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

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

PLAINTIFF'S MEMORANDUM ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The parties have cross-moved for summary judgment. Plaintiff shows below that the material facts are not in dispute and the Court should resolve the contested legal issues in favor of plaintiff. If the Court disagrees, it should follow the ordinary rule to consider "all facts and inferences therefrom in favor of the party against whom the motion under consideration was made." *Five Points Rd. Joint Venture v. Johanns*, 542 F.3d 1121, 1124 (7th Cir. 2008.)

I. Relevant Facts

A. Background Undisputed Facts

Plaintiff David Bourke is a disabled employee of the Department of Veteran Affairs who started to work for the VA in 2009. (Defendant's Rule 56.1(a)(2) Statement, ¶¶ 1-2, 13; Plaintiff's Rule 56.1(a)(2) Statement, ¶ 1.) 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 than] 40 feet due to back pain and breathing." (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 3.) The

VA provided plaintiff with a motorized scooter to use in the workplace sometime before October of 2018. (Defendant's Rule 56.1(a)(2) Statement, ¶ 3; Plaintiff's Rule 56.1(a)(2) Statement, ¶ 4.) Plaintiff would leave the scooter at the hospital each night in a locked and secure location. (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 9.)

On June 17, 2019, plaintiff requested the VA to provide him with several accommodations to reduce the he experienced while ambulating to his workstation, including "a parking reserved slot in the back of bldg. 200 by outpatient pharmacy and a handicap parking spot." (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 6.) Plaintiff supported his request for the accommodation with medical evidence attesting to his disabilities (*Id.*, ¶ 7), impairments (*id.*, ¶ 8), and the extent to which the impairments limited his activities. (*Id.*, ¶ 9.)

The VA granted the accommodation on August 30, 2019, assigning plaintiff a reserved parking space adjacent to the pharmacy entrance in Building 200 with a sign designating it as "reserved parking." (Defendant's Rule 56.1(a)(2) Statement, ¶ 13; Plaintiff's Rule 56.1(a)(2) Statement, ¶ 10.) The parking space was the closest spot to plaintiff's work area in Building 200. (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 11.) With the accommodation in place, plaintiff would walk the short distance from his reserved parking space to the pharmacy entrance every morning and then retrieve his motorized scooter from a locked office near that entrance. (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 12.) He would reverse the process at the end of the day. (*Id.*)

B. Door Closings at the Hines VA Hospital in Response to Covid

Starting on March 16, 2020, as a response to the Covid pandemic, the VA closed all entrance doors to Building 200 other than the main entrance lobby and the emergency room. (Defendant's Rule 56.1(a)(2) Statement, ¶¶ 20, 27; Plaintiff's Rule 56.1(a)(2) Statement, ¶ 13.)

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. (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 15.) The VA did not involve its Human Resources Department in deciding which doors to close. (*Id.*, ¶ 16.) The VA did not engage in any "interactive process" with employees, like plaintiff, whose "reasonable accommodation" parking spaces would be impacted by the door closings. (*Id.*, ¶ 17.) The position of the VA was 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." (*Id.*, ¶ 18.)

One of the doors that the VA closed was the door by the outpatient pharmacy, which is the door plaintiff entered each day as part of the accommodation the VA had granted to him in 2019. (Defendant's Rule 56.1(a)(2) Statement, ¶ 27; Plaintiff's Rule 56.1(a)(2) Statement, ¶ 11.)

C. Application of the Door Closing Policy to Plaintiff

Plaintiff negotiated an exception to the door closing policy with the Hines Police Department (Plaintiff's Rule 56.1(a)(2) Statement, ¶¶ 20-24) and continued to use the entrance by the outpatient pharmacy for about two months until May 14, 2020. (*Id.*, ¶ 25.)

The exception ended when Shawn Scheirer, a "Human Resource Specialist" at the Hines Hospital, instructed the Hines Police Department to prohibit plaintiff from using that entrance. (*Id.*, ¶ 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. (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 27.) Had the VA engaged in an interactive, the VA would have learned from the screener supervisor at the hospital Emergency Room that she could detail a screener to the pharmacy entrance to screen plaintiff when he arrived for work. (*Id.*, ¶ 28.)

Plaintiff requested that the VA accommodate his disability by providing a reserved parking space adjacent to the front lobby. (Defendant's Rule 56.1(a)(2) Statement, ¶ 32; Plaintiff's Rule 56.1(a)(2) Statement, ¶ 29.) The VA rejected this request for several reasons: First, because it would have required that an existing handicapped parking spot be designated for an individual. (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 30.) Second, it would require the VA police "to monitor and throw people out of that spot and write tickets and tow their cars every day of the week." (Defendant's Rule 56.1(a)(2) Statement, ¶¶ 39-40; Plaintiff's Rule 56.1(a)(2) Statement, ¶ 30.)

The VA also rejected plaintiff's request to store his scooter overnight in the Emergency Room. (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 32.) This decision was made by plaintiff's second level supervisor, who did not have the authority to approve parking a scooter in the Emergency Room. (*Id.* 33-34.) Other than the decision by the second level

supervisor, no work was done to investigate the feasibility of storing plaintiff's scooter in the Emergency Room. (*Id.*, ¶ 35.)

Plaintiff rejected a proposal by the VA to accept a parking space in front of Building 1, Section C and to store his motorized scooter in the Patient Advocate Department. (Defendant's Rule 56.1(a)(2) Statement, ¶¶ 41-51.) The VA recognized that plaintiff would need help getting to his car from this entrance (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 37), and has not presented any evidence that it offered to provide plaintiff with such assistance. (*Id.*, ¶ 38.) Plaintiff rejected this proposal because Building 1 was far from his work area and did not provide a place for plaintiff to safely secure his scooter. (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 36.)

The VA reopened the "pharmacy entrance" on June 29, 2020. (Defendant's Rule 56.1(a)(2) Statement, ¶ 53; Plaintiff's Rule 56.1(a)(2) Statement, ¶ 40.) This act restored the status quo to when plaintiff could enter and leave through the pharmacy entrance. (*Id.*)

D. Subsequent Attempts to Close the Pharmacy Entrance

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 Rule 56.1(a)(2) Statement, ¶ 41.) Carmen Smith, who was then the "reasonable accommodation coordinator at the Hines VA", discussed this plan with plaintiff and informed VA management that moving plaintiff's parking spot required the agency to "prove undue hardship." (*Id.*, ¶¶ 42-43.)

The VA again investigated the possibility of closing the pharmacy entrance in December of 2020. (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 44.) Bryan Fong, then a facility planner at the Hines VA, measured the distance from a potential parking spot to a secured storage area in Building 228 as "pushing the 40-50 ft distance marker for the RA." (*Id.* ¶ 45.) Fong concluded that a conference room in Building 228 could accommodate plaintiff's limited ability to walk. (*Id.*)

II. The Legal Dispute

Plaintiff contends that the determinative issue in this case is whether the VA could, consistent with the Rehabilitation Act, unilaterally rescind the reasonable accommodation it had granted plaintiff in 2019. Plaintiff contends that there must be an undue hardship to the VA before it may rescind a previously granted reasonable accommodation and that the VA must engage in an interactive process before it rescinds a previously granted reasonable accommodation.

Defendant skips over the question of whether the VA could unilaterally rescind the reasonable accommodation parking space and contends that the only issue on summary judgment is whether, after it rescinded plaintiff's reasonable accommodation, plaintiff rejected an equivalent reasonable accommodation. (ECF No. 30 at 10.)

Plaintiff shows below that the Court should decide both questions in his favor.

A. Defendant May Not Unilaterally Rescind a Reasonable Accommodation Without Establishing an "Undue Hardship"

When it granted plaintiff a reasonable accommodation in 2019, the VA found that plaintiff was a "qualified individual with a disability" and that his disability could be accommodated by what the VA Rehabilitation Act handbook described as the "routine

accommodation" of "an assigned accessible parking space close to the building entrance and the employee's office." VA Handbook 5975.1, Section 15(a)(8), ECF No. 31-2 at 225. The VA therefore granted plaintiff a designated parking space closest to the workplace entrance.

Defendant does not disagree that plaintiff remained a "qualified individual with disability" when it rescinded his assigned accessible parking space. (Def. Summary Judgment Memorandum, ECF No. 30 at 10-11.) Nor does defendant assert that either the building entrance or plaintiff's office had changed location before it rescinded the accessible parking space.

Defendant's argument appears to be that because it decided that it would not assign a Covid screener to the building entrance that plaintiff used, his assignment of a parking spot closest to that entrance was rescinded. (Def. Summary Judgment Memorandum, ECF No. 30 at 4.) Defendant's expectation was that plaintiff would then "re-engage in the interactive process" to find an alternative parking spot. (Defendant's Rule 56.1 Statement, ¶ 25.; Plaintiff's Rule 56.1 Statement, ¶ 14.) This expectation is unlawful.

In *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the Court held that once an employee has proposed "a method of accommodation that is reasonable," the employer must show that providing the accommodation would result in an "undue hardship." *Id.* at 402. Here, plaintiff proposed a "method that was reasonable" when he discussed his plight with Associate Police Chief Eric Ousley in March of 2020. (Plaintiff's Rule 56.1 Statement, ¶¶ 16-18.) Ousley agreed to plaintiff's requested accommodation and gave

plaintiff permission to enter through the pharmacy entrance on the understanding that he "will continue to be screened every day." (*Id.*, ¶ 20.)

Under *Barnett*, the VA has the burden to show that the reasonable accommodation approved by Ousley was not reasonable. *Barnett*, 535 US at 402 (2002). This burden always remains with the employer. *Ellison v. U.S. Postal Serv.*, 84 F.4th 750, 760 (7th Cir. 2023); *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 787 (7th Cir. 2002). The VA does not attempt to meet this burden but seeks to argue that its directive "to implement screening procedures" superseded the Rehabilitation Act. (Def. Summary Judgment Memorandum, ECF No. 30 at 3-4.) This is incorrect.

The VA, in its policy implementing the Rehabilitation Act, acknowledges that "the Rehabilitation Act is superior to any office, facility, Administration, or VA policy on telework, hours of duty, parking etc." (VA Handbook 5975.1(3)(j)(3), ECF No 31-2 at 212.) This is a correct statement of the law. The Rehabilitation Act is superior to the VA's decision to close the pharmacy door rather than detail a screener to meet plaintiff at the pharmacy door when he arrived at 5 a.m. each workday.

Defendant offers a different theory, arguing that once it rescinded the reasonable accommodation it had furnished plaintiff, the Rehabilitation Act ceased to protect plaintiff until he "requested to be re-accommodated." (ECF No. 30 at 11.) This Court should reject this theory.

B. Defendant's "Re-accommodation" Theory Is Meritless

The Court should reject defendant's argument that, once it rescinded the reasonable accommodation it had furnished plaintiff, the Rehabilitation Act ceased to protect

plaintiff until he "requested to be re-accommodated." (ECF No. 30 at 11.) Defendant is unable to present any authority for this theory, citing a single case for the unremarkable proposition that the "accommodation process begins when the employee specifically requests an accommodation." (ECF No. 30 at 11, citing *Cloe v. City of Indianapolis*, 712 F.3d 1171, 1178 (7th Cir. 2013).)

In this case, plaintiff requested the accommodation in 2019, and it was granted. Defendant does not suggest that plaintiff stopped being a qualified individual with a disability when he was barred from entering the workplace through the pharmacy door. Nor does defendant contend that it was unaware of plaintiff's disability when it told plaintiff he could no longer use the pharmacy door to retrieve his scooter and start his workday. Finally, defendant does not contend that its regulations implementing the Rehabilitation Act allow it to rescind a reasonable accommodation under the circumstances of this case.

Congress extended the Rehabilitation Act in 1978 to apply to federal agencies, requiring each agency to promulgate regulations to implement the Act. 29 U.S.C. § 794(a). The regulations promulgated by the VA are contained in its 'Handbook 5975.1," Defendant's Exhibit 8, ECF 31-2 at 199-238.

Section 15(c) of the Handbook makes plain that a reasonable accommodation may only be changed under "rare circumstances." 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.)

The VA applied Section 15(c) when it responded to a proposal in October of 2020 to again close the pharmacy entrance, this time because of "staffing and the low use of the pharmacy entrance." (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 41.) Carmen Smith, who was then the "reasonable accommodation coordinator at the Hines VA," discussed this plan with plaintiff, and informed VA management that moving the parking spot required the agency to "prove undue hardship" as well as that the "accommodation is no longer effective." (Plaintiff's Rule 56.1(a)(2) Statement, ¶¶ 43-44.)

The VA regulations define an "undue hardship" as "the significant difficulty or expense incurred or anticipated" by providing a particular accommodation. (VA Handbook 5975.1, Section 2(q), ECF No. 31 at 207.) The regulations provide that when the claimed hardship is unreasonable cost, "[o]nly the Secretary, VA, can deny a request based on cost." (*Id.*, Section 2(q)(1), ECF No. 31 at 207.) Defendant thus cannot assert that there would have been an "undue hardship" if it had detailed a screener to be at the pharmacy door to screen plaintiff each morning at 5:00 a.m. when he arrived for work. This is the reasonable accommodation plaintiff would have suggested had the VA engaged in an "interactive process" before rescinding his reasonable accommodation. (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 28.)

There is no merit in any argument that the need to undertake Covid screening made it impracticable to allow plaintiff to continue to enter through the pharmacy entrance. First, the VA did not consider this issue. The VA's position was simply that if any of the door closings impacted any person who had "reasonable accommodation" parking space, "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." (Plaintiff Rule 56.1(a)(2) Statement, ¶ 18.) Second, the cost of detailing a screener to the pharmacy when plaintiff entered the building at 5 a.m. is not a basis for depriving plaintiff of his reasonable accommodation unless the Secretary of the VA determined that the accommodation would have been too costly.[1] (VA Handbook 5975.1, Section 2(q), ECF No. 31 at 207.) Nothing in the record suggests that the Secretary was asked to consider this question.

The VA should have done in May of 2020 what it did in October of 2020, when it again considered closing the pharmacy entrance for financial reasons. (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 33.) The "reasonable accommodation coordinator" advised the VA that closing the pharmacy entrance and depriving plaintiff of his reasonable accommodation parking spot required the VA "to prove undue hardship and show how this accommodation is no longer effective." (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 35.)

Plaintiff's accommodation of parking his car near the pharmacy entrance was a reasonable accommodation before and after the Covid closures. The VA violated the

[1] *Cf. Groff v. DeJoy*, 600 U.S. 447, 468 (2023) ("undue hardship" for religious accommodation required a burden that is substantial "in the overall context of an employer's business")

Rehabilitation Act when it stopped plaintiff from entering through the pharmacy entrance from May 20, 2020 to June 29, 2020. The Court should therefore grant summary judgment to plaintiff.

C. The Court Should Deny the VA's Motion for Summary Judgment

Viewed in the light most favorable to plaintiff, the summary judgment record fails to show that the VA made a reasonable effort to accommodate plaintiff's disability after it stopped plaintiff from entering through the pharmacy door.[2] Plaintiff discusses below the "specific, admissible evidence," *Johnson v. Advoc. Health & Hosps. Corp.*, 892 F.3d 887, 894 (7th Cir. 2018), which shows that there is a genuine dispute of material fact on the VA's motion.

Defendant's theory is that after it rescinded plaintiff's accommodation, it offered him an alternate accommodation that he rejected. (ECF No. 30 at 9-10). A jury would be entitled to find that defendant is to meet its burden of showing that the alternate accommodations proposed by plaintiff were not reasonable.

The VA admits that it refused to consider plaintiff's request for a parking space in front of the Emergency Room entrance. (ECF 30 at 11.) The VA's explanation for this decision is somewhat evasive.

[2] In plaintiff's view, the Court need not reach this question because the VA violated the Rehabilitation Act when it rescinded plaintiff's reasonable accommodation to park adjacent to the pharmacy entrance and enter through that door.

The medical evidence supporting plaintiff's request for a reasonable accommodation included the limitation that plaintiff could not walk more than 40 feet, even with a cane or walker. (Plaintiff's Rule 56.1(a)(2) Statement, ¶ 3.)

No one measured the distance plaintiff would have been required to walk with any of the accommodations defendant offered to plaintiff after it prohibited him from entering through the pharmacy entrance. The first effort to measure these distances occurred in December of 2020, when Brian Fong, a facility planner, measured the distance from an available parking spot to a secured storage area in building 228, found it to be "pushing the 40-50 ft distance marker for the RA," and concluded that storing plaintiff's scooter in a conference room in Building 228 could accommodate plaintiff's limited ability to walk. (Plaintiff's Additional Facts, ¶ 19.)

The VA argues that it was unreasonable for plaintiff to reject a parking spot in front of the entrance to Building 1. (ECF No. 30 at 11-12.) The VA, however, fails to present any evidence that the distance plaintiff would have been required to walk from this parking spot was within the 40-foot limit of his physical abilities. On the contrary, the VA has a produced an email stating that if the VA relocating plaintiff's parking spot to Building 1, Section 1, he would "will need assistance with getting to his car." (Plaintiff's Additional Facts, ¶ 20.) The VA has not come forward with any evidence that it offered to provide plaintiff with such assistance. (*Id.*. ¶ 21.)

The VA asserts that it was entitled to reject plaintiff's request to park adjacent to the Emergency Room entrance because the parking spaces there had been "designated as a general handicapped space (for patients and visitors.)" (*Id.*) This reason is contrary

to VA policy set out in 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.

(Plaintiff's Additional Facts, ¶ 12.) Moreover, the reasons proffered by the VA are not the "undue hardship" required by *US Airways, Inc. v. Barnett*, *supra*—there is no "undue hardship" from designating a general handicapped space as reserved for a particular employee.

The VA also contends that it was unreasonable for plaintiff to expect that he could store his scooter overnight in the Emergency Room. (ECF 30 at 11.) The only support for this claim comes from Christopher Wirtjes, plaintiff's second level supervisor who did not "think" it was feasible to store the scooter in the Emergency Room. (Plaintiff's Additional Facts, ¶ 13.) Wirtjes did not have authority to approve parking a scooter in the Emergency Room (*Id.*, ¶ 14.) Viewed in the light most favorable to plaintiff, the record shows that the VA did not do any work to investigate the feasibility of plaintiff storing his scooter in the Emergency Room. (*Id.*, ¶ 15.)

III. Conclusion

"An employer may not rescind an existing reasonable accommodation unless there is a material change in circumstances that warrants it." *Isbell v. John Crane, Inc.*, 30 F. Supp. 3d 725, 734 (N.D. Ill. 2014). Defendants have not shown any such circumstance. The

Court should deny the defense motion for summary judgment and grant plaintiff's motion for summary judgment on liability.

Respectfully submitted,

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