veterans Affairs,)	
<i>Defendant.</i>)	

**PLAINTIFF'S LOCAL RULE 56.1(a)(2)
STATEMENT OF UNDISPUTED FACTS**

Plaintiff submits the following “Statement of Undisputed Facts” in support of his cross-motion for summary judgment:

1. Plaintiff David Bourke has been employed by the VA since October of 2009. (Defendant’s Exhibit 1, Notification of Personnel Action, ECF No. 31-2 at 2.)

2. Plaintiff was diagnosed with sarcoidosis in 2015.¹ (Bourke Dep. 14:20-22, ECF No. 31-2 at 27.)

3. By June of 2019, plaintiff had become “unable to walk [more than] 15 feet without cane/walker due to shortness of breath due to underlying lung condition” and “with cane or walker, still unable to walk [more

¹ Plaintiff describes this as a misdiagnosis. (Bourke Dep. 14:11, ECF No. 31-2 at 17.) Plaintiff’s claims of medical malpractice are at issue in *Bourke v. United States*, No. 20-cv-4427, *on remand from* 25 F.4th 486 (7th Cir. 2021).

than] 40 feet due to back pain and breathing.” (Defendant’s Exhibit 3, ECF No. 31-2 at 197, “Request for Medical Documentation.”)

4. The VA provided plaintiff with a motorized scooter to use in the workplace sometime before October of 2018. (Bourke Dep. 25:16-20, ECF No. 31-2 at 28.)

5. The motorized scooter was too heavy for plaintiff to take home. (Bourke Dep. 23:18-25, ECF No. 31-2 at 26.)

6. On June 17, 2019, plaintiff requested the VA to provide him with several accommodations, including “a parking reserved slot in the back of bldg. 200 by outpatient pharmacy and a handicap parking spot.” (Defendant’s Exhibit 4, Written Confirmation of Request for Accommodation, ECF No. 31-2 at 109.)

7. Plaintiff supported his request with medical documentation establishing that plaintiff has the following impairments:

- a. Difficulty in functioning in high stress environments
- b. Confined to motorized scooter and cannot walk more than 15 feet without using a cane or walker
- c. Shortness of breath with exertion with walker or cane 40-50 feet
- d. Experiences pain related to spinal fracture.

(Defendant's Exhibit 4, Written Confirmation of Request for Accommodation, ECF No. 31-2 at 109.)

8. The Request for Medical Documentation, on page 2, listed the following as to the extent to which the impairments limit activities

- a. Veteran requires work setting with limited stress
- b. Unable to walk more than 15 feet without cane/walker due to shortness of breath due to underlying lung condition
- c. With cane/walker, still unable to walk for more than 40 feet due to back pain and breathing.

(Defendant's Exhibit 7, Request for Medical Documentation ECF No. 31-2 at 197.)

9. On August 30, 2019, the VA granted plaintiff a "reasonable accommodation" parking space in the rear of Building 200, along with a sign designating it as "reserved parking." (Defendant's Exhibit 10, Accommodation Request Determination, ECF No. 31-2 at 295-96; Smith Dep. at 7:24-8:10, ECF No. 31-3 at 8-9.)

10. This "reasonable accommodation" parking spot was the closest spot to plaintiff's work area in Building 200. (Bourke Dep. 36:26:23-24, ECF No. 31-2 at 39.)

11. At the start of each workday, plaintiff would walk from his car to the entrance adjacent to the pharmacy and retrieve his motorized scooter from a locked office; plaintiff would reverse the process at the end of the day. (Bourke Dep. 36:14-37:2, ECF No. 31-2 at 39-40; Bourke Dep. 35:22-36:9, ECF No. 31-2 at 37-38.)

12. Starting on March 16, 2020, as a response to the COVID pandemic, the VA closed all entrance doors to Building 200 other than the doors at the main entrance lobby and the emergency room. (Defendants' Exhibit 15, ECF No. 31-3 at 76.)

13. The door by the outpatient pharmacy (the door plaintiff entered each day) was among the entrances that were closed. (Defendants' Exhibit 15, ECF No. 31-3 at 76.)

14. In choosing which doors to close, the VA was aware that door closings would have an impact on persons who had "reasonable accommodation" parking spaces. (Beidelschies Dep. 20:4-7, ECF No. 31-3 at 58.)

15. The VA did not involve its Human Resources Department in deciding which doors would be closed. (Scheirer Dep. 32:19-33:3, ECF No. 31-2 at 272.)

16. In choosing which doors to close, the VA did not engage in any "interactive process" with those of its employees, like plaintiff, whose

“reasonable accommodation” parking spaces would lose their utility because of the door closings. (Schierer Dep. 8:20-9:1, ECF No. 31-2 at 247.)

17. The position of the VA is that if any of the door closings impacted persons who had “reasonable accommodation” parking spaces, “the employee would communicate that to their supervisor, the supervisor would work with the employee and the reasonable accommodation team to accommodate, if possible, that employee.” (Beidelschies Dep. 24:8-11, ECF No. 31-3 at 62.)

18. In choosing which doors to close and making plaintiff’s “reasonable accommodation” parking space unreasonably distant from an entrance to the workplace, the VA disregarded the commands of its regulations implementing the Rehabilitation Act, specifically Section 15(c) of the “VA Handbook 5975.1,” Defendant’s Exhibit 8, ECF 31-2 at 198-238. This section provides as follows:

Once an accommodation request is approved for a permanent disability/functional limitation, the employee should be allowed to keep the accommodation after the DMO [Designated Management Official] no longer supervises the employee. In rare instances, the accommodation may need to be changed, but the DMO and LRAC [Local Reasonable Accommodation Coordinator] should first check with RC [Regional Counsel], OGC [Office of General Counsel], or NRAC [National Regional Accommodations Coordinator] before making any changes that are not requested by the employee. The accommodation, including necessary equipment and software, also “goes with” the employee when transferring to a new VA location. If an employee’s job duties change, the LRAC may check to verify that the current accommodation is still needed and effective.

(VA Handbook 5975.1, Section 15(c), ECF No. 31 at 225.)

19. In March of 2020, plaintiff complained to Associate Police Chief Eric Ousley of the Hines Police Department about the closing of the door by the outpatient pharmacy (hereinafter “pharmacy entrance”). (Bourke Dep. 37:22-38:14, ECF No. 31-2 at 41.)

20. Plaintiff explained in an email to Ousley dated March 13, 2020 that he “cannot walk very far” because of his disabilities. (Plaintiff’s Exhibit 1, Email, Bourke to Ousley, March 13, 2020.)

21. Plaintiff told Ousley that, even though there was not a screener at the door by the pharmacy entrance, he would retrieve his motorized scooter from a locked office, drive to the main entrance, and get screened before going to his work area. (Bourke Dep. 38:7-14, ECF No. 31-2 at 41.)

22. The locked office provided “a very secure location that was behind locked doors” for the motorized scooter. (Bourke Dep. 35:3-4, ECF 31-2 at 38.)

23. Ousley gave plaintiff permission to continue to enter through the pharmacy entrance on the understanding that plaintiff “will continue to be screened every day.” (Bourke Dep. 38:15-20, ECF No. 31-2 at 41.)

24. Plaintiff continued to enter through the pharmacy entrance until May 14, 2020; plaintiff also continued to report to the screeners to have his temperature checked to comply with the COVID-19 protocol. (Email,

Bourke to Ousley and Scheirer, May 14, 2000, Defendant's Exhibit 16, ECF No. 31-3 at 79.)

25. On May 14, 2020, Shawn Scheirer, a "Human Resource Specialist" at the Hines Hospital, instructed the Hines Police Department to stop plaintiff from continuing to use the pharmacy entrance. (Schierer Dep. 12:1-20, ECF No. 31-2 at 251.)

26. The VA did not initiate any interactive process with plaintiff about his use of the pharmacy entrance before ordering him to stop using that entrance. (Schierer Dep. 7-8, ECF No. 31-2 at 20:20-21:1.)

27. Had the VA engaged in an interactive process with plaintiff before prohibiting from entering through the pharmacy door, the VA would have learned from the screener supervisor at the hospital Emergency Room that she could have detailed a screener to the pharmacy entrance to screen plaintiff when he arrived for work. (Bourke Dep. 54:24-55:9, ECF No. 31-2 at 57-58.)

28. After learning that he could no longer enter through the pharmacy entrance, plaintiff requested the VA to provide him with a reserved parking space adjacent to the front lobby. (Bourke Dep. 58:21-59:3 ECF No. 31-2 at 61-62.)

29. The VA rejected plaintiff's request for a reserved parking space adjacent to the front lobby for two reasons: First, because it would

have required that an existing handicapped parking spot be designated for an individual. (Schreier Dep. 36:1 to 37:7, ECF No. 31-2 at 275.) Second, because the VA police “would have to monitor and throw people out of that spot and write tickets and tow their cars every day of the week.” (Bourke Dep. 54:11-14, ECF No. 31-2 at 57.)

30. In refusing plaintiff’s request for a reserved parking space adjacent to the front lobby, the VA disregarded the commands of Section 17(b) of the “VA Handbook 5975.1,” Defendant’s Exhibit 8, ECF 31-2 at 198-238. Section 17(b) provides as follows:

b. When an employee requests a space near the building as a reasonable accommodation (and goes through the accommodation process), that employee must be provided an assigned space with the shortest route to their workspace. The Americans with Disabilities Act Accessibility Guidelines specify the size of the space and the access area.

(VA Handbook 5975.1, Section 17(b), ECF N. 31 at 228.)

31. The VA also rejected plaintiff’s request to store his scooter overnight in the Emergency Room. (Defendant’s Exhibit 19, Email, Wirtjes to Graham, May 15, 2000, ECF No. 31-3 at 128.)

32. The VA has not presented any evidence that plaintiff’s request to store his scooter in the Emergency Room was ever presented to the person with authority to grant or deny that request: The VA rejected that request because Christopher Wirtjes, plaintiff’s second level supervisor did not “think we can have a scooter parked in the ED on off hours as this can

be a high traffic area on on off hours.” (Defendant’s Exhibit 19, Email, Wirtjes to Graham, May 15, 2000, ECF No. 31-3 at 128.)

33. Wirtjes did not have authority to approve parking a scooter in the Emergency Room and could only state that the person with this power was “[p]robably the chief of staff.” (Wirtjes Dep. 11:4-8, ECF No. 31-2 at 181.)

34. Other than Wirtjes’s belief, no work was done to investigate the feasibility of plaintiff storing his scooter in the Emergency Room. (Graham Dep. 35:10-14, ECF 31-2 at 146.)

35. Plaintiff rejected the VA’s proposal that he enter the hospital through Building 1, Section C because that entrance was “way, way too far away from my work station” (Bourke Dep. 50:13-14, ECF No. 31-2 at 53) and because the VA refused to provide him with a reserved parking space adjacent to the entrance. (Bourke Dep. 55:18-20, ECF No. 31-2 at 58.)

36. The VA recognized that, if plaintiff parked at Building 1, Section 1, he would “will need assistance with getting to his car” after is “parking spot is moved and available.” (Email, Graham to Scheirer, May 18, 2020, Plaintiff’s Exhibit 2.)

37. The VA has not come forward with any evidence that it provided plaintiff with such assistance. (Graham Dep. 40:7-11, ECF No. 31-2 at 151.)

38. Plaintiff advised the VA on June 3, 2020 of the harm that would result from its refusal to allow him to enter through the pharmacy entrance:

Per our conversation today, I will continue to park by Bldg. 228 handicap spot and enter into my work station ASU basement of Bldg. 200, in order to leave my scooter in a locked-secure area at my work station. The added distance and ambulation and subsequent pain, will be endured for safety concerns for the secure storage of my equipment. I will await the opening of the back of Bldg. 200 (outpatient pharmacy) to park in my RA assigned parking area #1011. Why the 16 or so handicap parking areas behind Bldg. 200, which are close to entry and convenient, are still denied access for Veterans to utilizes, makes no sense what-so-ever?

(Email, Bourke to Graham, June 3, 2020, ECF No. 31-4 at 2.)

39. The VA reopened the “pharmacy entrance” on June 29, 2020. (Email, McField to Yenerall, July 6, 2020, ECF No. 31-4 at 5.) This restored the status quo to when plaintiff was able to enter and leave through the pharmacy entrance. (McFields Dep. 30:4-6, ECF No. 31-3 at 119.)

40. In October of 2020, the VA announced that it intended to close the pharmacy entrance “[d]ue to staffing and the low use of the pharmacy entrance.” (Plaintiff’s Exhibit 2, Email, Smith to Tepper, October 8, 2020.)

41. Carmen Smith, who was then the “reasonable accommodation coordinator at the Hines VA” (Plaintiff’s Exhibit 4, Smith Dep. 5:12-15), discussed this plan with plaintiff (Plaintiff’s Exhibit 5, Email, Smith to Bourke, October 13, 2020), and informed VA management that moving the parking

spot required the agency to “prove undue hardship.” (Plaintiff’s Exhibit 5, Email, Smith to Marris, October 8, 2020.)

42. In a subsequent email on October 13, 2020, Smith recommended that the VA not close the pharmacy entrance and reminded the VA that, to close the pharmacy entrance, the VA “will need to prove undue hardship and show how this accommodation is no longer effective.” (Plaintiff’s Exhibit 7, Email, Smith to Morris, October 13, 2020.)

43. The VA again investigated the possibility of closing the pharmacy entrance in December of 2020. (Plaintiff’s Exhibit 8, Email, Morris to Fong, December 1, 2020.)

44. Bryan Fong, then a facility planner at the Hines VA (Plaintiff’s Exhibit 9, Fong Dep. 4:16-23), measured the distance from a parking spot to a secured storage area in building 228 (*id.* at 6:18-22) as “pushing the 40-50 ft distance marker for the RA” (Plaintiff’s Exhibit 8, Email, Fong to Morris, December 2, 2020) and concluded that a conference room in Building 228 could accommodate plaintiff’s limited ability to walk. (*Id.*)

45. Fong was the only person employed as a “facility planner” at the Hines VA in March of 2020. (Plaintiff’s Exhibit 9, Fong Dep. 15:18.)

46. Fong did not measure distances between parking spaces and entrances in connection with the closing in March of 2020. (Plaintiff’s Exhibit 9, Fong Dep. 9:19-23.)

47. Other than the work performed by Fong, the VA does not have evidence that it measured the distance between any of the alternative parking spaces available to plaintiff and the place where plaintiff could safely secure his scooter; the only evidence to the VA on this issue is that Schirer “walked every single one” of the available parking spots. (Schirer Dep. 14-17, ECF No. 31-2 at 268.)

48. During the time that plaintiff was unable to enter by the pharmacy door, he was required to walk “two and a half to sometimes three times further” (Bourke Dep. 76:10-14, ECF No. 31-2 at 79), experienced increased right hip pain, requiring that he “stop two, three times, lean on a railing” while walking from his car to the workplace (*id.* at 76:23-77:1, ECF No. 31-2 at 79-80), and required an increase in his pain medication from 15 grams of morphine to 30 milligrams a day. (*Id.* at 78:5-10, ECF No. 31-2 at 81.)

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