

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

**DEFENDANT'S RESPONSE TO PLAINTIFF'S
LOCAL RULE 56.1(a) STATEMENT OF UNDISPUTED MATERIAL FACTS**

Defendant Denis McDonough, Secretary of the Department of Veterans Affairs, though his attorney, Morris Pasqual, Acting United States Attorney for the Northern District of Illinois, submits the following responses to plaintiff's statement of facts pursuant to Local Rule 56.1:¹

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit.

2. Plaintiff was diagnosed with sarcoidosis in 2015.² (Bourke Dep. 14:20-22, ECF No. 31-2 at 27.)

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit.

3. By June of 2019, plaintiff had become “unable to walk [more than] 15 feet without cane/walker due to shortness of breath due to underlying lung condition” and “with cane or walker, still unable to walk [more than] 40 feet due to back pain and breathing.” (Defendant’s Exhibit 3, ECF No. 31-2 at 197, “Request for Medical Documentation.”)

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit.

¹ Any admission of fact is in the context of addressing plaintiff's motion for summary judgment and does not constitute an admission in any other context or future proceedings.

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

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit that Bourke's healthcare providers at the VA, specifically his physical therapy doctor, helped him to obtain a scooter for his personal use at home or at work. *See Plaintiff's Response to Defendant's Statement of Material Facts (Pl. Resp. to DSMF) ¶ 3 (Dkt. 32)* (unqualified admission that Bourke obtained a personally owned scooter through his healthcare provider). Deny that Bourke was provided with a scooter specifically "to use in the workplace." The evidence Bourke cites does not support any inference that the scooter was issued to Bourke solely for use at work or that it was part of a reasonable accommodation. Rather, it was Bourke's personally owned scooter, and he was able to use it at work or at home for personal use. DSMF Ex. 2 at 23:11-17 ("I don't think the RA was for the scooter itself."), 24: 13-16 ("they said, 'No. That is your scooter. Whether you leave here or go home, whatever you do with it, it's yours.'"), 25:5-6 (clarifying he obtained the scooter through his physical therapy doctor) (Dkt. 31-2 at 26, 27, 28).

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit that Bourke testified that he could not take the scooter apart, load it into his vehicle, and then reassemble it. DSMF Ex. 2 at 23:21-25 (Dkt. 31-2 at 26).

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit.

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

- a. Difficulty in functioning in high stress environments

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

(Defendant's Exhibit 4, Written Confirmation of Request for Accommodation, ECF No. 31-2 at 109.)³

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit.

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

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

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit.

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit.

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit.

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Deny that

Bourke testified that he stored his scooter in a "locked office." Bourke testified that prior to the COVID-19 pandemic, he would park his scooter at his "work station in a corner" and that this

³ The document cited and quoted in paragraph 7 appears at DSMF Ex. 7 at BOURKE 1031 (Dkt. 31-2 at 196), not DSMF Ex. 4.

space was “behind locked doors.” DSMF Ex. 2 at 34:25-35:4 (Dkt. 31-2 at 37-38). Bourke did not testify specifically to his end-of-day routine in the passages cited by him in paragraph 11.

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Admit.

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Admit.

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Admit.

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Admit only that Shawn Scheirer, the Local Reasonable Accommodations Coordinator (LRAC), testified that he was not aware that the Human Resource Department had been involved in the decisions involving door closures. DSMF Ex. 9 at 32:22-24 (Dkt. 31-2 at 271).

16. In choosing which doors to close, the VA did not engage in any “interactive process” with those of its employees, like plaintiff, whose “reasonable accommodation” parking spaces would lose their utility because of the door closings. (Schierer Dep. 8:20-9:1, ECF No. 31-2 at 247.)

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Deny that the evidence cited by Bourke supports the statement in paragraph 16 that the VA did not engage in an interactive process with employees, *generally*, who had to be re-accommodated due to the COVID-19 screening procedures. Admit that LRAC Scheirer testified that there was no conversation

specifically with Bourke regarding the closure of the pharmacy door. DSMF Ex. 9 at 8:22-9:1 (Dkt. 31-2 at 247-48).

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Admit.

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

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

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Defendant objects to the first sentence of this paragraph because it makes improper legal argument. With this objection, defendant denies that the cited evidence (or *any* record evidence) supports the statement that the offered temporary reasonable accommodation parking space at Section C was “unreasonably distant from an entrance to the workplace.” Plaintiff was offered a parking space directly in front of the entrance to Building 1, Section C, where he also would have been able to store his scooter. Pl. Resp. to DSMF ¶¶ 50 (Dkt. 32) (unqualified admission that Graham offered Bourke a parking space in front of Section C); DSMF Ex. 2 at 50:17-18 (Dkt. 31-2 at 53) (Bourke’s

testimony that Graham asked him “to park in the handicapped spot, disabled spot, outside the C Section, Building 1”); DSMF Ex. 20 at USA000265 (Dkt. 31-3 at 131) (photo of offered parking space at Section C, which is the first space in the lot nearest to Building 1, Section, C, to the right in the photo (identified as such by Major McField at DSMF Ex. 17 at 15:13-16:3 (Dkt. 31-3 at 95-96)). Admit that the VA Handbook contains the quoted passage.

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Deny that Bourke testified that he spoke *only* with Chief Ousley in March 2020. Bourke testified that he spoke to Chief Ousley *and* Major Deshaun McField in March 2020. DSMF Ex. 2 at 38:1-6 (Dkt. 31-2 at 41).

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Admit.

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Deny that Bourke testified that he stored his scooter in a locked office and deny that Bourke was screened before entering his work area. DSMF Ex. 2 at 34:25-35:4 (Bourke’s testimony that he stored his scooter at his workstation in the ASU, a space that was “behind locked doors”), 38:10-11 (testifying that “every morning I was making my way to my scooter” *then* getting screened) (Dkt. 31-2 at 37-38, 41). Bourke testified that he told Chief Ousley *and* Major McField that after entering via his usual entrance (where there was no screener) he would get his scooter and “take

the scooter to the main entrance and get screened.” DSMF Ex. 2 at 38:8-13 (Dkt. 31-2 at 41). Prior to being screened, Bourke used his scooter to move through Building 200 to a screener. Pl. Resp. to DSMF ¶ 29 (Dkt. 32 at 7) (unqualified admission to statement that Bourke would “use his scooter to go through the facility to the main or ER entrances to be screened”).

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Deny that Bourke testified that he stored his scooter in a locked office. DSMF Ex. 2 at 34:25-35:4 (Dkt. 31-2 at 37-38). Bourke testified that in the ASU, he parked his scooter at his “work station in a corner where they showed [him] where they wanted it. It was in a very secure location that was behind locked doors.” *Id.*

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Defendant objects to this paragraph because the stated fact is in dispute and is immaterial. With this objection, deny. The cited evidence does not support the statement that Chief Ousley consented to Bourke’s continued use of the pharmacy door after screening procedures were instituted at Hines. In the cited deposition passage, Bourke testified that *Major McField* was the one to give him “permission” to continue to use that entrance. DSMF Ex. 2 at 38:16 (Dkt. 31-2 at 41). Bourke cites to no evidence of a separate conversation with Chief Ousley. At his deposition, Major McField corroborated the fact that he spoke to Bourke but had a different recollection of the conversation. Major McField stated that in March 2020 he had advised Bourke to contact the LRAC for a temporary spot but gave Bourke permission to continue to use the pharmacy door until

he obtained a new temporary spot, “but only for this week.” DSMF Ex. 17 at 6:8, 7:9-18 (Dkt. 31-3 at 86, 87).

24. Plaintiff continued to enter through the pharmacy entrance until May 14, 2020; plaintiff also continued to report to the screeners to have his temperature checked to comply with the COVID-19 protocol. (Email, Bourke to Ousley and Scheirer, May 14, 2000, Defendant’s Exhibit 16, ECF No. 31-3 at 79.)

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Admit only that Bourke continued to use the pharmacy door until May 14, 2020. Deny Bourke’s characterization that he complied with the screening procedures. The evidence Bourke cites does not support the statement that he “compl[ied] with the COVID-19 protocol.” The VA’s COVID screening procedures instructed all employees to enter Hines facilities *and* be screened at one of the designated *entry* points. DSMF Exs. 15 (email to Hines staff with instructions on accessing the facilities via “designated access points”), 14 at 6:11-16, 10:12-18 (testimony of then-Assistant Director Beidelschies regarding the purpose of screening procedures early in the pandemic) (Dkt. 31-3 at 76-77, 44, 48). Bourke evaded that policy by entering the ASU space without being screened, retrieving his scooter from the ASU workspace, and then using his scooter to make his way through Building 200 to the main entrance (again, before being screened), where he was finally screened after having navigated through staff and patient spaces in Building 200. DSMF Ex. 2 at 34:25-35:4 (Bourke’s testimony that he stored his scooter at his workstation in the ASU, a space that was “behind locked doors”), 38:8-14 (testifying: “even though they [. . .] don’t have a screener back there, that every morning I was making my way to my scooter, and before I even removed my jacket, I would take the scooter to the main entrance and get screened”); (Dkt. 31-2 at 37-38, 41); Pl. Resp. to DSMF ¶ 29 (Dkt. 32 at 7) (unqualified admission that “use his scooter to go through the facility” prior to being screened).

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Deny. The cited deposition testimony does not support the statement. LRAC Scheirer did not testify that he instructed the police to bar Bourke’s access to the pharmacy door. In the cited deposition testimony, LRAC Scheirer is responding to questions about a May 14, 2020, email. DSMF Ex. 9 at 10:16-11:4 (Dkt. 31-2 at 249-50); Def. Ex. 31 at USA000259-60. (email marked by plaintiff as “Exhibit 9” and presented as such during LRAC Scheirer’s deposition). In response to this line of questioning, LRAC Scheirer testified only that he became aware that Bourke was entering the Hines medical facility via the pharmacy door, which was supposed to be secured due to the COVID lockdown procedures. DSMF Ex. 9 at 12:1-13 (Dkt. 31-2 at 251). In the email exchange at issue in the deposition Q&A LRAC Scheirer did not “instruct” the police to bar Bourke’s use of the pharmacy door. Def. Ex. 31 at USA000259. Instead, he is responding to an email from Bourke, who asked Chief Ousley of the VA Police to identify a new parking space for him. *Id.* at USA000259-60. Bourke’s original email does not state who told him he could no longer use the pharmacy door; rather, Bourke is asking for a new reasonable accommodation parking space for use “until the back of Bldg. 200 is opened up again.” *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. (Schierer Dep. 7-8, ECF No. 31-2 at 20:20-21:1.)

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Admit.

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Defendant

objects to this paragraph because it is speculative and relies on inadmissible hearsay. The cited testimony is Bourke's recollection of a statement purportedly made by an individual who Bourke has neither named nor identified as a witness. *See* DSMF Ex. 30 (Dkt. 31-4 at 59) (Bourke's Rule 26(a) disclosures listing only two witnesses, Bourke and Dr. Raj Uppal). The cited testimony is inadmissible hearsay. With this objection, deny. Bourke has not produced or identified any evidence that in May 2020 he asked for a dedicated screener to be posted to the pharmacy door as a temporary accommodation or that this was a feasible or reasonable accommodation at the time.

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit.

Further stating that the contemporaneous evidence in the record indicates that in May 2020, Bourke requested *specifically* to be accommodated with scooter storage in the ER, along with parking nearby. DSMF Ex. 16 (Dkt. 31-3 at 79) (May 14, 2020, email from Bourke to Chief Ousley and LRAC Scheirer asking for "a new reserved parking spot" and an "area room or closet, in the ED [emergency] department, where I could lock up my electric scooter safely[.]").

29. The VA rejected plaintiff's request for a reserved parking space adjacent to the front lobby for two reasons: First, because it would have required that an existing handicapped parking spot be designated for an individual. (Schreier Dep. 36:1 to 37:7, ECF No. 31-2 at 275.) Second, because the VA police "would have to monitor and throw people out of that spot and write tickets and tow their cars every day of the week." (Bourke Dep. 54:11-14, ECF No. 31-2 at 57.)

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit only

that *one* reason the VA determined that Bourke's request to park near the entrance to the ER was not feasible was because the VA would not "redesignate a handicapped spot to an individual person." DSMF Ex. 9 at 36:2-7 (Dkt. 31-2 at 275); *see also* DSMF Ex. 17 at 19:23-20:3 (Dkt. 31-

3 at 99-100) (Major McField's testimony that Hines does not have "separate handicapped spots for employees versus veterans [patients]"). Further stating that the VA also determined that there was no place in the ER for Bourke to securely store his scooter during his off hours, making parking in front of the ER entrance impractical for Bourke. *See* Pl. Resp. to DSMF ¶¶ 37 (Dkt. 32 at 8-9) (unqualified admission to fact that Bourke's supervisor, Angela Graham, was unable to identify possible storage within the ER space).

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

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

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Defendant objects to this paragraph because it makes improper legal argument. With this objection, deny that Bourke has cited to any evidence to support the statement that the VA violated this or any other portion of VA Handbook 5975.1. Admit that the VA Handbook contains the quoted passage.

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit.

32. The VA has not presented any evidence that plaintiff's request to store his scooter in the Emergency Room was ever presented to the person with authority to grant or deny that request: The VA rejected that request because Christopher Wirtjes, plaintiff's second level supervisor did not "think we can have a scooter parked in the ED on off hours as this can be a high traffic area on on off hours." (Defendant's Exhibit 19, Email, Wirtjes to Graham, May 15, 2000, ECF No. 31-3 at 128.)

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Deny. Bourke admits that Graham could not identify a secure space for Bourke to store his scooter in the ER space. Pl. Resp. to DSMF ¶ 37 (Dkt. 32 at 8-9). Bourke also admits that Wirtjes identified multiple COVID pandemic-related issues with utilizing ER space for scooter storage. *Id.* at ¶ 38 (Dkt. 32 at 9). Per VA Handbook 5975.1, both Graham and Wirtjes (Bourke's first- and second-line supervisors) are designated management officials with authority to decide if the VA will provide a particular accommodation. DSMF Ex. 8 at 5 (Dkt. 31-2 at 203) (at 2.a. describing the "DMO" as the "decision-maker").

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit that Wirtjes testified that approval to store Bourke's scooter during the COVID-19 pandemic would "probably" have to come from the "chief of staff." DSMF Ex. 6 at 11:4-8 (Dkt. 31-2 at 181). Wirtjes also testified that he knew he "wasn't going to be able to get approval for" Bourke to store his scooter in the ER. *Id.* at 11:1-2 (Dkt. 31-2 at 181). Deny that Wirtjes did not have authority to evaluate the reasonableness of Bourke's requested accommodation. Per VA Handbook 5975.1, Wirtjes, together with Graham, had authority to make a final determination on whether to grant Bourke's proposed temporary accommodation. DSMF Ex. 8 at 5, 26 (Dkt. 31-2 at 203, 24). Bourke has not cited to any evidence to support his assertion that Wirtjes was required to present Bourke's patently unreasonable request to the chief of staff.

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Deny. The evidence Bourke cites does not support the conclusion that Wirtjes was making decision based on

his “belief” or that “no work was done to investigate the feasibility of plaintiff storing his scooter in the” ER. Wirtjes testified that in 2020 he was the chief of the patient administration service and he testified to the conditions under which Hines was operating the ER at the beginning of the pandemic. DSMF Ex. 6 at 5:9-10; 18:13-19:6 (Dkt. 31-2 at 175, 188-89). When Graham was asked at her 2023 deposition whether there was “any work that was done to investigate the feasibility of David parking his scooter in the ED,” she responded that she didn’t “know anything about that.” DSMF Ex. 5 at 35:10-14 (Dkt. 31-2 at 146). Just prior to this testimony, though, Graham stated that she had inquired (or, “investigated,” to use Bourke’s term) into the feasibility of storing Bourke’s scooter in the ER. Id. at 33:3-6, 34:4-5, 34:11-20 (Dkt. 144, 145). Additionally, *contemporaneous* evidence indicates that in May 2020, Graham asked LRAC Scheirer about Bourke storing his scooter in or near the ER, and stated that “[t]here is a[n] outlet there that he can use[] to charge up the scooter.” DSMF Ex. 19 at USA000228 (Dkt. 31-3 at 128). Further, Bourke has admitted that Graham attempted to identify secure storage for Bourke’s scooter in the ER space but could not find a secure location. Pl. Resp. to DSMF ¶ 37 (Dkt. 32 at 8-9).

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Deny that the cited evidence accurately states the primary reason Bourke rejected the VA’s offered temporary accommodation. Bourke testified that “the main reason” he “would not accept that *parking spot*” was due to concerns about the security of his scooter. DSMF Ex. 2 at 50:3-12 (Dkt. 31-2 at 53) (emphasis added). This testimony is corroborated by contemporaneous evidence, namely the email Bourke sent to Graham informing her that he was rejecting the Section C accommodation

“in order to leave my scooter in a locked-secure area at my work station.” DSMF Ex. 21. That email makes no mention of the Section C accommodation being too far from his workstation, nor does it mention any issue with the VA not identifying an accompanying parking space outside Section C. *Id.* And Bourke testified during his deposition that he would have accepted the Section C accommodation *if* he was offered a locked space for storing his scooter. DSMF Ex. 2 at 57:24-58:2 (Dkt. 31-2 at 60-61) (“If I was offered a locked spot, I would have accepted, but since they would not give me a locked room and a key, I refused the spot.”).

Further stating, the quoted and cited testimony is misleading and is inconsistent with other testimony by Bourke and with the contemporaneous evidence. Regarding Bourke’s statement that “that entrance was ‘way, way too far away from my work station,’” this quote is taken out of context. Read in context, Bourke’s criticism was not that he’d have to *walk* too far, but that the distance he’d have to travel *with his scooter* from Section C to the ASU was too far. *Id.* at 50:3-21 (Dkt. 31-2 at 53). Similarly, it is disingenuous for Bourke to rely on the cited testimony to state that the VA “refused to provide his with a reserved parking space” at Section C. Bourke acknowledges that Graham “wanted [him] to park in the handicapped spot, disabled spot, outside the *C Section, Building 1*. DSMF Ex. 2 at 50:16-18 (Dkt. 31-2 at 53) (emphasis added). Bourke was included on emails from his supervisor and others discussing scooter storage *and* a parking space near Section C. DSMF Ex. 18 at USA0000261-62 (Dkt. 31-3 at 123-24). The record contains numerous emails among VA staff regarding the parking space at Section C. DSMF Ex. 20 at USA000271-76 (Dkt. 31-2 at 137-42). At LRAC Scheirer’s direction, the engineering department generated a work order for installation of a reserved parking sign at Section C. *Id.* at USA000270-71 (Dkt. 31-3 at 136-37).

36. The VA recognized that, if plaintiff parked at Building 1, Section 1, he would “will need assistance with getting to his car” after is “parking spot is moved and available.” (Email, Graham to Scheirer, May 18, 2020, Plaintiff’s Exhibit 2.)⁴

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Deny. The quoted email does not state that “if plaintiff parked at Building 1” he would regularly need assistance. In context, the May 18, 2020, email does not suggest that Bourke would need routine assistance other than on the date the parking spot is moved. Pl. Ex. 3 (Dkt. 42 at 8). Graham sent the email to LRAC Scheirer asking him to notify her “when David parking spot is moved and available. He will need to have assistance with getting to his car when this is completed.” *Id.* A common sense understanding of this request would be that once Bourke’s parking space was moved to Section C, he would also be storing his scooter there, and on the day of the move, if he were to leave his scooter at Section C, his parking space would be unacceptably far away from that entrance. He would need assistance on the day of the move if he had parked his car near the pharmacy door or another entrance but would be leaving his scooter at Section C. Further, regarding the email, Graham testified that her concern was that Bourke might deny the Section C accommodation. DSMF Ex. 5 at 40: 2-6 (Dkt. 31-2 at 151). Graham’s concern was not that Bourke would need assistance on a daily basis at Section C but that he might need assistance if he rejected that accommodation. Graham’s email was sent on the afternoon of May 18, 2020, but Bourke did not reject the Section C accommodation until June 3, 2020, nor did he request any assistance at that time. DSMF Ex. 21 (Dkt. 31-4 at 2).

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

⁴ The email cited and quoted in paragraph 17 appears at Pl. Ex. 3 (Dkt. 42 at 8), not Pl. Ex. 2.

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit, and further responding that Bourke did not ask for further assistance or a different accommodation once he rejected the VA's temporary re-accommodation at Section C. DSMF Ex. 21 (Dkt. 31-4 at 2).

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

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

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit that Bourke wrote the above-quoted email to Graham. Deny that Bourke has presented evidence of injury.

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Admit.

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Defendant objects to paragraph 40 as immaterial. Bourke's complaint alleges discrimination from March 2020 through July 2020. Dkt. 1, ¶¶ 9, 14. As it related to Bourke's parking space, his underlying administrative EEO complaint alleged denial of his reasonable accommodation beginning on May

14, 2020. Def. Ex. 32. Bourke now admits that the window of alleged denial of his accommodation is narrow: May 14, 2020, through June 29, 2020. Pl. Resp. to DSMF ¶ 28, 53, 54 (Dkt. 32 at 6, 14) (Bourke’s unqualified admissions that he was able to utilize his original accommodation through May 14, 2020, that he regained full access to that original accommodation on or around June 29, 2020, and that he continued to have uninterrupted access to his original accommodation until he transferred out of the ASU in late 2022). With this objection, admit that VA staff considered closing the pharmacy door in October 2020 due to staffing and usage. Def. Ex. 33 at USA000643-48 (full email chain, including discussion of resources). Deny that the pharmacy door was closed. Pl. Resp. to DSMF ¶ 54 (Dkt. 32 at 14) (unqualified admission that the pharmacy door remained open until Bourke changed departments).

41. Carmen Smith, who was then the “reasonable accommodation coordinator at the Hines VA” (Plaintiff’s Exhibit 4, Smith Dep. 5:12-15), discussed this plan with plaintiff (Plaintiff’s Exhibit 5, Email, Smith to Bourke, October 13, 2020), and informed VA management that moving the parking spot required the agency to “prove undue hardship.” (Plaintiff’s Exhibit 5, Email, Smith to Marris, October 8, 2020.)

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Defendant objects to paragraph 41 as immaterial for the reasons stated in its objection to paragraph 40. With this objection, admit that Carmen Smith was the LRAC in October 2020 and that she communicated with Bourke regarding a possible closure of the pharmacy door in October 2020. Admit that LRAC Smith suggested to other VA staff that the VA would have to “prove undue hardship” if it were to close the pharmacy door again. Deny that LRAC Smith was involved in the VA’s efforts to re-accommodate Bourke in May 2020. Pl. Ex. 4 at 22:17-21 (Dkt. 42 at 31). As a factual matter, deny that LRAC Smith’s invocation of “undue hardship” is consistent with the VA Handbook 5975.1. DSMF Ex. 8 at 33 (Dkt. 31-2 at 231) (describing “undue hardship” in

context of denying a request for an accommodation, not altering an existing accommodation due to a public health emergency).

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Defendant objects to paragraph 42 as immaterial for the reasons stated in its objection to paragraph 40. With this objection, admit that on October 13, 2020, LRAC Smith recommended against further closures of the pharmacy door. Deny that LRAC Smith was involved in the VA’s efforts to re-accommodate Bourke in May 2020. Pl. Ex. 4 at 22:17-21 (Dkt. 42 at 31). As a factual matter, deny that LRAC Smith’s invocation of “undue hardship” is consistent with VA Handbook 5975.1. DSMF Ex. 8 at 33 (Dkt. 31-2 at 231).

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Defendant objects to paragraph 43 as immaterial for the reasons stated in its objection to paragraph 40. With this objection, admit that in November and December of 2020, there was a large crane set up near the pharmacy door that had the potential to impact Bourke’s access to his usual accommodation. Def. Ex. 34 at USA 000660. Admit that, because of the construction project, the VA evaluated possible temporary accommodations for Bourke and another employee. *Id.* at USA000656-59.

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Defendant objects to paragraph 44 as immaterial for the reasons stated in its objection to paragraph 40. With this objection, admit that Bryan Fong was a facility planner at Hines from February 2020 to March 2021. Pl. Ex. 9 at 4:18-22 (Dkt. 42 at 46). Deny that Fong testified that he “measured” any distance via a precise methodology. *Id.* at 7:19-20; 8:11-15 (Dkt. 42 at 49, 50). Fong testified that he “walked” the area at the main entrance to Building 228 as a way of measuring the distance between the entrance there and possible locations for Bourke’s scooter. *Id.* Deny that there is evidence to suggest that Fong and LRAC Scheirer used different methods to “measure” possible accommodations because they both testified that they “walked” various paths. *Id.*; DSMF Ex. 9 at 29:14-17; 36:16-20 (Dkt. 31-2 at 268, 275). Deny that Fong was routinely involved in reasonable accommodations or that he was involved in the VA’s efforts to re-accommodate Bourke in May 2020. Pl. Ex. 9 at 5:20; 11:11-14 (Dkt. 42 at 47, 53).

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Defendant objects to paragraph 45 as immaterial for the reasons stated in its objection to paragraph 40. With this objection, admit that Fong testified that he was the only facility planner at Hines in March 2020.

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

Defendant's Response to Plaintiff's LR 56.1(a) Statement of Facts: Defendant objects to paragraph 46 as immaterial for the reasons stated in its objection to paragraph 40. With this objection, deny. Fong testified only that he “was not part of that decision-making process”

when questioned about his involvement in implementing the screening procedures in March 2020. Pl. Ex. 9 at 9:12-14 (Dkt. 42 at 51).

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Defendant objects to Bourke’s statement in paragraph 47 to the extent it constitutes legal argument regarding the burden of proof applicable to this case. Defendant also objects to Bourke’s reliance on Fong’s testimony, which is immaterial. With this objection, deny. Fong did not testify that he “measured” the area tasked to him beyond “walking” that area. Pl. Ex. 9 at 7:19-20; 8:11-15 (Dkt. 42 at 49, 50). LRAC Scheirer testified that he “walked every single” option, referring to the pharmacy door, the ER entrance, and the C Section entrance. DSMF Ex. 9 at 29:14-17; 35:15-22; 36:16-20 (Dkt. 31-2 at 268, 274, 275). In consideration of Bourke’s physical limitations, LRAC Scheirer determined which option offered the shortest walking distance and which route had the fewest trip hazards. *Id.* at 28:23-29:13 (pharmacy door and C Section entrance); 36:7-12 (ER entrance); 36:19-37:3 (Section C entrance) (Dkt. 31-2 at 267-68, 275-76).

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

Defendant’s Response to Plaintiff’s LR 56.1(a) Statement of Facts: Defendant admits only that Bourke so testified during his deposition. Deny that Bourke has introduced competent evidence of an increase in his pain medication or evidence that the alleged increase was due to his having to walk to and from his car during the approximately 46 days during which he

did not have access to the pharmacy door. One of Bourke's pain doctors, Dr. Raj Uppal, testified that he recommends walking for all of his patients. Def. Ex. 35 at 24:3-10; 26:2-23. Dr. Uppal recalled Bourke telling him that during the door closures his pain was "a little worse." *Id.* at 24:22-25:6. But Dr. Uppal also testified that Bourke "always had moderate to severe pain[.] So his pain is preexisting; even before I saw him [starting in 2015 or 2016], he has been on pain medications." *Id.* at 11:8-14. While Bourke testified that it was Dr. Uppal who increased his narcotic medication (DSMF Ex. 2 at 76:17-19 (Dkt. 31-2 at 79), Dr. Uppal did not testify to Bourke needing an increase in pain medication. *See* Def. Ex. 35 at 23:20-25:10. Dr. Uppal testified that Bourke's primary provider managed his opioid medication. *Id.* at 12:5-9. And both Dr. Uppal and Angela Graham testified that Bourke regularly walked with his cane during the workday even though he was not required to do so. *Id.* 13:3-14:3 (testifying that he saw Bourke use his scooter to leave the ASU but that within the ASU Bourke was walking with his cane to take patients to the preop area and to take family to the recovery room), 25:6-8 ("all day he was walking there from ASU to preop taking the patients back and forth to recovery room"); DSMF Ex. 5 at 42:5-20 (Dkt. 31-2 at 153) (Graham, Bourke's direct supervisor: "in doing rounds, I have seen David several times our other area without his scooter because he was up and walking; Bourke "didn't need to escort a patient to the rooms or anything" but "there was many times that he would get up and escort a patient or go back to the nurse's office without his scooter").

Respectfully submitted,

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