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 REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Although defendant objects and quibbles about Plaintiff's Statement of Undisputed Facts, the contentions that defendant does not dispute establish that plaintiff is entitled to summary judgment on liability.

I. The Facts That Are Not Disputed by Defendant

Plaintiff is a disabled employee of the Veterans Administration. (ECF No. 44 at 1, ¶¶ 1–3.) In 2018, plaintiff obtained a motorized scooter that he used in the workplace. (ECF No. 44 at 2, ¶ 4.) In 2019, defendant granted plaintiff an accommodation for his mobility issues (ECF No. 44 at 1, ¶ 3) by assigning him the closest parking spot to the door adjacent to his work area. (ECF No. 44 at 3, ¶¶ 9, 10.)

Plaintiff remained disabled and in need of that parking spot on March 16, 2020, when defendant, in response to the COVID pandemic, closed the entrance door adjacent to plaintiff's parking space. (ECF No. 44 at 4, ¶¶ 12-

14.) In choosing which doors to close, defendant knew that the door closings would have an impact on persons who had "reasonable accommodation" parking spaces. (ECF No. 44 at 4, ¶ 14.) Defendant did not involve its "Local Reasonable Accommodations Coordinator" in selecting which doors to close. (ECF No. 44 at 4, ¶ 16.) Nor did defendant have any conversation with plaintiff about closing the entrance door adjacent to his parking spot and his work area. (ECF No. 44 at 5, ¶ 17.)

Defendant permitted plaintiff to continue to use the entrance door adjacent to his parking space until May 14, 2020 (ECF No. 44, ¶ 24) when defendant ordered plaintiff to stop using that entrance. (ECF No. 44, ¶ 26.) Defendant did not initiate any interactive process with plaintiff about his use of that entrance when it ordered plaintiff to stop using it. (*Id.)*

Plaintiff then requested defendant to provide him with a reserved parking spot adjacent to the front lobby. (ECF No. 44, ¶ 28.) Defendant rejected that request because, *inter alia*, it refused to designate an existing handicapped parking spot for an individual. (ECF No. 44, ¶ 29.) Defendant offered plaintiff a different parking spot, which plaintiff rejected (ECF No. 44, ¶ 35) because of his need "to leave my scooter in a locked-secure area." (ECF No. 44, ¶ 38.)

Defendant reopened the door closest to plaintiff's work area on June 29, 2020, and plaintiff resumed using that entrance. (ECF No. 44, ¶ 39.)

II. The Court Should Reject Defendant's Attempt to Manufacture Factual Disputes

Defendant offers legal argument and offers new factual contentions in its response to several of Plaintiff's Statement of Undisputed Facts.[1] This procedure is contrary to Local Rule 56.1(e)(2), which does not permit new facts or legal argument in a response to a statement of undisputed facts.

Plaintiff shows in Part III below that he is entitled to summary judgment on liability even without considering the contentions that defendant attempts to dispute. Plaintiff therefore limits his discussion of the attempt to create disputes to the following two examples.

1. Did plaintiff use the motorized scooter he obtained through the VA at home and at work?

Defendant attempts to create a factual dispute about whether plaintiff used the motorized scooter he obtained through his VA healthcare provider at home and at work. (ECF No. 44 at 2, ¶ 4.) Defendant ignores Local Rule 56.1(e)(2) in its response to paragraph 5 of plaintiff's uncontested facts, that "[t]he motor school was too heavy for plaintiff to take home." Rather than comply with the rule, which requires that the response either "admit

[1] ECF No. 44, ¶¶ 4, 11, 21, 32, 33, 34, 35, 36, 40-48.

the asserted facts, dispute the asserted facts, or admit in part and dispute in part," defendant "[a]dmits that Bourke testified that he could not take the scooter apart, load it into his vehicle, and then reassemble it." (ECF No. 44, ¶ 5.) The Court should deem this contention admitted and reject defendant's argument that plaintiff used the scooter at home.

2. Did plaintiff store his motorized scooter in a "locked office?"

Defendant asserts that plaintiff stored his motorized scooter next to his workstation, behind locked doors, but attempts to dispute that this was a "locked office." (ECF No. 44, ¶ 11.) The Court should reject defendant's response to contention 11 because defendant's response neither admits, disputes, or admits in part and disputes in part plaintiff's contention.

> Plaintiff's contention 11 is:
>
> 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.

(ECF No. 44, ¶ 11.)

Defendant responded to this contention without denying the contention. Instead, defendant "den[ied] that Bourke testified that he stored his scooter in a 'locked office'" and then offered excerpts of plaintiff's deposition testimony. ECF No. 44, ¶ 11. The Court should therefore accept as admitted

the fact that plaintiff stored his motorized scooter in a locked office at the end of each workday.

III. Plaintiff Is Entitled to Summary Judgment on Liability

Defendant's position is that plaintiff had the burden, under the Rehabilitation Act, to "communicate" when he was impacted by the door closing (ECF No. 44 at 5, ¶ 17), and to then "re-engage the interactive process." (ECF No. 43 at 4-9.)

The outcome of this case thus turns on a single question of law:

> May an employer rescind a reasonable accommodation granted under the Rehabilitation Act, in the absence of any change in the employee's status as a "qualified individual with disability," without reengaging in the "interactive process" mandated by the Act?

Neither party has identified caselaw that squarely resolves this question.

Plaintiff relies on the VA Handbook (ECF No. 36 at 6-11); defendant asserts that plaintiff misreads the Handbook and that it does not apply to the facts of this case. (ECF No. 43 at 5.)

Plaintiff also relies on *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) for the proposition that once an employee has proposed "a method of accommodation that is reasonable," the employer must show that providing the accommodation would result in an "undue hardship." (ECF No. 36 at 7, quoting *Barnett*, 535 U.S. at 402.)

Defendant cannot satisfy the test of *Barnett* because it does not present any "undue hardship." Instead, defendant argues that *Barnett* is limited to its facts, i.e., to situations where "the employer, relying on its system of seniority for assigning positions … had refused to accommodate the plaintiff *at all*, resulting in the plaintiff losing his job." (ECF No. 53 at 11.) Defendant's argument overlooks the reasoning the *Barnett* Court employed.

The Court in *Barnett* framed the legal question as follows:

> In US Airways' view, the fact that an accommodation would violate the rules of a seniority system always shows that the accommodation is not a "reasonable" one. In Barnett's polar opposite view, a seniority system violation never shows that an accommodation sought is not a "reasonable" one. Barnett concedes that a violation of seniority rules might help to show that the accommodation will work "undue" employer "hardship," but that is a matter for an employer to demonstrate case by case.

US Airways, Inc. v. Barnett, 535 U.S. at 396–97.

The Supreme Court resolved this legal question by adopting the "practical way" in which the lower federal courts had resolved the issue. *Barnett*, 535 U.S. at 401. The Court held that the employee "need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases." *Id.* The employer "then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." *Id.* at 402. The Court concluded that when a proposed accommodation interferes with a seniority system, it "will not be reasonable

in the run of cases." *Id.* at 403. The Court also concluded that the employee "nonetheless remains free to show that special circumstances … [show that] the requested 'accommodation' is 'reasonable' on the particular facts." *Id.* at 405.

Defendant argues that the Seventh Circuit limited *Barnett* to cases involving a seniority system in *EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012). (ECF No. 43 at 12.) This is incorrect.

In *EEOC v. United Airlines, Inc.*, the Court concluded that *Barnett*

> [O]utlined a two-step, case-specific approach. The "plaintiff/employee ... need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases." *Id.* at 401. Once the plaintiff has shown he seeks a reasonable method of accommodation, the burden shifts to the defendant/employer to "show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." (citations omitted)

EEOC. v. United Airlines, Inc., 693 F.3d at 762.

Here, plaintiff showed an accommodation that seemed reasonable: entering through the door closest to his workplace, as plaintiff did until May 20, 2021. Because defendant had agreed to this accommodation before, defendant cannot show that it was unreasonable. Defendant has not shown any "undue hardship" from continuing this accommodation. The Court should therefore grant summary judgment on liability in favor of plaintiff and hold a trial to determine the amount of damages due to plaintiff.

IV. Conclusion

For the reasons above stated and those previously advanced, the Court should grant plaintiff's motion for summary judgment on liability and set the case for a trial on damages.

Respectfully submitted,

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