

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

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

**PLAINTIFF'S APPENDIX OF EXHIBITS TO
CROSS-MOTIONS FOR SUMMARY JUDGMENT**

/s/ Kenneth N. Flaxman
Kenneth N. Flaxman
ARDC No. 0830399
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Exhibit 1

From: [Bourke, David](#)
To: [Ousley, Eric](#)
Subject: Entry at the back of building 200 by outpatient pharmacy
Date: Friday, March 13, 2020 1:06:00 PM

Hello deputy chief Ousley my name is David Bourke and I work in the ambulatory surgery unit Bldg. 200 basement room B 019. My work ext. 28019 or 20262. I enter Bldg. 200 at the back by outpatient pharmacy, due to my Hines VA reasonable accommodation requires I park in spot #1011. I need entry by this entrance due to my disabilities and cannot walk very far. I usually arrive at the back of Bldg. 200 around 5:00am to 5:15am. Is this entry open at 5:00am? Please contact me and about entry by this designated parking spot I have. I spoke with Major McFields on my lunch and he told me to call (708)2022013 upon my arriving at the back of Bldg. 200 and someone will have to open up this door so I can enter? If this the course you want me to use please call or email about this issue. My cell phone number (630)392-1377 after 2:30pm or my work number is ext. 28019 or 20262.

Thank you, David Bourke
Ambulatory surgery unit Bldg. 200
Basement room B 019 ext. 28019 or 20262

Exhibit 2

From: Bisard, Jon <Jon.Bisard@va.gov>
Sent: Thursday, October 8, 2020 12:32 PM
To: Tepper, Samantha <Samantha.Tepper@va.gov>; Smith, Carmen A (HIN) <Carmen.Smith2@va.gov>
Cc: Morris, Angela M. <Angela.Morris4@va.gov>; Bisard, Jon <Jon.Bisard@va.gov>
Subject: RE: Door Closure/Parking Issue

All, this issue is a part of Mr. Bourke's discrimination complaint which is currently in the investigative stage. It is my understanding that prior to filing the complaint the Hospital Director (Doctor Braverman) denied Mr. Bourke's request to use that door as he was entering without COVID screening. Jon

From: Smith, Carmen A (HIN) <Carmen.Smith2@va.gov>
Sent: Thursday, October 8, 2020 12:17 PM
To: Tepper, Samantha <Samantha.Tepper@va.gov>
Cc: Morris, Angela M. <Angela.Morris4@va.gov>; Cooper, Tammy C. FHCC Lovell <Tammy.Cooper2@va.gov>; Bisard, Jon <Jon.Bisard@va.gov>
Subject: RE: Door Closure/Parking Issue

Good Day,

It is the advisement of the RA office not to close the pharmacy entrance. The facility would have to prove that this is truly an undue hardship on the agency. Due to the current EEO investigation this will look like reprisal. It is the advisement of this office not to pursue this. The current accommodation is effective for the employee. If staffing is the issue then perhaps you all can close another entrance other than outpatient pharmacy.

Best,

Carmen Smith, VHA-CM
Human Resources Specialist
Reasonable Accommodation Coordinator (578)
VISN 12 Worklife
Ph: 708-202-5668
Fax: 708-202-7345
Email: carmen.smith2@va.gov

Search Accommodation Options by clicking on the below site:
www.askjan.org

Join the VA Pulse RA Community of Practice
<https://www.vapulse.net/groups/reasonable-accommodation-services>

Exhibit 3

Graham, Angela

From: Graham, Angela
Sent: Monday, May 18, 2020 1:48 PM
To: Scheirer, Shawn D (HIN)
Subject: David Bourke

Good Afternoon Shawn

Can you give me a heads up when David parking spot is moved and available. He will need to have assistance with getting to his car when this is completed

Yours Sincerely,

Angela Graham
Supervisory for Surgical Clinics
Eye Clinic, 5th Floor Surgical Clinics, 2nd Floor Pre- Op/Post Op Surgical, Ambulatory Surgery
Patient Administrative Services
Office (708)202-2758
Mobile (708) 904-1119
U.S. Department Of Veteran Affairs
Edward Hines Jr V.A Hospital

Exhibit 4

1 IN THE UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF ILLINOIS

3 EASTERN DIVISION

4

5 DAVID BOURKE,)
6 Plaintiff,)
7 vs.) No. 22 CV 3164
8 DENIS McDONOUGH, SECRETARY,)
9 U.S. DEPARTMENT OF VETERANS)
10 AFFAIRS, UNITED STATES OF)
11 AMERICA,)
12 Defendants.)

13

14 The deposition of CARMEN SMITH, called for
15 examination pursuant to Notice and the Rules of
16 Civil Procedure for the United States District
17 Courts pertaining to the taking of depositions,
18 taken before Tabitha Watson, an Illinois Shorthand
19 Reporter, via videoconference, on the 31st day of
20 May, 2023, at the hour of 9:59 a.m.

21

22

23 Reported by: Tabitha Watson, CSR, RPR

24 License No.: 084-004824



1 APPEARANCES:

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3 ATTORNEY KENNETH N. FLAXMAN

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7 E-mail: knf@kenlaw.com

8 Representing the Plaintiff,

9
10 UNITED STATES ATTORNEY'S OFFICE, by

11 ATTORNEY NICOLE FLORES

12 219 South Dearborn Street, 9th Floor

13 Chicago, Illinois 60604

14 Phone: (312) 886-9082

15 E-mail: nicole.flores3@usdoj.gov

16 Representing the Defendants.



1 MS. REPORTER: For the record, this deposition
2 is being taken by Zoom videoconference and the oath
3 will be administered by me remotely. If there are
4 no objections to this, would counsel please state
5 so and identify themselves for the record, starting
6 with plaintiff's attorney.

7 ATTORNEY FLAXMAN: I am Kenneth Flaxman for the
8 plaintiff.

9 ATTORNEY FLORES: And I am Nicole Flores for
10 the defendant. No objection.

11 ATTORNEY FLAXMAN: Plaintiff has no objection
12 also.

13 (Witness sworn via videoconference.)

14 CARMEN SMITH,
15 called as a witness herein, was examined and
16 testified as follows:

17 EXAMINATION

18 BY ATTORNEY FLAXMAN:

19 Q. Good morning. Could you state your name
20 and spell your last name for us, please?

21 A. Yes. Carmen Smith, S-M-I-T-H.

22 Q. And what's your business or occupation?

23 A. I am a lead human resource specialist with
24 the Department of Veteran Affairs.

1 Q. For how long have you worked for the
2 Department of Veteran Affairs?

3 A. For 13 and a half years.

4 Q. And what did you do before that?

5 A. I worked in the private sector HR,
6 customer service, quality assurance.

7 Q. Okay. I think in one of your e-mails you
8 told Mr. Bourke that you had served in the
9 military?

10 A. No. I've never served. My father served.

11 Q. Okay. Somebody else.

12 All right. Were you the reasonable
13 accommodation coordinator at Hines before December
14 9th of 2019?

15 A. Before December 9th, yes.

16 Q. December 9th. And did you return to that
17 position in June of 2020?

18 A. Yes.

19 Q. How did you -- what were your duties as
20 the reasonable accommodation coordinator?

21 A. As the reasonable accommodation
22 coordinator, my duties are basically a liaison
23 between management and the employee. So I am
24 responsible for walking employees and management

1 through the reasonable accommodation process,
2 ensuring that all the documents are in, and then
3 reviewing the medical documentation to determine if
4 the employee is indeed a qualified individual with
5 a disability which limits one or more major life
6 activities.

7 Q. And in the course of your work as the RA
8 coordinator, did you meet the plaintiff in this
9 case, David Bourke?

10 A. Yes.

11 Q. How did you first meet him, if you recall?

12 A. If I recall correctly, he submitted a
13 reasonable accommodation request to his supervisor
14 who then forwarded the request to me and then I met
15 him as part of the interactive process where I met
16 with both him and his supervisor to discuss his
17 reasonable accommodation request.

18 Q. Could you explain to us what you meant by
19 interactive process?

20 A. Well, the interactive process, it's a
21 communication between the employee and supervisor
22 in consultation with the reasonable accommodation
23 coordinator to determine how to best respond to the
24 employee's request.

1 Q. And did you engage in that interactive
2 process with Mr. Bourke about his reasonable
3 request?

4 A. Yes.

5 Q. Do you recall about when that was -- when
6 that began?

7 A. I engaged with him back in 2018 I believe.

8 Q. And what was the result if you recall of
9 that interactive process, Mr. Bourke's RA request?

10 A. The result of the interactive process was
11 that his supervisor listened to his request,
12 learned of his limitations, and then kind of
13 brainstormed ideas of how to best accommodate him
14 and, if I recall correctly, his request at that
15 time was approved.

16 Q. And did he get a close parking spot?

17 A. Yes, I believe that is correct. That was
18 one of his requests.

19 Q. Do you remember in August -- well, did you
20 look at any documents to prepare for this
21 deposition?

22 A. Yes, I did. I glanced at them. I can't
23 quite recall them all.

24 Q. Can you tell us which documents you can

1 recall having looked at?

2 A. I looked at the affidavit that I signed as
3 well as I did review some e-mails that were e-mail
4 communications between Mr. Bourke and myself as
5 well as management and myself.

6 Q. Do you recall if you got an e-mail from
7 August 29th of 2019 about a parking placard?

8 A. Vaguely, yes.

9 Q. Let me put that on the screen.

10 A. Okay. That would definitely help.

11 Thanks.

12 Q. If I can get that working. Is it there?

13 Yes.

14 A. Yes. Mm-hmm.

15 Q. Do you see it's marked Smith Exhibit 1 at
16 the bottom of the page and to the right it says
17 Page 1?

18 A. Mm-hmm.

19 Q. And then we're looking at an e-mail, is
20 that an e-mail that you wrote or sent?

21 A. Yes.

22 Q. On August 29th, 2019?

23 A. Yes.

24 Q. What did you mean that his reserved

1 parking numbering 1011 was installed by
2 engineering? How did engineering install a parking
3 spot?

4 A. It kind of looks like a handicapped sign
5 almost. You know how you park somewhere and they
6 put the pole with the sign? That's what that is.
7 Engineering would have installed a sign that
8 says -- I believe it says like reserved parking and
9 then it has number -- this number that was assigned
10 to him, 1011.

11 Q. Were you involved in getting that and that
12 parking spot being assigned to Mr. Bourke?

13 A. Mr. Bourke -- if I recall, the employee
14 usually bears the responsibility of telling us
15 which parking spot would be most convenient for
16 them. Hines has a huge campus, so that's the
17 policy there is that they would -- the employee
18 would let us know which parking spot would be the
19 best for them.

20 Q. Now, to change Mr. Bourke's parking spot,
21 would the procedures of the VA require that there
22 be another interactive process?

23 A. It can. The interactive process is
24 ongoing. So Mr. Bourke can definitely request to

1 re-engage or the facility, the agency can request
2 to re-engage at any time.

3 Q. Okay. Let me stop sharing so I can look
4 at my notes.

5 A. Mm-hmm.

6 Q. Stop share. Okay. Thank you.

7 Are there rules and regulations of the VA
8 that you followed in doing your job with reasonable
9 accommodation requests?

10 A. Can you please explain further? I'm not
11 sure I quite understand.

12 Q. Well, is there a policy manual at the VA
13 about -- that relates to reasonable accommodation
14 requests?

15 A. Yes. There's VA Handbook 5975.1.

16 Q. And did you follow that in your work?

17 A. Yes, sir.

18 Q. Does that policy require something about
19 an undue hardship when there's a change in a
20 reasonable accommodation?

21 A. Yes. An undue hardship is in the policy
22 manual.

23 Q. Now, did you ever learn that at some time
24 after 2019 Mr. Bourke's reasonable accommodation

1 parking spot that you had been involved with was
2 changed?

3 A. After 2019, yes, I did learn of that --
4 well, no, it wasn't changed. I believe he just had
5 some issues with it.

6 Q. Well, was he no longer able to park at the
7 same parking spot?

8 A. I believe some issues with COVID had
9 arisen where they had closed some particular doors
10 due to COVID and COVID entry and people entering
11 and things like that. I wasn't the RA coordinator
12 at the beginning of COVID, so I'm not really sure
13 exactly what transpired at the very beginning and
14 how they determined which doors would be closed.

15 Q. Why did you stop being RA coordinator?

16 A. Well, at the present time when I was the
17 RA coordinator, it only went to GS9. So there was
18 no -- there was no promotion, no room for
19 advancement. So I left RA coordinator to become a
20 recruitment -- recruitment and placement HR
21 specialist and then once I got in that role, then
22 they decided to reclassify the RA role and give it
23 promotion potential and then I was asked to reapply
24 and I did.

1 Q. Okay. After you returned to the position
2 of RA coordinator, do you remember the date in June
3 of 2020 when that happened?

4 A. No. It was early June. I can't recall
5 exactly. I believe it was early June, like maybe
6 the first pay period of June or something like
7 that.

8 Q. Okay. After you returned to RA
9 coordinator in early June, did you become involved
10 again with Mr. Bourke's RA needs?

11 A. I believe so. I don't believe it was
12 immediate, but sometime during that next tenure of
13 being the RA coordinator from 2020 to 2021, I did.

14 Q. And what's your present position?

15 A. I am the lead human resource specialist RA
16 coordinator, but I'm not with Hines VISN 12. I am
17 with VISN 20 Department of Veteran Affairs. So
18 it's on the west coast. So I left Hines April 2021
19 to join the VISN 20 team.

20 Q. So just what city are you in now?

21 A. Oh, I'm in Chicago virtually; however, I
22 service Portland, Oregon; Seattle, Washington;
23 Anchorage, Alaska; and Boise, Idaho, that region.

24 Q. Okay. Do you remember back in October of



1 2020 when there was some issue about changing
2 Mr. Bourke's reasonable accommodation parking spot?

3 A. Yeah. I did review those documents, yes.

4 Q. Okay. And was there ever a showing of an
5 undue hardship that the agency would have if they
6 didn't change his parking spot?

7 A. I don't believe, if I recall correctly,
8 that they showed an undue hardship.

9 Q. Okay. Let me -- let's go over the
10 documents if I can get this going again.

11 A. Sure.

12 Q. Let me get my magic notes, which I'll try
13 not to share. Oh, good. I think -- are we sharing
14 my magic notes, my work product?

15 ATTORNEY FLORES: I don't see anything.

16 ATTORNEY FLAXMAN: Well, all right. So ...

17 BY ATTORNEY FLAXMAN:

18 Q. Okay. Looking at Page 2 of Smith
19 Exhibit 1, is that your e-mail at the bottom of
20 that page?

21 A. Yes.

22 Q. And did you write it to Angela Morris?

23 A. Yes.

24 Q. Who was Angela Morris at that time?



1 A. I believe she was the acting associate
2 director.

3 Q. Do you know if she's still there?

4 A. I have no idea.

5 Q. And, well, in your e-mail you wrote
6 something about OGC for concurrence, do you see
7 that?

8 A. Mm-hmm.

9 Q. What is OGC?

10 A. The Office of General Counsel.

11 Q. Do you know if the VA ever went through
12 the Office of General Counsel about Mr. Bourke's RA
13 requests?

14 A. I don't recall. If they did, it would be
15 in the documentation.

16 Q. Okay. And is it -- am I correct that
17 under the procedure manual at the VA the agency
18 would have to prove undue hardship to change a
19 reasonable accommodation parking spot?

20 A. That is correct. For any reasonable
21 accommodation, they would have to prove undue
22 hardship.

23 Q. And have you ever seen any documents in
24 which the agency proved undue hardship or changing



1 Mr. Bourke's parking spot?

2 A. Not that I recall.

3 Q. Okay. Let's turn to Page 3 of Exhibit 1
4 and is this exhibit -- is this an e-mail that you
5 sent on October 13th of 2020?

6 A. Yes.

7 Q. And does it accurately summarize your
8 conversation with Mr. Bourke?

9 A. I don't recall the conversation, but if
10 that's what I put in the e-mail. That was so long
11 ago.

12 Q. Do you know if he had a scooter that he
13 used to move from place to place back in October of
14 2020?

15 A. Yeah, I do recall a scooter.

16 Q. And at the last paragraph you wrote, due
17 to the sensitivity of this matter. Do you recall
18 what you meant by that?

19 A. Wait one second.

20 Q. That paragraph starts, I am not in
21 agreement with the three suggestions.

22 A. Correct. I said -- because I'm neutral,
23 so I'm not in agreement or disagree with it. But
24 due to the sensitivity of the matter, I recommend

1 leaving the entrance open because of the employee,
2 this is a reasonable accommodation request. It's a
3 sensitive matter.

4 Q. Okay. Let's go to Page 8. And is that
5 another -- is that an e-mail that you sent on
6 October 8, 2020 at 12:36 p.m.?

7 A. Yes.

8 Q. Do you recall making the suggestion that
9 the back -- that the pharmacy entrance not be
10 closed for Mr. Bourke?

11 A. Yes. That was my recommendation per this
12 e-mail.

13 Q. Okay. And was it your assessment -- was
14 it your view back in October that Mr. Bourke's
15 reasonable accommodation was -- had been effective
16 for him?

17 A. Correct.

18 Q. Going back to Page 7, which has in the
19 middle -- is that an -- do you see the e-mail that
20 you sent on October 8, 2020 at 12:17 p.m.?

21 A. Yes.

22 Q. And then the second sentence, you wrote,
23 the facility would have to prove that this is truly
24 an undue hardship on the agency.



1 A. Correct.

2 Q. What did you mean by that?

3 A. The agency -- the burden is on the agency
4 to prove that the accommodation is not effective.

5 The employee states that it's effective for him.

6 So the agency would have to prove why it would not
7 be effective.

8 Q. And would the agency have to have reduced
9 that in writing, its determination that a
10 modification of the reasonable accommodation was
11 required?

12 A. Yeah. They would have to provide a
13 written justification as to why this accommodation
14 is not effective and then provide documentation to
15 support. That would then have to go to the Office
16 of General Counsel to review and then concur with
17 their decision. However, the decision --
18 concurrence from OGC or recommendation from the
19 reasonable accommodation coordinator, we don't make
20 the decision. The decision is ultimately up to the
21 agency to decide whether or not they will take the
22 recommendation or concurrence or nonconcurrence
23 from the OGC.

24 Q. Have you ever seen any documentation that

1 indicates that the agency made a showing of undue
2 hardship --

3 A. Not that I can recall.

4 Q. -- with respect to Mr. Bourke's parking
5 spot at any time after he got it in 2019 I think?

6 A. Not that I can recall.

7 Q. Okay. If you look at Page 6, that's an
8 e-mail from you to Samantha Tepper. Do you know
9 who Samantha Tepper was or is?

10 A. She worked in the director's office. I'm
11 not sure what her exact -- I see what her title is.
12 I'm not sure what her role, if that makes sense,
13 is.

14 Q. Okay. Does this e-mail establish an undue
15 hardship that required Mr. Bourke's parking spot be
16 changed?

17 A. No.

18 Q. Does it say who made the decision to make
19 the pharmacy entry at Hines an exit-only?

20 A. No. It doesn't state that.

21 Q. Do you know who made that decision?

22 A. No, I don't. I'm not sure. It could have
23 been -- it was someone in the -- it had to be
24 someone in the director's office. Possibly Angela

1 Morris. I'm not sure. Or that could have been a
2 compilation of director's office and engineering.
3 I'm unsure. I wouldn't be privy to that
4 information.

5 Q. If you look at Page 5, at the top is
6 another e-mail from you dated November 20th, 2020
7 at 11:53 a.m., do you see that?

8 A. Yes.

9 Q. In that e-mail, you state that the
10 employee cannot walk more than 15 feet without a
11 cane or walker. How did you make that
12 determination?

13 A. I believe it had to be from some medical
14 documentation that he would have submitted.

15 Q. And is that the same for the next
16 sentence, with cane or walker no more than 40 or
17 50 feet?

18 A. Yes.

19 Q. If we go back to -- let's go back to
20 Page 3. I think we did Page 3.

21 A. Yes.

22 Q. Let's look at Page 4. This is an e-mail
23 from December 20th. Well, it's an e-mail thread.
24 It's two e-mails. There's -- do you know who Brian



1 Fong is?

2 A. Excuse me. No. I don't believe I've ever
3 met him personally.

4 Q. Well, is there a position called facility
5 planner?

6 A. There could be. I'm not familiar.

7 Q. Did you ever learn that in December of
8 2020 Mr. Fong -- let's go back.

9 December 2, 2020, were you still the RA
10 coordinator?

11 A. No. I believe I had transitioned at that
12 time to recruitment and placement. I was
13 officially hired in recruitment and placement in
14 September of 2020, but we were waiting on a new RA
15 coordinator. So I'm not sure exactly -- I
16 transitioned sometime in December, but I'm not sure
17 if I was here or not.

18 Q. Do you know who the new RA coordinator is
19 or was?

20 A. At that time, it was Shawn Scheirer.

21 Q. Do you ever talk with Mr. Scheirer about
22 Mr. Bourke's RA?

23 A. Not that I can recall. I know when he
24 came on board, I did do a turnover report for him.



1 Whether or not Mr. Bourke was included on that
2 turnover, I can't recall.

3 **Q. What's a turnover report?**

4 A. Where I basically -- open cases that I
5 have time, when the new RA coordinator comes on
6 board, I let him know where we are in the process
7 and provide details to him so that he can pick up
8 right where I left off and begin to follow-up on
9 these cases.

10 **Q. Do you still have a copy of that turnover?**

11 A. No, I don't. Probably not. No.

12 **Q. Do you know where we could find a copy?**

13 A. Shawn may have it or the new RA
14 coordinator may still have one. I don't know.
15 It's not something that's procedure. It's just
16 something I did as a professional courtesy.

17 **Q. When is the last time you spoke with
18 Mr. Bourke?**

19 A. Oh, I believe he sent me an e-mail maybe
20 right after I left Hines I believe, but I haven't
21 actually spoken -- verbally spoken with him. I
22 believe the last communication was sometime right
23 after I left Hines.

24 ATTORNEY FLAXMAN: Okay. I have nothing



1 further.

2 ATTORNEY FLORES: Okay. I just have a couple
3 follow-up questions, Ms. Smith.

4 EXAMINATION

5 BY ATTORNEY FLORES:

6 Q. Just to be clear, were you the -- you
7 were -- were you the RA specialist from March of
8 2020 through May of 2020?

9 A. No.

10 Q. Okay. And then you came back and then
11 left again in December of 2020, is that what you
12 just testified to?

13 A. No. I left in December of 2019.

14 Q. 2019?

15 A. Yeah. December 2019 through June 2020 and
16 then from June 2020 to April, I believe, 2021.

17 Q. Okay. Were you involved at all in
18 Mr. Bourke's accommodations or interactive process
19 during the time period of March 2020 through May of
20 2020?

21 A. No. I wasn't in that position.

22 Q. Okay. And to your knowledge when you were
23 involved in the interactive process in 2019 with
24 Mr. Bourke, to your knowledge, did he request a --

1 a reasonable accommodation scooter as part of his
2 request for a parking spot?

3 A. Not to my knowledge.

4 Q. And when you testified earlier that the
5 agency had not documented undue hardship, were you
6 referring to the time period in which you were
7 involved in Mr. Bourke's accommodations --

8 A. Yes.

9 Q. -- after you returned?

10 A. Yes.

11 Q. Okay. So did you have any knowledge or
12 oversight into the process from March of 2020 to
13 May of 2020 --

14 A. No.

15 Q. -- and to whether or not there was undue
16 hardship to the agency at that time?

17 A. No.

18 Q. Okay. And at the time that you became
19 involved once again, in the fall of 2020, had the
20 pharmacy doors been reopened after a period of
21 being closed?

22 A. I don't recall.

23 ATTORNEY FLORES: Okay. I think that's all my
24 questions.

1 ATTORNEY FLAXMAN: I have nothing further.

2 Signature?

3 ATTORNEY FLORES: We'll review.

4 (Witness excused.)

5 (Deposition concluded at

6 10:25 a.m.)

7

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Exhibit 04

Exhibit 5

Lieb, Theresa (ORMDI)

From: Smith, Carmen A (HIN)
Sent: Tuesday, October 13, 2020 9:01 AM
To: Bourke, David
Subject: Reserved Parking Spot Issue

Hi Mr. Bourke

It was a pleasure speaking with you this morning. Per our telephone conversation, I advised you that the facility would like to close the pharmacy entrance due to staffing shortages and very little traffic (only 40 people) per day coming through that entrance. I advised you that an option is to find you a new entrance and a place in very close proximity to the new entrance where we can have your scooter stored.

Your response:

Absolutely not. The answer is no. You advised me to provide leadership with the following 3 options:

1. Have HR man their own doors because they have less than 40 people.
2. Close down the Directors entrance and require the Director to enter through another door.
3. Allow you alone to continue to enter through the pharmacy entrance, where you will go and retrieve your scooter and then go to the nearest screening entrance.

If number 3 is allowed then you would like to have this approval in writing so that in the event that you are stopped that you will have the documentation to provide. Thank you.

Best,

Carmen Smith, VHA-CM
Human Resources Specialist
Reasonable Accommodation Coordinator (578)
VISN 12 Worklife
Ph: 708-202-5668
Fax: 708-202-7345
Email: carmen.smith2@va.gov

Search Accommodation Options by clicking on the below site:

www.askjan.org

Join the VA Pulse RA Community of Practice

<https://www.vapulse.net/groups/reasonable-accommodation-services>



Exhibit 6



From: Morris, Angela M. <Angela.Morris4@va.gov>

Sent: Thursday, October 8, 2020 3:56 PM

To: Smith, Carmen A (HIN) <Carmen.Smith2@va.gov>; Bisard, Jon <Jon.Bisard@va.gov>; Tepper, Samantha <Samantha.Tepper@va.gov>

Subject: RE: Door Closure/Parking Issue

Greetings Carmen,

Our office consulted with Police. It appears that the employee will need to consult further with the RA coordinator to locate a parking spot. Once identified, the new parking spot location should be shared with police for concurrence and engagement with Engineering. Is that correct? If so, can you circle back to the patient and provide an update to the group?

Thanks,

Angela Morris, MPH, LCSW

Acting Associate Director

Edward Hines, Jr. VA Hospital

Phone: 708.202.2152

Mobile: 708.516.9644

Angela.Morris4@va.gov

From: Smith, Carmen A (HIN) <Carmen.Smith2@va.gov>

Sent: Thursday, October 8, 2020 1:03 PM

To: Morris, Angela M. <Angela.Morris4@va.gov>; Bisard, Jon <Jon.Bisard@va.gov>; Tepper, Samantha <Samantha.Tepper@va.gov>

Subject: RE: Door Closure/Parking Issue

This would have to go through OGC for concurrence because this is a reasonable accommodation. The agency would have prove undue hardship and that is very difficult to prove. Prepare your written justification along with any supporting documentation and I will review and submit to OGC.

Best,

Carmen Smith, VHA-CM
Human Resources Specialist

Exhibit 7

From: [Smith, Carmen A \(HIN\)](#)
To: [Morris, Angela M.](#); [Bisard, Jon](#); [Tepper, Samantha](#)
Subject: RE: Door Closure/Parking Issue
Date: Tuesday, October 13, 2020 10:51:59 AM

Good Day,

I have reached out the employee and advised him that I will assist him with locating another parking spot with a spot to secure his scooter. His response was simple: No. He has stated that this is reprisal and the current accommodation is effective for him. The agency would need to prove undue hardship. My recommendation is the same as before to leave the pharmacy entrance open.

He stated that the reason that there are very few people entering through pharmacy is because the veterans are not aware that they can enter through that door. He has the following suggestions which he wanted shared:

1. Have HR man their own doors because they have less than 40 people.
2. Close down the Directors entrance and require the Director to enter through another door.
3. Allow you alone to continue to enter through the pharmacy entrance, where you will go and retrieve your scooter and then go to the nearest screening entrance.

I am NOT in agreement with the 3 suggestions however the employee insisted that I provide this to leadership in writing and he will be requesting records via a FOIA request and his representative. Due to the sensitivity of this matter, I recommend leaving the entrance open. If the facility does not want to leave the entrance open then they will need to prove undue hardship and show how this accommodation is no longer effective.

Best,

Carmen Smith, VHA-CM
Human Resources Specialist
Reasonable Accommodation Coordinator (578)
VISN 12 Worklife
Ph: 708-202-5668
Fax: 708-202-7345
Email: carmen.smith2@va.gov

Search Accommodation Options by clicking on the below site:
www.askjan.org

Join the VA Pulse RA Community of Practice
<https://www.vapulse.net/groups/reasonable-accommodation-services>

9I\JVjh,

From: [Morris, Angela M.](#)
To: [Fong, Bryan E. FHCC Lovell](#); [Powell, Adam \(HIN\)](#)
Cc: [Beidelschies, Jon E \(HIN\)](#)
Subject: RE: RA discussion follow-up
Date: Wednesday, December 2, 2020 3:57:00 PM

Thank you Bryan.

From: Fong, Bryan E. (HIN) <Bryan.Fong1@va.gov>
Sent: Wednesday, December 2, 2020 3:51 PM
To: Morris, Angela M. <Angela.Morris4@va.gov>; Powell, Adam (HIN) <Adam.Powell2@va.gov>
Cc: Beidelschies, Jon E (HIN) <Jon.Beidelschies@va.gov>
Subject: RE: RA discussion follow-up

Walked the possible paths from the workplace to the doors. By B228's entrance there is no easily securable space within the lobby. The only possible options near B228's doors would be the first conference room in Mental Health's Admin area on the first floor. Anywhere else would probably be pushing the 40-50 ft. distance marker for the RA or is not secure enough.

V/r

Bryan Fong
Facility Planner
Edward Hines, Jr. VA Hospital
5000 S. 5th Ave.
Building 1, Room G413
Hines, IL 60141
Office: 708-202-8387 x24621
Bryan.Fong1@va.gov

Hazard Zet Forward

From: Morris, Angela M. <Angela.Morris4@va.gov>
Sent: Tuesday, December 1, 2020 4:13 PM
To: Fong, Bryan E. (HIN) <Bryan.Fong1@va.gov>; Powell, Adam (HIN) <Adam.Powell2@va.gov>
Cc: Beidelschies, Jon E (HIN) <Jon.Beidelschies@va.gov>
Subject: FW: RA discussion follow-up

Greetings,
We are hoping to temporarily relocate someone with an RA so the pharmacy entrance of building 200 can be closed. Bryan, can you assess whether there is a location available in building 228 that is within the distance mentioned below?

Thank you,
Angela

From: Smith, Carmen A (HIN)

Exhibit 9

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

DAVID BOURKE,)
Plaintiff,)
vs.) No. 22-CV-3164
)
DENIS MCDONOUGH, SECRETARY,)
U.S. DEPARTMENT OF VETERANS)
AFFAIRS, UNITED STATES OF)
AMERICA,)
Defendant.)

The deposition of BRYAN FONG, called for examination pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions, taken before Ronda L. Jones, a notary public within and for the County of Cook, State of Illinois, via videoconference, on the 14th day of July, 2023, at the hour of 10:08 a.m.

Reported by: Ronda L. Jones, CSR, RPR

License No.: 084-002728

1 APPEARANCES:

2 KENNETH N. FLAXMAN LAW OFFICE

3 BY: MR. KENNETH N. FLAXMAN

4 200 South Michigan Avenue, Suite 201

5 Chicago, Illinois 60604

6 (312) 427-3200

7 knf@kenlaw.com

8 Representing the Plaintiff;

9
10 MS. NICOLE FLORES

11 Assistant U.S. Attorney

12 219 South Dearborn Street, 9th Floor

13 Chicago, Illinois 60604

14 (312) 886-9082

15 nicole.flores3@usdoj.gov

16 Representing the Defendant.



1 BRYAN FONG,
2 called as a witness herein, having been first duly sworn, was
3 examined and testified as follows:

4 EXAMINATION

5 BY MR. FLAXMAN:

6 Q. Good morning, sir. Could you state your name and
7 spell your last name for us, please?

8 A. My name is Bryan, B-r-y-a-n, last name Fong,
9 F-o-n-q.

10 Q. What's your business or occupation?

11 A. I'm a program analyst.

12 Q. And by whom are you employed?

13 A. I work for VH -- not VHA. I work for the -- so I
14 just changed positions. So I work for the Financial Services
15 Center for VA.

16 Q. Were you ever a facility planner?

17 A. Yes, sir.

18 Q. For how long -- could you give us the starting
19 dates and ending dates of when you worked as a facility
20 planner, about?

21 A. February 2021 -- no. February 2020 to March 2021,
22 I believe. I have the years a little mixed up because of the
23 pandemic.

24 Q. Well, did you start working as a facility planner



1 before COVID?

2 A. Yes, about a month prior to it.

3 Q. That sounds like February 2020.

4 A. Yeah.

5 Q. What did you -- tell us about how old you are?

6 A. I am 38 years old.

7 Q. And briefly what's your professional training or
8 education? What's your education?

9 A. I have a Bachelor's in Business Administration and
10 an MBA focused in healthcare administration. Prior training
11 from on the job is indeed analytics.

12 Q. What did you do as a facility planner?

13 A. The main role of the facility planner was strategic
14 planning as well as planning out how projects were to go for
15 repairs, builds, things like that, in order to change or
16 modernize a facility when necessary as part of the overall
17 strategic and facility plan.

18 Q. Did you ever have any involvement with reasonable
19 accommodations for people of limited mobility?

20 A. That was not a normal scope of my job. Referring
21 to the reason why I'm here, that was one of the few times
22 where, yes, I was brought in as part of that process, I guess
23 for lack of a better word.

24 Q. Do you recall how you happened to be brought into

1 that process?

2 A. I received an E-mail saying that they needed me to
3 assess an area.

4 Q. Do you remember who sent you that E-mail?

5 A. Angela Morris, I believe, according to the
6 document.

7 Q. By "the document" are you referring to the E-mails
8 that are contained in something -- in a document, in a piece
9 of paper which is labeled USA000656 at the bottom?

10 A. The E-mail that was attached to the -- as part of
11 the deposition?

12 Q. Right. I'm trying to identify it. There are
13 numbers at the bottom of the page.

14 A. Oh, yes, 000656.

15 Q. Right. Okay. So we're looking at the same
16 document?

17 A. Yes, sir.

18 Q. Do you remember what it was that you were asked by
19 Ms. Morris to do?

20 A. To look at an area in Building 228, if it was
21 within the scope of a reasonable accommodation, assessment of
22 if it would meet the needs.

23 Q. When you said "scope of reasonable accommodation,"
24 what exactly did you mean?



1 A. If it was within a certain distance, 50 feet, as
2 well as if it's securable.

3 Q. A certain distance from where? Between what two
4 points?

5 A. I don't actually know. I just know that it was
6 from Building 228 to somewhere in Building 200.

7 Q. Was it from a parking space to a building door?

8 A. They weren't very clear. I believe it was --
9 actually it wasn't very clear. I don't remember. It's been
10 a few years.

11 Q. Okay. So let's look -- at the bottom of the page,
12 is that the E-mail from Angela Morris to you that got you
13 working on this job?

14 A. Yes.

15 Q. The way I read it the second sentence says, "Bryan,
16 can you assess whether there is a location available in
17 Building 228 that is within the distance mentioned below?"
18 And what location in Building 228 were you looking for?

19 A. The area I walked was the main entrance of
20 Building 228 where the desk was, that general area.

21 Q. Do you know why it was that this request came to
22 you?

23 A. I think as part of being a facility planner they
24 just assigned anything that had to do with the facility, the



1 structures or things like that to me, the amount of times
2 that I would have to walk areas to assess needs or things
3 like that.

4 Q. Okay. And you wrote back to Ms. Morris an E-mail
5 that's at the top of this exhibit, 656. Is that right?

6 A. Yes, sir.

7 Q. And you ended your E-mail by referring to the 40 to
8 50 foot distance marker for the RA. What did you mean by
9 that?

10 A. I believe that in conversation, not an E-mail but a
11 conversation, someone told me that the distance I was looking
12 for was 50 feet in order to satisfy the reasonable
13 accommodation. So that's what I was referring to, where I
14 walked to where -- I think they were going to somewhere near
15 pharmacy if I remember correctly, that that was too far.

16 Q. And when you ended that sentence "or is not secure
17 enough," what did you mean by that?

18 A. The way I looked at security is if we could place
19 the item or whatever it is behind a locked door or something,
20 a locked gate, that only the individual, as well as for
21 emergency purposes security or facility management, could
22 access that area to make it more private, if you will.

23 Q. Do you remember whether that item was an electric
24 scooter?



1 A. I think that's what I was told.

2 Q. And was it Angela Morris who told you these things?

3 A. I'm not sure.

4 Q. Okay. Have you done any work like this where you
5 walk possible paths and measure distances at any other time
6 while you worked for the VA?

7 A. As a facility planner I had to walk paths at
8 various points, yes.

9 Q. Do you recall back in March of 2020 that there were
10 door closings, entrance door closings at the Hines VA?

11 A. Yes, as part of the facility COVID response, yes.

12 Q. Did you walk any distances or any possible paths in
13 connection with the door closings?

14 A. I was not part of that decision-making process.

15 Q. Were there other facility planners back in March of
16 2020 at the Hines VA?

17 A. No. I was the only one on board, and I had just
18 come on board maybe two weeks prior to that.

19 Q. So as far as you know no one measured the distances
20 between parking spaces and doors in connection with door
21 closings?

22 A. Not to my knowledge, but I wasn't part of that
23 decision-making process.

24 Q. What entranceway did you use to enter the Hines VA

1 before the door closings?

2 A. I would enter through the very end section, not A
3 but the other letter. I believe it was G section where the
4 main parking lots were where staff normally parked and
5 entered into the building.

6 Q. And did that entranceway change with the door
7 closings?

8 A. No. That entranceway stayed open.

9 Q. After you sent the E-mail that's on 656 did you
10 have any further involvement with this particular RA and the
11 possible paths from workplace to the doors?

12 A. I don't believe so. I don't remember any other
13 conversations about it.

14 Q. Have you ever measured the distance from entrance
15 doors to parking spaces?

16 A. I have not.

17 Q. Do you know if anybody has?

18 A. I do not know.

19 Q. Now, the 40 to 50 feet distance marker, that's
20 something you got from Ms. Morris. Is that correct? I don't
21 want to put words in your mouth.

22 A. I don't remember who told me it was 40 to 50 feet.
23 I just remember being told that the target was 40 to 50 feet.

24 Q. Have you ever used that distance in other work



1 you've done in measuring distances at the Hines VA?

2 A. No, I did not. I think this was the only RA I
3 really had to work on.

4 MR. FLAXMAN: I have nothing further.

5 MS. FLORES: I just have, I think, one or two questions.
6 Just give me one moment.

7 EXAMINATION

8 BY MS. FLORES:

9 Q. Mr. Fong, I just have one question for you.

10 A. Yes, ma'am.

11 Q. Were you at all involved in identifying a
12 reasonable accommodation for this individual prior to
13 December of 2020?

14 A. No.

15 MS. FLORES: Thank you. That's all. We'll reserve.

16 * * *

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