UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

DEFENDANT'S COMBINED RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

As plaintiff David Bourke's briefing makes clear, he is not asking this court to apply the Rehabilitation Act but rather to carve out an exception to the Rehabilitation Act (and VA policy) just for him. The court should reject this request and grant summary judgment for the VA, as neither the case law nor the undisputed facts support Bourke's position.

Bourke was not the only employee whose reasonable accommodation parking space was impacted by the COVID screening procedures at Hines in early 2020. Others, including his own supervisor and a doctor, had to be temporarily re-accommodated. These employees had their routines upended to help keep Hines' veterans safe during the early months of the pandemic. But Bourke demanded more than his fellow employees. First, he wanted continued access to the Hines facility without undergoing COVID screening. Then, he wanted to store his scooter in the ER (during a public health emergency) and to use a nearby parking space reserved for handicapped visitors. Finally, he now claims he was entitled to a dedicated COVID screener available for his arrival at work, despite limited access to PPE and other resources. Bourke's demands are facially unreasonable, and he is not entitled to relief simply because the VA rejected these demands.

Argument

I. Local Rule 56.1 Violations

Bourke makes a number of improper objections and denials in his response to the VA's statement of facts. The VA will not belabor Bourke's responses except to point out that most are based on a misreading of the cited evidence or on portions of Bourke's deposition testimony that do not constitute sufficient or competent evidence to create a genuine dispute of material fact. *Szymanski v. Rite-Way Lawn Maintenance Co., Inc.*, 231 F.3d 360, 364 (7th Cir. 2000).

First, Bourke fundamentally misreads the facts and evidence regarding the Building 1, Section C (Section C) temporary accommodation, but his misreading does not render the related facts to be disputed. For example, in objecting to Defendant's Statement of Material Facts (DSMF) ¶ 46,[1] Bourke asserts that the cited May 2020 email chain does not support the fact that the VA police confirmed the availability of a parking space directly in front of Section C. However, the cited email includes a response from Major McField (of the VA police) stating, "This parking spot is located *directly in front of the C door of building 1*, there is a pole in the ground however the spot does not belong to anyone. Will this be acceptable?" DSMF Ex. 20 at USA000271 (Dkt. 31-3 at 137) (emphasis added). Similarly, Bourke cannot deny DSMF ¶ 48 by mischaracterizing Graham's deposition testimony. In the cited testimony, Graham compares the distances involved in Bourke's proposed accommodation near the ER entrance "in front of Building 200" and the offered accommodation at Section C, concluding that "to get him a shorter distance of a walk" the

[1] The DSMF is on the court's docket at Dkt. 31, and the Plaintiff's Statement of Material Facts (PSMF) is at Dkt. 35. For simplicity, reference will not be made to the docket identifiers for these two documents. However, responses and exhibits to these documents will also be identified by citation to the docket.

"C Section" would have been the "feasible" solution. DSMF Ex. at 5 at 27:5-11 (Dkt. 31-2 at 138).[2] Misunderstanding does not create an issue of fact.

Second, Bourke cannot rely on his inconsistent testimony to create genuine dispute of fact. For example, the May 2020 email traffic identifying and reserving offered the temporary parking space at Section C (discussed above) also demonstrates the ways in which much of Bourke's deposition testimony flies in the face of the contemporaneous record evidence. In attempting to deny or rebut DSMF ¶ 47, Bourke cites to his deposition testimony wherein he states that the VA did not offer him a reserved parking space in front of Section C, but the same email chain supporting DSMF ¶ 46 starts with a request from the LRAC to Hines engineering instructing them to install a reserved parking sign at the spot directly in front of the entrance. DSMF Ex. 20 at USA000271 (Dkt. 31-3 at 137). And the same exhibit includes a copy of the actual work order for installation of the reserved parking sign. *Id*. at USA000270 (Dkt. 31-3 at 136).

More importantly, Bourke was included on emails from his supervisor and others discussing scooter storage and a parking space at Section C. DSMF Ex. 18 at USA000261-62 (Dkt. 31-3 at 123-24). In response to an email from LRAC Scheirer stating that he would contact the VA police to identify a spot, Bourke responded, stating "I still want my parking outback [sic] of pharmacy #1011 when the back opens up." *Id*. Bourke's response *acknowledges* that the temporary accommodation included both a parking space in front of Section C *and* storage for his

[2] As a further example, in his objection to DSMF ¶ 19, Bourke claims that "[n]othing in the cited pages of the 30(b)(6) deposition supports" the VA's statement. Pl. Resp. to DSMF ¶ 19 (Dkt. 32 at 5). Again, Bourke misreads the evidence. That paragraph consolidates the following statements taken directly from an answer by the Jon Beidelschies, then-assistant director at Hines: "in March of 2020 COVID was moving its way east/west" (DSMF Ex. 14 at 6:7-8 (Dkt. 31-3 at 44)); "We did not have vaccines. We were seeing a lot of hospitals overrun." (*id*. at 6:9-10); "Again, remember at this point there was no vaccination. There was minimal testing." *Id*. at 6:24-7:1 (Dkt. 31-3 at 45). Additionally, DSMF ¶ 20, which Bourke also denies, is based on the developing and various concerns that Beidelschies described on page 6 of his deposition testimony. Bourke's objection and denial are without merit.

scooter in that Patient Advocate space. And Bourke's own deposition testimony on this point, read in context, actually supports the fact that the VA offered him a parking space in front of Section C, in addition to storage for his scooter. DSMF Ex. 2 at 50:17-18 (Dkt. 31-2 at 53).[3] Bourke's deposition testimony to the contrary, contradicted by the contemporaneous documentary evidence, his own testimony, and the testimony of other witnesses, does not create a genuine dispute of material fact. *Harris N.A. v. Hershey*, 711 F3d 794, 798 (7th Cir. 2013) ("A mere scintilla of evidence . . . is not sufficient; there must be evidence on which the jury could reasonably find for the non-moving party.") No reasonable jury would find that the VA offered did *not* offer Bourke a parking space in front of Section C. There is simply no dispute about the fact that once the entrance at the rear of Building 200 (pharmacy door) were locked on May 14, 2020, the VA sought to relocate Bourke's parking space *and* scooter storage to Section C.

For these reasons, the facts at DSMF at ¶¶ 19-20, 31, 34, 39, 42-44, 46-48, and 56 should be deemed as admitted.[4]

II. The VA Is Not Liable for Bourke's Failure to Re-Engage the Interactive Process.

Bourke's claims are based on the untenable and unsupported premise that the VA could not alter his reasonable accommodation once it was granted. It is well-settled that the interactive

[3] Bourke's attempt to deny DSMF ¶ 47 is also misleading in that in order to make it appear that he was never offered a parking space in front of Section C, Bourke includes a quote from his deposition that is incomplete and taken out of context. While Bourke did testify that the offered temporary accommodation was "way, way too far away from [his] work station," in the sentence that follows Bourke stated that he was being asked "to park in the handicapped spot, disabled spot, *outside the C Section, Building 1*." DSMF Ex. 2 at 50:17-18 (Dkt. 31-2 at 53) (emphasis added). Bourke's criticism was not that he wasn't offered a parking space or that he'd have to *walk* too far, but that the distance he'd travel once retrieving his scooter was too far. But that is not at issue in this case—The accommodation Bourke sought was for the purpose of minimizing the distance he had to *walk*. And certainly, Bourke's grievance on this point is not a denial of DSMF ¶ 47. A minor inconvenience during a public health emergency is not an actionable denial of a reasonable accommodation.

[4] As Bourke points out, the reference in paragraph 31 to the VA's exhibit 17 does not apply to this fact and the reference was made in error.

process is flexible and ongoing, most commonly because the needs of individual employees with disabilities can change. *Cloe v. City of Indianapolis*, 712 F.3d 1171, 1178 (7th Cir. 2013) ("Reasonable accommodation . . . is a process, not a one-off event"). But circumstances of employers may change due to unforeseen circumstances as well, and VA policy contemplates such scenarios. The VA Handbook on reasonable accommodations recognizes that as a general matter, once an accommodation request is approved, "the employee should be allowed to keep the accommodation," even if the employee's supervisor changes or the employee transfers to a new VA location. DSMF Ex. 8 at USA000565 (Dkt. 31-2 at 225). But that same policy anticipates that "[i]n rare instances, the accommodation may need to be changed." *Id*.

Bourke recognizes as much but complains that the VA did not follow what he interprets to be the "commands" of the Handbook. PSMF ¶ 18.[5] The Handbook outlines the process supervisors and LRACs *should* follow before making changes "not requested by the employee," but that language is not the "command" Bourke makes it out to be. The permissive use of "should" (rather than "must") indicates that the process is a best practice rather than a command. In this case, the change was made during a public health emergency by the Hines incident command, which included executive leadership. The decision to close certain doors to effectuate the mandated screening policy, applicable to all employees, was not made by a supervisor or LRAC, and so the best practice outlined in the Handbook could not apply.

Bourke also argues that this VA policy triggers an "undue hardship" analysis, Pl. Memo. at 10, but nothing in the cited portions of the Handbook indicate that the VA cannot change an employee's accommodation save for an undue hardship to the agency. To the contrary, the

[5] Bourke does not contend that the COVID-19 pandemic was not a "rare instance" as contemplated by the policy, nor can he. For the reasons explained by then-Assistant Director of Hines, Jon Beidelschies, the pandemic created an unprecedented public health emergency and a strain on healthcare facilities, including Hines. DSMF ¶¶ 19-23.

Handbook requires the VA to make an undue hardship determination only if it will deny a request for an accommodation. DSMF Ex. 8 at USA000548 (Dkt. 31-2 at 208). That is not the case here, where the VA offered Bourke a reasonable temporary accommodation.

Additionally, Bourke's characterization of the door closures as a "unilateral rescission" of his reasonable accommodation is wholly inaccurate. The situation Bourke found himself in on May 14, 2020, when the pharmacy door was definitively locked, was a situation of his own making. No later than March 12, 2020, Bourke had notice that as of March 16, 2020, his usual entrance would be closed and he would have to undergo screening at a designated entry point. DSMF ¶ 26. Despite having been through the reasonable accommodation process previously with his supervisor, Angela Graham, DSMF ¶ 6, Bourke did not approach Graham or otherwise try to find a new accommodation that would comply with the COVID screening policy. Instead, as Bourke now admits, he continued to access his ASU workspace and scooter via the pharmacy door without being screened, and then used his scooter to go through the hospital facility to the main entrance for screening. Pl. Resp. to DSMF ¶ 29 (Dkt. 32 at 7).[6]

The VA provided Bourke with notice of the change and time to arrive at a temporary solution that would comply with the screening procedures. The interactive process is flexible, but supervisors are not mind readers. It is the employee's responsibility to ask for a reasonable

[6] Bourke' statement of facts asserts immaterial and disputed facts relating to an alleged agreement Bourke made with VA Police Chief Eric Ousley regarding access to the pharmacy door. PSMF ¶ 23. According to Bourke's own deposition testimony it was Major Deshaun McField who agreed to let him access his workspace via the pharmacy door. DSMF Ex. 2 at 38:15-19, 42:15-16 (Dkt. 31-2 at 41, 45). Major McField's deposition testimony corroborates the fact that he spoke to Bourke in mid-March 2020, but McField further testified that he told Bourke that while the VA Police would allow him to access the pharmacy door for a week, Bourke needed to pursue getting a temporary reasonable accommodation parking spot at an open entrance. DSMF Ex. 17 at 7:9-18 (Dkt. 31-3 at 87). These facts are very much in dispute, but they are also immaterial. The undisputed fact is that Bourke continued to access his ASU workplace and scooter via the pharmacy door up until May 14, 2020 (and, in the process, skirted the VA screening procedures for about 2 months). Pl. Resp. to DSMF ¶¶ 29-30 (Dkt. 32 at 7).

accommodation or, as in this case, to notify a supervisor that an accommodation is no longer serving their needs. *See Cloe*, 712 F.3d at 1178 (interactive process begins when an employee specifically asks an employer for an accommodation). Indeed, in this case, Graham testified that she was unaware that Bourke had continued to enter the facility via the pharmacy door. Def. Ex. 5 at 12:7-11 (Dkt. 31-2 at 123).

As the Seventh Circuit has recognized, common sense dictates that an employee must notify their employer of their need for an accommodation. *Beck v. Univ. of Wisc. Bd. Of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1996) (noting that an employee should not be able to keep a disability secret and then sue for failure to accommodate). Notifying an employer of the need for an accommodation triggers the interactive process. *Id*. at 1135. In other words, an employee cannot avoid the interactive process by failing to disclose a disability and then sue their employer. Here, where Bourke had notice of a change to his usual accommodation due to emergency changes affecting all employees at Hines, he cannot sue simply because he chose to not timely *re*-engage the interactive process to identify a new accommodation. This is particularly true in this case, where Bourke's scooter was personally owned (*e.g*. not issued as a reasonable accommodation) and off-hours storage had been arranged outside of the reasonable accommodation process. Pl. Resp. to DSMF¶¶ 3, 6 (unqualified admissions regarding scooter ownership and scope of reasonable accommodation), 16 (admitting that the ASU clinical manager allowed Bourke to store the scooter at his workstation, outside of the RA process) (Dkt. 32 at 1, 2, 4).

It is also telling that once Graham became aware of the need to re-accommodate Bourke, she immediately re-engaged the interactive process with him and worked with LRAC Scheirer to identify a new, temporary reasonable accommodation. DSMF ¶ 34. Bourke's attempt to deny that the VA re-engaged Bourke in the interactive process is a quibble over the legal term rather than

with the facts, nor does it make a difference that Bourke refused to label his conversations, meetings, and emails as an "interactive process." Pl. Resp. to DSMF ¶ 34 (Dkt. 32 at 8). Further, as discussed above, Bourke cannot create a genuine dispute of material fact by misreading the evidence. For example, the evidence cited by the VA at DSMF ¶ 34 states that Graham "met with David" to discuss the VA's offered accommodation (DSMF Ex. 5 at 19:17-20 (Dkt. 31-2 at 130)), that "Mr. Bourke was part of the conversation prior to his spot being moved" (DSMF Ex. 9 at 8:4-5 (Dkt. 31-2 at 247)); and that he "was part of the conversations letting him know that there was an issue with his current spot and there would be no way for him to access the door he was current at." *Id*. at 9:9-13 (Dkt. 31-2 at 248). Bourke's own deposition testimony shows that he discussed his proposed accommodation in the ER space with his supervisor (DSMF Ex. 2 at 71:23-72:2 (Dkt. 31-2 at 74-75)) and that the VA provided him with explanations as to why using the ER parking and interior space was not feasible. *Id*. at 72:5-73:6 (Dkt. 31-2 at 75-76).

Importantly, Bourke now also admits that the VA considered Bourke's alternate request, Pl. Resp. to DSMF ¶ 36 (Dkt. 32 at 8), and that Graham tried to identify a location in the ER where Bourke could store his scooter. *Id*. at ¶ 37 (Dkt. 32 at 8-9). Bourke also admits that Graham offered him an alternate accommodation, *id*. at ¶ 50 (Dkt. 32 at 13), and that he met with Graham to discuss the proposed accommodation. *Id*. at ¶ 51 (Dkt. 32 at 13); *see also* DSMF Ex. 2 at 49:20-24 (Dkt. 31-2 at 49). Throughout the process, Bourke was included on emails and gave his input regarding the possible temporary accommodation. DSMF Exs. 16, 18, 21. Bourke has not cited sufficient evidence to create a genuine dispute as to whether the VA re-engaged the interactive process with him in May 2020.

In choosing to make himself an exception to the COVID screening procedures instead of involving his supervisor or pursuing a temporary accommodation parking space near an entrance

with screening, Bourke created the situation on May 14, 2020, when he found himself locked out of the pharmacy door and without a functional reasonable accommodation parking space. The Hines incident command rightly anticipated that some employees with accommodation parking spaces would be affected by the door closures and that those employees would work with their supervisors to find temporary (if less convenient) solutions. The Hines incident command did not anticipate that Bourke, an employee tasked with keeping veteran patients safe (especially during a global pandemic), would dodge the facility-wide policy for screening. But, as anticipated, VA staff acted swiftly and diligently in finding a temporary solution for Bourke once they learned that his usual accommodation was not working for him.

III. The VA's Proposed Temporary Accommodation Was Reasonable and the Undue Hardship Analysis Is Not Applicable.

This court should not accept Bourke's invitation to shift the burden of proof by framing the issue as one of undue hardship rather than reasonableness. This is not a case in which the VA refused to accommodate Bourke or to engage in the interactive process with him. Rather, the VA offered Bourke an accommodation that was reasonable under the extreme conditions that existed in the first few months of the COVID-19 pandemic. That the reasonable accommodation offered to Bourke was not his preferred accommodation is of no consequence, because it was the VA's prerogative to choose an accommodation that was reasonable under the circumstances. *Igasaki v. Ill. Dept. of Financial and Professional Regulation*, 988 F.3d 948, 961 (7th Cir. 2021); *Hoppe v. Lewis Univ.*, 692 F.3d 833, 840 (7th Cir. 2012); *EEOC v. Sears, Roebuck & Co.*, 417 F.3d 789, 805 (7th Cir. 2005); *Jay v. Intermet Wagner Inc.*, 233 F.3d 1014, 1017 (7th Cir. 2000. The VA does not have to establish undue burden simply because Bourke refused the accommodation and thereafter refused to participate in the interactive process. Crucially, Bourke has failed to come forward with competent evidence that the VA's offered accommodation was not reasonable.

Bourke does not meaningfully dispute that the Patient Advocate space (where the VA offered space to Bourke for storing his scooter during off-hours) was secure. Pl. Resp. to DSMF ¶ 44 (Dkt. 32 at 11) (admitting to the description of the Patient Advocate space being outside of the public view, with no after-hours traffic, and near the VA Police Department). Bourke has expressed a subjective belief that the proposed location for storing his scooter was not secure and has provided hearsay evidence regarding two instances of theft, but he has not pointed to any admissible evidence regarding the specific characteristics of the space that would make it unsecure. Bourke's own supervisor left her keys in *her* scooter in that space to no negative consequence. DSMF ¶ 45. There is simply no evidence that the Patient Advocate space was not secure.

And while Bourke has first-hand knowledge of and can testify to the qualities of his scooter, including the fact that it was a model that could be broken down, his speculation regarding the security of the Patient Advocate space is not enough to overcome summary judgment. *Igasaki*, 988 F.3d at 960 ("impermissible speculation" or "mere assertions" not sufficient to defeat summary judgment); *Riley v. City of Kokomo*, 909 F.3d 182, 192 (7th Cir. 2018) ("bare speculation or a scintilla of evidence" not enough to defeat summary judgment). For example, in his testimony Bourke attempts to create an inference that because the Hines facility, generally, was open 24/7 and homeless veterans were treated there, the "unguarded, unlocked" Patient Advocate space was not secure. DSMF Ex. 2 at 49:23-50:2 (Dkt. 31-2 at 52-53). But there is no evidence that homeless veterans accessed the Patient Advocate space in off-hours or that these veterans were stealing *anything* from Hines. Bourke's inference is impermissibly based on speculation. Even assuming Bourke's description of his scooter is accurate, there is simply no evidence to support Bourke's assertion that the Patient Advocate space was not adequately secure to act as temporary off-hours storage.

Further, as discussed above, Bourke has not come forward with sufficient competent evidence to create a dispute regarding the fact that the VA offered (and, in fact, reserved) a parking space in front of Section C, for his exclusive use until the pharmacy door reopened (which happened just six weeks later). The undisputed material facts are that the VA offered Bourke a parking space directly in front of an authorized entrance with a screener, and also offered him a secure space in which to store his scooter.[7] Bourke himself admits that the accommodation at Section C, would have been a shorter walk than what he ended up with for those six weeks. DSMF Ex. 2 at 57:20-58:2 (Dkt. 31-2 at 60-61). Under the circumstances, the temporary accommodation the VA offered to Bourke was reasonable, and no reasonable jury would find otherwise.

Bourke relies on *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), to argue that the VA has the burden of proving undue hardship because it offered Bourke a reasonable accommodation that was different from the one he preferred. But Bourke's reliance on *Barnett* is misplaced. In *Barnett*, the factual issue was that the employer, relying on its system of seniority for assigning positions (including the one requested by the plaintiff as a reasonable accommodation), had refused to accommodate the plaintiff *at all*, resulting in the plaintiff losing his job. In its analysis, the Court endorsed the approach of lower courts requiring a plaintiff first to make a showing that their proposed accommodation is "reasonable on its face," and second to require the defendant

[7] Bourke claims that "[n]o one measured the distance plaintiff would have been required to walk" with the offered accommodation, but Bourke does not deny that LRAC Scheirer walked and assessed the possible options (referring to the accommodation offered in front of Section C, and Bourke's preferred accommodation in front of Building 200, at the entrance to the ER). Pl. Resp. to DSMF ¶ 47. Further, for the reasons discussed above, Bourke does not meaningfully deny that in walking the possible options, Scheirer determined that the walk from the parking space in front of Section C, to his scooter was the shortest option—even shorter than Bourke's original accommodation near the pharmacy door—and presented fewer tripping hazards. *Id*. Graham also testified that Section C involved "less steps. It was less walking." DSMF Ex. 5 at 47:5-9 (Dkt. 31-2 at 158). The *only* reason he rejected the offered accommodation was his perception that the offered storage space was not secure enough. DSMF Ex. 2 at 57:24-58:2 (Dkt. 31-2 at 60-61) ("If I was offered a locked spot [in Section C], I would have accepted.").

employer demonstrate undue hardship. *Id*. at 401-402; *EEOC v. United Airlines, Inc.*, 693 F.3d 760, 764 (7th Cir. 2012) (describing this analysis as *Barnett* steps one and two).

The Seventh Circuit has recognized that *Barnett* created a "narrow, fact-specific exception" where a plaintiff may show that special circumstances would allow for the ADA (or the Rehabilitation Act) to trump an employer's seniority system. *United Airlines*, 693 F.3d at 764 (overruling *Mays v. Principi*, 301 F.3d 866 (7th Cir. 2002), as having impermissibly expanded the exception). Such is not the case here. To the contrary, even after *Barnett*, the Seventh Circuit has "repeatedly" recognized that an "employer need not provide the exact accommodation an employee asks for." *EEOC v. Charter Commun., LLC*, 75 F.4th 729, 742 (7th Cir. 2023) (collecting cases). Instead, the duty of the employer is satisfied when it "does what is necessary to enable the disabled worker to work in reasonable comfort." *Id*. (citation omitted).

Because the VA offered Bourke a reasonable accommodation, this court should not reach a question of undue hardship. The fact that a subsequent LRAC who was not involved in the facts at issue in this case used the words "undue hardship" in connection with an event that took place after the alleged discrimination here, Pl. Memo. at 11, does not make that analysis any more applicable. The burden shifts to the employer to demonstrate undue hardship only if the employer fails to offer a reasonable accommodation to the employee. *Kauffman v. Petersen Health Care VII, LLC*, 769 F.3d 958, 963 (7th Cir. 2014) (finding employer failed to make showing of undue hardship where it failed to engage in interactive process and told employee that it could not accommodate her disability, leaving her with "no alternative to quitting").

IV. Should *Barnett* Apply to This Case, Bourke Cannot Make Prima Facie Showing That His Preferred Accommodation Was Reasonable.

Even under *Barnett*'s two-step analysis, Bourke fails to make a *prima facie* showing that his preferred accommodations were reasonable. In moving for summary judgment, Bourke claims

that he was entitled to (1) a screener placed at the outpatient pharmacy door, or (2) secure storage for his scooter in the ER with a parking space nearby. Pl. Memo. at 10-11, 13-14. There are numerous issues with Bourke's *argument*, but, fundamentally, Bourke has failed to come forward with evidence to suggest that either accommodation was reasonable.

Regarding Bourke's argument that the VA should have posted a screener at the pharmacy door, one threshold issue is that there is no evidence that Bourke asked for this as an accommodation. Bourke testified about the purported availability of a screener in May 2020, DSMF Ex. 2 at 55:1-8 (Dkt. 31-2 at 58), but he never testified (nor did he introduce documentary evidence to suggest) that he ever requested a detailed screener as an accommodation. However, even assuming *arguendo* that the VA should have considered this possible accommodation during the interactive process, Bourke can point to no admissible evidence to show that this accommodation was reasonable.

First, Bourke's testimony about the availability of a screener in May 2020 to allow the re-opening of the outpatient pharmacy door just for him is inadmissible hearsay. Def. Resp. to PSMF ¶ 27. Bourke has not introduced any admissible evidence to establish that a screener was available prior to June 29, 2020, when the pharmacy door *did* reopen. Second, then-Assistant Director Beidelschies (who was part of the incident command team and has first-hand knowledge of the decisions regarding screening) testified to the specific factors used in determining where screening would take place, and to the fact that Hines leadership was constantly adapting to changing circumstances. DSMF Ex. 14 at 8:13-11:20, 28:12-16 (Dkt. 31-3 at 46-49, 66). While Bourke speculates that the sole barrier to posting a screener to the pharmacy door was cost, he admits that the VA also had to consider staffing and availability of PPE and thermal handheld thermometers

(among other factors). Pl. Resp. to DSMF ¶ 23 (Dkt. 32 at 6). There is simply no admissible evidence that assigning a screener to the pharmacy door in May 2020 was reasonable or required.

As to Bourke's specific request for a parking space near the ER entrance with secure storage within the ER, even now, at summary judgment, Bourke has failed to identify a secure space within the ER where he could have stored his scooter. A vague, unidentified accommodation is, on its face, unreasonable. This is particularly so in this case, where Bourke was requesting space within a 24/7 ER during the early COVID-19 pandemic. It is telling that Bourke identified a specific parking space where he wanted to park his vehicle but has failed to describe with any specificity a place where he could securely store his scooter within the ER. DSMF Ex. 2 at 58:22-23 (Dkt. 31-2 at 61) (identifying "the No. 1 [parking] spot outside the emergency room"); *id*. at 71:25-72:1 (Dkt. 31-2 at 74-75) (identifying "that first spot, handicapped spot right outside the emergency room"). Bourke admits, as he must, that his supervisor was unable to identify secure storage space, Pl. Resp. to DSMF ¶ 37 (Dkt. 32 at 8-9), and that the ER was a "high-traffic area on off" hours and "the heart of the intake" of COVID patients. *Id*. at ¶ 38 (Dkt. 32 at 9). Under the circumstances at play in May 2020, it was facially *un*reasonable for Bourke to use the ER to store his personal scooter.

Finally, that Bourke on the one hand, claims to have been so concerned with the security of his scooter, but on the other hand, has never identified a secure storage space in the ER (where there would be people coming and going during his off hours at the height of the pandemic) is an inconsistency that Bourke cannot now reconcile. Bourke has failed, as a legal and factual matter, to point to any reason why he (alone among other employees who were impacted by the door closures) was entitled to his preferred, but unreasonable, accommodation of choice.

Conclusion

For the foregoing reasons, the court should deny Bourke's motion for summary judgment and grant summary judgment in the VA's favor.

Respectfully submitted,

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