

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MARK S. PALMQUIST,

Plaintiff

v.

JAMES PEAKE, Secretary,
Department of Veterans Affairs,

Defendant

Civil No. 07-98-B-W

RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT

Mark Palmquist is suing the United States Department of Veterans Affairs (VA) in a single count complaint alleging one legal claim of discrimination and retaliation under the Rehabilitation Act, Title VII, and the ADA. After some initial confusion, the theory of this case has now been honed. Palmquist contends that he was retaliated against under the Rehabilitation Act for his "protected complaints about disability discrimination" when a supervisor, Sherry Aichner, gave him a poor reference to Delores Tate for a subsequent employment opportunity at the VA Regional Office in Nashville, Tennessee for Ratings Veterans Service Representatives, and he "insists that this reference played a substantial role in his failure to be hired" for one of the Nashville service representative positions.¹ The United States² has filed a motion for summary judgment. (Doc. No. 27.) I denied Palmquist's motion for oral hearing or, in the alternative, a motion to file a surreply, while giving the United States an opportunity to address the substantive legal issue raised in that motion and in Palmquist's response to the motion for

¹ (See Pl.'s Opp'n Mot. Summ. J. at 4.) Palmquist's response to the motion for summary judgment makes it clear that he is bringing a single retaliation claim based on the reference in question. Understandably, the United States briefed its summary judgment motion as if it contained two independent counts, one for discrimination and one for retaliation; the First Amended complaint, while only having one "Legal Claim," suggests this intent. (First Am. Comp, ¶¶ 1,20, Doc. No. 21.) The United States spent a great deal of time and energy in its original summary judgment motion seeking to discredit a "cat's paw" theory of liability in connection with a claim of direct discrimination regarding the Tennessee hiring decision. (See Def.'s Suppl.Br. at 5 n. 6.)

² From here on out I refer to the defendant as the United States.

summary judgment.³ After a careful review of the record I conclude that Palmquist has not generated a genuine dispute of fact that he engaged in protected conduct under the Rehabilitation Act. What he describes as “protected complaints” were, in fact, complaints about his failure to receive the required preferences as a disabled veteran, and in my view he has not demonstrated that those complaints were “protected complaints against discrimination” under the Rehabilitation Act. I recommend that the Court grant the motion for summary judgment.

DISCUSSION

A. Summary Judgment Standard

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In the lexicon of Rule 56, 'genuine' connotes that the evidence on the point is such that a reasonable jury, drawing favorable inferences, could resolve the fact in the manner urged by the nonmoving party, and 'material' connotes that a contested fact has the potential to alter the outcome of the suit under the governing law if the controversy over it is resolved satisfactorily to the nonmovant." Blackie v. Maine, 75 F.3d 716, 721 (1st Cir. 1996) (quoting United States v. One Parcel of Real Property (Great Harbor Neck, New Shoreham, R.I.), 960 F.2d 200, 204 (1st Cir.1992)). I "draw the relevant facts from the summary judgment record and rehearse them in the light most flattering to" Palmquist. Bergeron v. Cabral, 560 F.3d 1, 4 (1st Cir. 2009) (citing Cox v. Hainey, 391 F.3d 25, 27 (1st Cir.2004)).

The United States has requested that the court strike several paragraphs of Palmquist's statement of additional facts. Some of these requests rely on Pilgrim v. Trustees of Tufts

³ (Doc. Nos. 55, 56 & 61.)

College, 118 F.3d 864, 871 (1st Cir. 1997) in which the Panel stated that the plaintiff's perception was not evidence. Palmquist has filed a memorandum in response to these requests. I address each one of these disputes in the order in which they appear in the parties' interwoven facts in the attached appendix.⁴

B. Legal Framework for a Retaliation Claim under the Rehabilitation Act

The Rehabilitation Act provides as relevant to Palmquist's claim: "No otherwise qualified individual with a disability in the United States,... shall, solely by reason of her or his disability ... be subjected to discrimination ... under any program or activity conducted by any Executive agency...." 29 U.S.C. § 794(a).

In his motion for oral argument, Palmquist insists that he is bringing his claim of retaliation under the Rehabilitation Act and not Title VII. (Mot. Oral Argument at 1-2.) In his memorandum in opposition to the motion for summary judgment Palmquist cites to Title I of the American with Disabilities Act (ADA) incorporated into the Rehabilitation Act and relies on the ADA's specific retaliation prohibition, 42 U.S.C. § 12203. (Pl.'s Opp'n Mot. Summ. J. at 5.)

Section 174(d) of title 29, expressly provides:

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

29 U.S.C. § 794(d).

⁴ The parties have amassed a huge factual record. In the course of this recommended decision I have culled the limited facts I deem material to this decision and I discuss them in the context of my legal conclusions. Because this is a recommended decision, I have appended the statement of facts in their entirety to assist the District Court Judge in his de novo review of the issues presented by this motion.

And 42 U.S.C. § 12203(a) reads: "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). See Jarvis v. Potter, 500 F.3d 1113, 1125 (10th Cir. 2007) (federal employee Rehabilitation Act retaliation claim brought pursuant to 42 U.S.C. § 12203(a)).

Thus, there is no doubt that the "Rehabilitation Act prohibits retaliation against employees for complaining about violations of the Act." Quiles-Quiles v. Henderson, 439 F.3d 1, 8 (1st Cir. 2006) (federal employee claim) (citing 29 U.S.C. § 791 and Coons v. Sec'y of the Treasury, 383 F.3d 879, 887 (9th Cir.2004)). "To prove retaliation," Palmquist must "establish that (1) he engaged in protected conduct; (2) he experienced an adverse employment action; and (3) there was a causal connection between the protected conduct and the adverse employment action." Id. (citing Calero-Cerezo U.S. Dept. Justice, 355 F.3d 6, 25 (1st Cir. 2004)); accord Enica v. Principi, 544 F.3d 328, 343 (1st Cir. 2008) (Title VII).⁵

⁵ With respect to the adverse action showing, Palmquist must show that a reasonable employee would have found the challenged action "materially adverse." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). The Supreme Court elaborated:

The scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. We therefore reject the standards applied in the Courts of Appeals that have treated the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination provision and that have limited actionable retaliation to so-called "ultimate employment decisions."

The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm.... In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Rochon [v. Gonzales], 438 F.3d [1211,] 1219[(D.C.Cir.2006)] (quoting Washington v. [Illinois Dep't of Revenue], 420 F.3d [658,] 662[(7th Cir.2005).

We speak of material adversity because we believe it is important to separate significant from trivial harms.

548 U.S. at 67-68; see Carmona-Rivera v. Puerto Rico, 464 F.3d 14, 19 -20 (1st Cir. 2006) (applying Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) to a retaliation claim by a plaintiff alleging discrimination under Title VII, the Rehabilitation Act, and the ADA). Balko v. Potter, Civ. No. 07-04-P-S, 2008 WL 539273, 11 (D.Me.

1. Purported Protected Conduct

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006), interpreting Title VII's anti-retaliation provision relative to its discrimination prohibition, explained: "The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct." 548 U.S. at 65. See also DeCaire v. Mukasey, 530 F.3d 1, 19 (1st Cir. 2008).

The United States explains that it asked in its Interrogatory No. 9 for Palmquist to "state the first and last name of each person that you contend retaliated against you and for each describe what he/she did to retaliate and the date the alleged retaliation occurred." (Mot. Summ. J. at 14.) Palmquist's response to that interrogatory was:

I contend that [my supervisor] Sherry Aichner retaliated against me for my EEO and other complaints about discrimination. As explained above, in the negative retaliatory reference she gave to the Nashville office about me on March 9, 2006, Ms. Aichner specifically refers to the EEO complaint I filed as a result of Iron Mountain's failure to interview me for the position of Voluntary Services Officer in 2004 or 2005, despite my qualifications for the job. The decision to deny me the promotion to the position in Nashville was based in substantial part on the retaliatory reference provided by Ms. Aichner, and thus, the denial of this promotion was another act of retaliation.

(Ex. 36, Pl.'s Resp. First Set of Interrogs. ¶ 9; see also Mot. Summ. J. at 14-15; Reply Mem. at 2 n. 1.) In his motion for oral argument, or, in the alternative for leave to file surreply, Palmquist

Fe. 25, 2008) (recommended decision) (applying Burlington Northern to a federal employee's Rehabilitation Act discrimination claim and to a retaliation claim brought pursuant to 42 U.S.C. § 2000e-3(a).)

Under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the burden then shifts to the United States to articulate a legitimate non-discriminatory reason for the reference in question. See Fennell v. First Step Design, Ltd., 83 F.3d 526, 535 (1st Cir. 1996)(Title VII retaliation claim); Mesnick v. General Elec. Co., 950 F.2d 816, 827-28 (1st Cir. 1991) (ADEA retaliation claim); see also Proctor v. United Parcel Service, 502 F.3d 1200, 1207 - 1208 (10th Cir. 2007) (federal employee ADA retaliation claim analyzed under McDonnell Douglas). If the United States crosses this threshold, Palmquist bears "the ultimate burden" of showing "that the proffered legitimate reason is in fact a pretext and that the job action was the result of the defendant's retaliatory animus." Fennell, 83 F.3d at 8 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993) and Mesnick v. General Elec. Co., 950 F.2d 816, 827-28 (1st Cir. 1991)).

I have concluded that I need go no further in my analysis than the "protected conduct" analysis of Palmquist's prima facie case.

points out that he included in his answers to interrogatories the representation that he made a complaint in 2005 about the Chief Patient Service opening as well. (Mot. Oral Argument at 2-3.)

a. 2004 Voluntary Services Officer union grievance

There is no dispute that Palmquist pursued a Union grievance apropos the lack of success of his application for the 2004 Voluntary Services Officer position. Palmquist represents that he sought EEO counseling with EEO Manager Maryanne Gibler concerning his not receiving an interview for the Voluntary Services Officer Position. He concedes that he did not file a formal EEO complaint following his union grievance because his time had run out to do so but contends that he filed an informal EEO complaint with Gibler prior to filing a union grievance. Gibler stated that it is possible she was aware of Palmquist's complaint in 2004 concerning the Voluntary Services position and cannot remember it now. She prepared an email to help Mr. Paul Noury, the hiring official, respond to Palmquist's union grievance and handled union grievance mediations.

With respect to the Union grievance Palmquist asserts that while the Union alleged that the Master Agreement merit promotion was violated, he alleged that the VA failed to follow its affirmative action policies in place to help advance and promote the veterans with certain targeted disabilities and that “he should have been interviewed and that he should have veteran’s preference over all candidates on all lists because he is a disabled veteran.” The October 5, 2004, "Report of Contact" clearly sets this out. (See Def.'s Ex. 18 at 1.)

While Aichner testified she was not aware that Palmquist pursued a grievance for not getting the voluntary services position, she was aware that Palmquist planned to go see EEO Manager, Gibler, when he was not interviewed for the position. For its part the United States insists that Aichner testified that Palmquist only told her he was going to see the patient

representative vis-à-vis his complaint, who was Gibler. There is no dispute that Palmquist told Aichner about having contacted his congressman.

b. 2005 Chief of Patient Services application attempt

As recited in the appendix of facts, according to Palmquist, in 2005, he applied for the position of Chief of Patient Services and submitted this application to Aichner. Aichner notified Palmquist that he did not meet the grade and time requirements for the position. Palmquist explained to Aichner that, although he did not meet the time and grade requirements for the position, he qualified for the position based on his education and the VA's affirmative hiring standards for veterans with disabilities. Aichner refused to fill out the required supervisor's employee appraisal. Aichner was aware of Palmquist's service connection based on being a disabled veteran, but not the percentage amount. She knew that his disability rating was significant enough that he qualified for preference in the hiring process. Of course, Aichner insists that she did not tell him he could not apply for the position. The United States concedes that Palmquist told Aichner that he was working towards a 100-percent service-connected disability rating. Aichner was aware that Palmquist commented that he believed that his disability rating was significant enough that he qualified for preference in the hiring process.

Certainly, the factual basis for this assertion of protected conduct is more murky than the factual basis for Palmquist's efforts apropos the 2004 Chief of Voluntary Services position. However, it seems to me that the fact that this interaction with Aichner followed Palmquist's assertion of his rights vis-à-vis the 2004 opening is likely relevant to the protected activity analysis. It also cannot be overlooked that Aichner's reference to Delores Tate included her report that Palmquist uses his service connected preference and watches carefully to make sure

he gets a job interview and that at one point when he did not get an interview he went right away to a patient representative. (See Doc. No. 38-2.)

2. Is this Protected Conduct?

The United States contends in its supplemental brief: “There is no evidence in the record that the cited articles of the Master Agreement have anything to do with an affirmative action plan.” (Def.’s Suppl. Br. at 3.) It insists that Palmquist’s complaints were about his “veteran’s preference” and that § 501 of the Rehabilitation Act “has nothing to do with veterans’ preferences nor does the Rehabilitation Act create a private right of action for violations of the veterans’ preference laws and regulations.” (*Id.*) The case to which it cites, the Sixth Circuit’s Seay v. Tennessee Valley Authority, does state:

[T]he Rehabilitation Act does not require an affirmative action policy for disabled veterans. Section 501 of the Act requires each federal agency to submit “an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution.” 29 U.S.C. § 791(b). To this end, § 501 provides a private remedy for individuals who encounter discrimination on the basis of disability. Mahon v. Crowell, 295 F.3d 585, 589 n. 2 (6th Cir.2002).

339 F.3d 454, 473 -74 (6th Cir. 2003).

Palmquist’s assertion is that the VA failed to follow its affirmative action policies in place to help advance and promote the veterans with certain targeted disabilities and that “he should have been interviewed and that he should have veteran’s preference over all candidates on all lists because he is a disabled veteran.” (Resp. SMF ¶ 30; Ex.18, Oct. 5, 2004, Report of Contact; Palmquist Dep. at 71:25; 72; 73:1-19.)

With regards to the conduct, Palmquist’s letter to Congressman Bart Stupak and copied to Anthony Principi, Secretary of the Department of Veterans Affairs is evidence. In this letter Palmquist stresses that he was “a disabled veteran with over 30% service connected disability”

and that he submitted his preference letter when applying. (Doc. No. 28-15 at 1.) He reports: “The other issues concerning not being interviewed stem from violations in current federal laws and the current Iron Mountain VA hospital[']s Disabled Veterans Affirmative Action Program.” (Id. at 2.) He does add after describing another veteran’s failure to get a position: “The mission statement of the Iron Mountain VA hospital is to ‘Eradicate Barriers’ for veterans and qualified minorities. These barriers will not be eradicated if the current employment practices continue at this facility.” (Id.)

The Report of Contact for his third step grievance written by Cynthia Gordon, the Chief of Nursing, indicates: “Mr. Palmquist contends that he should have been interviewed and that he should have veteran’s preference over all candidates on all lists because he is a disabled veteran.” (Doc. No. 28-19 at 1.) Gordon also notes as one of Palmquist’s and the Union’s concerns: “If an individual, other than a veterans preference eligible candidate, was selected from a separate certificate, the agency is required to get OPM’s approval of bypassing a veterans preference candidate.” (Id. at 2.) In his deposition testimony Palmquist summarized his disagreement with the information that he would not be interviewed:

[W]ithin the VA, that particular VA, they had disabled veterans affirmative action program that outlines how they advance and help promote veterans within certain disabilities.

Being a targeted individual, individual with a targeted disability, I should at least have warranted an interview if that is true if they followed their policies set forth by the VA that they want to promote and help veterans with targeted disabilities get up there.

One of the forms that they fill out and sent to the EEO commission every year is a standard 715, I believe, I didn’t know the whole thing. That it lists how they’re doing with their EEO program and affirmative action.

Particularly in targeted disabilities, Iron Mountain has failed to promote or help alleviate barriers as they put it to seek and hire jobs within their scope, and Iron Mountain was below that level consistently. So with all those things together, I would assume that I would at least have warranted an interview.

(Palmquist Dep. At 72-73.) He also points out that preference eligible veterans were listed on the vacancy announcement for the Nashville position as the first recruitment category. (Resp. SAMF ¶ 48, citing Doc. No. 28-16.) Thus, the evidence of his complaints forwarded by Palmquist belies the notion that he was making a complaint about the VA's affirmative action program "regardless of his veteran status." Mann v. Geren, No. CV406-267, 2007 WL 2595299, 2 (S.D. Ga. Sep. 5, 2007.)

As I explained in my April 27, 2008, order denying Palmquist's motion for oral argument/ to file a surreply, 29 U.S.C. § 791(b) reads:

(b) Federal agencies; affirmative action program plans

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Regulatory Commission) in the executive branch and the Smithsonian Institution shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

29 U.S.C. § 791(b).

And § 791(g) provides:

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

Id. § 791(g).

Thus, the anti-retaliation provision of 42 U.S.C. § 12203(a) is incorporated into the affirmative action provision of 29 U.S.C. § 791(b) and, Palmquist's argument goes, his grievance vis-à-vis the 2004 Voluntary Services Officer position alleged non-affirmative action employment discrimination. Palmquist has also generated facts relating to a 2005 Chief of Patient Services application attempt.

Palmquist v. Peake, Civ. No. 07-98-B-W, 2009 WL 1133459, 1 -2 (D.Me. Apr. 27, 2009).

In responding to my order to supplement, the United States summarizes:

Plaintiff contends that the law is different under the Rehabilitation Act. To support that argument, he relies on 29 U.S.C. § 791(b) (also referred to as Section 501(b) of the Rehabilitation Act), which requires that federal employers adopt an affirmative action program plan for "hiring, placement, and advancement of individuals with disabilities . . ." This section "impose[s] a duty upon federal agencies to structure their procedures and programs so as to ensure that handicapped individuals are afforded equal opportunity in both job assignments and promotion." Hall v. United States Postal Service, 857 F.2d 1073, 1077 (6th Cir. 1988)(quoting Prewitt v. United States Postal Service, 662 F.2d 292, 306 (5th Cir. 1981)). There does not appear to be case law directly on point on this issue. However, even if the Court assumes for purposes of this motion that complaints about failing to follow affirmative action plans adopted pursuant to section 501 of the Rehabilitation Act constitute protected conduct, Plaintiff's case fails as a factual matter.

(Def.'s Supp. Br. at 2.)⁶

⁶ In its original argument in its motion for summary judgment the United States contended that Palmquist did not engage in protected activity because he did not file an EEO complaint or contact EEO officers about the fact that he did not get an interview for the Voluntary Services Officer position. (Mot. Summ. J. at 15.) Recognizing that Palmquist did file a grievance with the Union as to the denial of this interview, it maintained that there was no discrimination claim in the union grievance; the United States insisted that to qualify as protected activity, the complaint must contain allegations cognizable under Title VII and, thus, the underlying complaint must be based on discrimination. (Id. at 15-16; Reply Mem. at 2.) "Finally," the United States maintained, "summary judgment should be granted because Plaintiff did not have a reasonable belief that he had been discriminated against because of a disability when he did not get the Voluntary Services job." (Mot. Summ. J. at 16.) Palmquist "was told at the time, he was not granted an interview for the Voluntary Services position because none of the external candidates were interviewed and Plaintiff did not have the grade and time requirements to apply as an internal candidate." (Id. at 16-17.) The United States insisted that an employer's failure to follow an affirmative action program does not constitute protected Title VII activity. (Reply. Mem. at 3.)

In his opposition brief Palmquist spends substantial effort attempting to convince the court that he does not have to prove that he is disabled under the Rehabilitation Act to press his retaliation claim. (Pl.'s Opp'n Mot. Summ. J. at 16-18.)

In its reply brief the United States opined:

While Plaintiff testified at his deposition that he recalls going to Maryanne Gibler for counseling when he did not get an interview for the Chief of Voluntary Services position, he admits that he filed a grievance, not an EEO complaint (Ex.1, Palmquist Deposition at 77:3-9, 13-22). The fact that Maryanne Gibler was both the patient representative and the EEO Officer, does not convert that complaint into protected activity, particularly where the complaint was that the VA failed to

The United States identifies 5 U.S.C. § 2108 as being the provision on which Palmquist must depend to assert his veteran's preference dispute. See also 5 U.S.C.A. § 3112. It maintains that there is no private cause of action under this provision and Taydus v. Cisneros, 902 F. Supp. 278, 284 (D. Mass. 1995) supports this position. See also Luttrell v. Runyon, 3 F. Supp. 2d 1181, 1187 (D. Kan. 1998).

However, the Vietnam Era Veterans' Readjustment Assistance Act (VEVRA) includes the following provision:

(c) Each agency shall include in its affirmative action plan for the hiring, placement, and advancement of handicapped individuals in such agency as required by section 501(b) of the Rehabilitation Act of 1973 (29 U.S.C. 791(b)), a separate specification of plans (in accordance with regulations which the Office of Personnel Management shall prescribe in consultation with the Secretary, the Secretary of Labor, and the Secretary of Health and Human Services, consistent with the purposes, provisions, and priorities of such Act) to promote and carry out such affirmative action with respect to disabled veterans in order to achieve the purpose of this section.

38 U.S.C.A. § 4214(c). It is not clear to me from reading the definition section of this act -- which clearly also addresses veterans that are not § 4211(2) "veteran[s] of the Vietnam era" -- that this provision could not apply to Palmquist⁷ or other veterans impacted by the hiring actions of which Palmquist complained. See id. § 4211(1), (3), (4), (6); id. § 4214(b)(2).⁸ If Palmquist

follow its affirmative action program for disabled veterans and not something cognizable under Title VII. Moreover, the facts do not support his claim that he even went to Maryanne Gibler. Maryanne Gibler has no memory of Plaintiff coming to her with this complaint, either formally or informally, (Def. SMF ¶ 25), and there is no documentation that he went to her. Since Plaintiff cannot file both an EEO complaint and a grievance but must do one or the other, (Def. SMF ¶ 23), and since he admits that he filed a grievance, and the nature of his complaint was not cognizable under Title VII, the Court can fairly conclude that he did not make an EEO complaint.

(Reply Mem. at 3-4.)

⁷ Palmquist served in the U.S. Marines from 1984 to 1990-1991.

⁸ The Third Circuit addressed in Antol v. Perry whether or not an individual complaining of a noncompliance with 38 U.S.C. § 4214(c) had a private right of action. The plaintiff argued "that when Congress included language in VEVRA instructing agencies to incorporate their affirmative action plans for disabled veterans into Rehabilitation Act § 501(b) affirmative action plans, Congress created a private right of action for violation of a VEVRA

is relying upon this section as providing the legal framework for his retaliation claim under the Rehabilitation Act, one would think the factual record would set forth his eligibility under this section and his argument filed in response to the motion or in his substantive motion to file a surreply would have explained how this provision relates to his retaliation claim that he engaged in “protected conduct.” Palmquist never mentions this statute and the United States only references it in a footnote, citing the Antol case for the proposition that there is no private right of action, but not addressing the language quoted above which appears to incorporate the veterans preference affirmative action requirements into the Rehabilitation Act. (See Def.’s Suppl. Br. at 4 n.4.)

The United States concedes that the Rehabilitation Act’s affirmative action provision “‘impose[s] a duty upon federal agencies to structure their procedures and programs so as to ensure that handicapped individuals are afforded equal opportunity in both job assignment and promotion.’” Hall v. USPS, 857 F.2d 1073, 1077 (6th Cir. 1988) (quoting Prewitt v. United States Postal Service, 662 F.2d 292, 306 (5th Cir. Unit A 1981), quoting Ryan v. FDIC, 565 F.2d 762, 763 (D.C.Cir.1977), and citing Mantolete v. Bolger, 767 F.2d 1416, 1421 (9th Cir.1985)). Hall noted: “This affirmative action obligation goes beyond the obligation set forth in section 504, which, by its terms, requires only non-discrimination.” Id. (emphasis added). So, in this sense, and this sense only, Palmquist’s 2004 and 2005 complaints could be construed as complaints “about violations of the Act.” Quiles-Quiles, 439 F.3d at 8. However, Palmquist has certainly

affirmative action plan.” 82 F.3d 1291, 1296 (3d Cir. 1996). “There may be many reasons why Congress chose not to provide for private suits against an Agency under VEVRA to enforce § 4214(c).” Judge Nygaard stated, adding: “We will not speculate as to those reasons. Regardless of whether we would agree with those reasons, Congress did not intend a private right of action, and we cannot create one under the guise of statutory construction.” Id. at 1298. Judge Sarokin dissented as to this conclusion, arguing: “The plain language of § 403(a) does more than ‘merely mentioning the Rehabilitation Act.’ It makes the plan with respect to disabled veterans a part of the agency’s 501(b) plan.” Antol, 82 F.3d at 1304 (Sarokin, J., dissenting in part) (cross-reference omitted) (quoting Blizard v. Dalton, 876 F. Supp. 95, 98 (E. D. Va. 1995).

not pressed an argument or generated facts that he was complaining under VEVRA. Yet it is clear from the factual record that Palmquist was not complaining about disability discrimination in the workplace; he was complaining about the VA's failure to follow some undefined disabled veterans' preference affirmative action program.

When push comes to shove regarding my recommendation on this summary judgment motion, Palmquist has not set forth facts that would establish he was complaining about a veteran's preference that might possibly be construed as part of the Rehabilitation Act's affirmative action mandate. While Palmquist might have believed whatever program he had in mind was incorporated into the Rehabilitation Act's affirmative action mandate, I have no legal basis to judge the reasonableness of that belief because the factual record is devoid of evidence about the contours of the Iron Mountain program. The detailed factual record does not support the conclusion that his complaints related to the Rehabilitation Act's more generic requirement regarding affirmative action for all disabled individuals. Whether Palmquist was complaining about his own status or lobbying on behalf of others,⁹ the summary judgment record has to demonstrate that his complaint arose under the affirmative action provision of the Rehabilitation Act to even arguably be actionable as protected conduct.

As set forth in the appended compilation of facts, Palmquist has indicated that in 1998 he entered a Vocational Rehabilitation Program sponsored by the Veterans Administration because of the severity of his service connected disabilities. He states that he provided the VA with proof of his disability from his vocational rehabilitation counselor and by registering on the VA website. He identifies the "Iron Mountain VA hospital's Disabled Veterans Affirmative Action

⁹ See Gomez-Perez v. Potter, ___ U.S. ___, ___-___, 128 S.Ct. 1931, 1936 -37 (2008) (summarizing precedents that recognize a protection against retaliation for complaining about discrimination against others).

Program” and represents that “these laws and policies establish a program to promote and consider disabled veterans over 30% for positions they are qualified for.” Palmquist told his supervisor, Aichner, that he was working towards a 100-percent service-connected disability but I have no clue what that endeavor entails and the factual record does not tell me. Palmquist maintains that since 2000 the Iron Mountain facility has consistently failed to meet its affirmative action goals for hiring of individuals with targeted disabilities but I have no facts about what those goals are and from where they are derived and how they have become incorporated into the Rehabilitation Act.

Otherwise I know that during his employment at Iron Mountain, Palmquist was receiving compensation for a service connected disability rated at 40% and that at the time that Palmquist applied for this position he had a 10 point veteran's preference. Eligible veterans receive many advantages in Federal employment, including preference for initial employment and a higher retention standing in the event of layoffs but the veteran's preference laws do not guarantee the veteran a job, nor do they give veterans preference in internal agency actions such as promotion, transfer, reassignment, and reinstatement. Veterans who qualify as preference eligibles (meaning they typically must have served on active duty for at least 2 years during a period of war or in a campaign or expedition for which a campaign badge is authorized, or be disabled) are entitled to an additional 5 or 10 points added onto their earned rating in a competitive civil service examination. In all other situations (for example, selection from a merit promotion list or other "internal" action such as reassignment, transfer, or reinstatement), veterans' preference is not a factor. Palmquist's veteran's preference makes him eligible to apply under special appointing authorities such as those for disabled veterans, veterans readjustment appointment (VRA) eligibles, those veterans having completed substantially three or more years of service under

honorable conditions, and severely handicapped individuals. The record evidence for this information is a declaration of Kathy Lee, a VA Human Resources Specialist who has additional duties of EEO Program Manager. (Def.'s Ex. 40, Doc. No. 41.) Palmquist adds that in addition to the advantages veteran's preference laws create in federal employment, the VA's affirmative action programs mandate practices and policies that promote the hiring and retention of disabled veterans as well. For this proposition he relies on his own deposition.

In short, the record includes facts that suggest that there are certain policies and regulations pertaining to veterans underlying Palmquist's veteran's preference affirmative action dispute with the VA. However, as the master of this civil action which he instigated Palmquist has not – even by the summary judgment stage – sufficiently connected the legal and factual dots to establish that he could meet the first predicate of his prima facie Rehabilitation Act retaliation claim. In other words Palmquist has not shown this court how the Rehabilitation Act incorporates any specific affirmative action policy or regulation for disabled veterans that has anything to do with the complaints he made. The record evidence is clear. Palmquist was not complaining in general about discrimination against disabled individuals or even disabled veterans. His so-called “protected complaints” were all about the VA's failure to properly implement a disabled veterans' preference under an affirmative action program. Palmquist's eleventh-hour motion to file a surreply (which was in fact a substantive surreply in disguise), or in the alternative, for oral argument, cannot salvage this lack of factual and legal foundation in the summary judgment record. The United States when fashioning its reply to Palmquist's response to its motion, and this court when fashioning its ultimate decision, is entitled to know not only the broad theory by which Palmquist claims to have engaged in “protected conduct” but also the factual predicates by which that theory is put into practice.

In making this recommendation I am well aware that to survive a motion for summary judgment Palmquist need only demonstrate he had a good faith, reasonable belief that the underlying challenged actions of the VA violated the Rehabilitation Act. See, e.g., Fantini v. Salem State Coll., 557 F.3d 22, 32 (1st Cir. 2009) (Title VII) (citing Wimmer v. Suffolk County Police Dept., 176 F.3d 125, 134 (2d Cir. 1999)); Ramirez Rodriguez v. Boehringer Ingelheim Pharm., Inc., 425 F.3d 67, 84 n. 20 (1st Cir. 2005) (ADEA); Claudio-Gotay v. Becton Dickinson Caribe, Ltd., 375 F.3d 99, 102 (1st Cir. 2004) (FLSA). There is no question “that a plaintiff may state a prima facie case for retaliation even when her primary claim for discrimination is insufficient to survive summary judgment.” Wimmer, 176 F.3d at 136. My point is not that Palmquist could not meet this burden but that he has failed to present the facts and the legal framework necessary for this court to analyze this claim. The record does indicate that Palmquist thought the VA was not respecting policies with respect to veterans preferences and he communicated this belief to Aichner; it does not provide a sufficient basis to conclude that he had a reasonable belief that the failure to sufficiently credit the veteran’s preference scheme violated the Rehabilitation Act and Palmquist communicated that belief to the VA. Benoit v. Technical Mfg. Corp., 331 F.3d 166, 175 (1st Cir. 2003) (citing Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261-62 (1st Cir.1999)).¹⁰

Palmquist’s theory of retaliation under the section of the Rehabilitation Act which requires federal agencies to adopt affirmative action programs for disabled veterans is a novel one. I could find no cases addressing the precise issue. At a minimum Palmquist should have at

¹⁰ For example if an employee complained that a hiring decision was a violation of his or her rights because it was made based on his or her age, he or she could not bring a retaliation claim under the ADA. There has to be some linkage between the type of discrimination, the content of the complaint identified as “protected conduct,” and the federal statutory scheme under which the retaliation claim is brought. The summary judgment record before me does not have that linkage.

least explained what program(s) the Veteran's Administration adopted that was/were incorporated into the Rehabilitation Act and, thereby, made his complaints about noncompliance "protected conduct." Surely Palmquist should have spelled this out for the United States and the Court no later than in his response to the motion for summary judgment. He did not do so and I recommend that the Court grant the motion for summary judgment.

Conclusion

For the reasons set forth above, I recommend that the Court grant the motion for summary judgment as to the single count of Palmquist's complaint.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

May 18, 2009

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APPENDIX OF SUMMARY JUDGMENT FACTS¹¹

Mark Palmquist served in the United States Marines from 1984 to 1990-1991. During his military service overseas, Palmquist suffered several combat related injuries. For example, Palmquist was in a Jeep rollover in Cuba and sustained injuries on a couple of missions in Panama. (SAMF ¶ 120; Resp. SAMF ¶ 120.)

Palmquist states that he suffers from the following impairments that he claims substantially limit a life activity: (1) traumatic brain injury; (2) spinal bifida, spinal stenosis, facet disease, and spinal fusions; (3) varicose veins and post phlebitis syndrome due to trauma; (4) chondromalacia of the patella; (5) traumatic arthritis; (6) sleep apnea; and (7) migraine headaches. (SMF ¶ 90; Resp. SMF ¶ 90; SAMF ¶ 121; Resp. SAMF ¶ 121.)

1. Palmquist Employment History

In 1998, Palmquist resigned his position at the U.S. Postal Service facility in Menominee, MI, in order to enter a Vocational Rehabilitation Program sponsored by the Veterans Administration because of the severity of his service connected disabilities. (SAMF ¶ 130; Resp. SAMF ¶ 130.) He participated in the VA Vocational Rehab Program until approximately May 2004, when he accepted the position of medical support assistant/unit coordinator for the Iron Mountain Veterans Affairs Medical Center in Iron Mountain, Michigan (“VAMC, Iron Mountain”), where he remained until October 2006, when he began work for the Department of

¹¹ It turns out that many of the facts that are included and contested in the parties’ statements of fact are not actually material to the legal analysis in this recommended decision. However, I have set forth a comprehensive distillation of the United States’ statement of fact and Palmquist’s additional statement of fact with their various qualifications, denials and requests to strike. If the District Court Judge decides that oral argument or additional briefing would be helpful in ruling on this summary judgment motion the factual record should be the same factual record submitted to the Court in the ordinary course of summary judgment practice. For that reason I have appended the entire forty-one page recitation of the facts to my recommended decision.

Veterans Affairs Medical Center in Togus (“VAMC, Togus”) in Augusta, Maine as a patient advocate. (SAMF ¶ 131; Resp. SAMF ¶ 131; SMF ¶ 1; Resp. SMF ¶ 1.)

The VAMC, Iron Mountain facility is a small medical facility. It has an acute ward, as well as a medical ward and a nursing home care unit with approximately 40 beds. There is a full outpatient department that is staffed with physicians and others. They provide mental health services as well. (SMF ¶ 2; Resp. SMF ¶ 2.)

At all times between May 2004 and October 29, 2006, Palmquist was assigned to work as a medical support assistant at VAMC Iron Mountain and Sherry Aichner was his immediate supervisor. (SMF ¶ 3; Palmquist Dep. 8:5-6; 10:24-25; 11:1; 29:3-22.)¹² Sherry Aichner started with the Veterans Administration in 1973 as a surgical nurse. Over the years she has worked in patient education, as a nursing instructor, and long-term care in the Nursing Home Care Unit. She was a supervisor in the Nursing Home Care Unit for 23 years. (SMF ¶ 4; Resp. SMF ¶ 4.)

According to the United States, Sherry Aichner and Mark Palmquist were neighbors and friends. They had a good relationship. (SMF ¶ 6; Palmquist Dep. at 30:2-25; 31:1-14; Aichner Dep. at 61:25, 62:1-16; 24-25; 63:1-11.) Palmquist adds that in the beginning, Aichner and Palmquist had a cordial relationship and he considered Aichner a friend. (Resp. SMF ¶ 6; Palmquist Dep. at 30:2-25; 31:14.) Approximately six or seven months after he began working at Iron Mountain, Palmquist made a request for what he describes as a reasonable accommodation in the form of a new chair for his back and spine disabilities. (Resp. SMF ¶ 6; Palmquist Dep. at 89: 12-25; 90: 1-4.) After he made his request, Palmquist perceived that Aichner’s attitude changed completely for the worse and the relationship ceased to exist. (Resp.

¹² According to Palmquist, Palmquist also had other supervisors. For example, he reported to another nurse when he was first hired, and when Aichner was not present, Palmquist reported to Cynthia Gordon, the Chief of Nursing, or another manager. (Resp. SMF ¶ 3; Palmquist Dep. 29:3-25; 30:1.) The materiality of this response escapes me.

SMF ¶ 6; Palmquist Dep. 90:5-8; Pl.'s Resp. 1st Interrogs. No. 5.) The parties agree that Palmquist never heard Aichner make any negative statements or comments about disabled employees or any comments or statements to Palmquist about his disability. (SMF ¶ 19; Resp. SMF ¶ 19.)

a. Aichner's Pre- March 2006 Appraisals of Palmquist

Aichner gave Palmquist fully satisfactory annual performance reviews on two occasions. (SMF ¶ 7; Resp. SMF ¶ 7; SAMF ¶ 132; Resp. SAMF ¶ 132.) According to the United States, an employee can receive a fully satisfactory review and still have areas to work on. (SMF ¶ 8; Aichner Dep. at 153:9-24). Palmquist adds that Aichner gave Palmquist fully satisfactory annual reviews because "he deserved [them]" (SAMF ¶ 131; Resp. SAMF ¶ 131) and she did not note any significant negative issues Palmquist needed to work on in the two annual evaluations she performed of him. (Resp. SMF ¶ 8 Aichner Dep. at 14:7-17; 15:4-25; 16:1; 18:14-19). There is no dispute that an employee has to have a major problem in order for Aichner to give an unsatisfactory rating. (SMF ¶ 9; Resp. SMF ¶ 9.)

There is no dispute that, in addition to the annual appraisals, Palmquist received performance appraisals from Aichner in connection with two positions Palmquist applied for while employed at Iron Mountain. (SAMF ¶ 133; SAMF ¶ 133.) In the first appraisal, Aichner wrote that Mr. Palmquist "was very well versed in VA regulations, policy". She also wrote that he "would have no problem learning and doing." (SAMF ¶ 134; Resp. SAMF ¶ 134.) In the second appraisal, Aichner rated all the categories that applied to Palmquist's current position as a 4 out of 5, meaning "employee has demonstrated the Rating Factor or Job Element to a degree that is clearly above that expected of a fully competent employee...." (SAMF ¶ 135, citing

Aichner Dep. at 12:7-25; 13:5.)¹³ Aichner testified that Palmquist's performance did not change significantly after she filled out the second promotion-specific performance appraisal and this appraisal reflects her evaluation of his performance that was fairly consistent throughout his entire time working for her. (SAMF ¶ 136; Resp. SAMF ¶136.)

According to Palmquist, Aichner was trained to put significant negative issues on employees' performance evaluations and she put no such issues on Palmquist's evaluations. (SAMF ¶ 137; Aichner Dep. at 15:19-25; 16:1; 18:14-19.) The United States responds that the appraisals Aichner did for Palmquist were performance appraisals and she did not note any significant performance problems. However, the appraisals did not ask her to evaluate Palmquist's conduct which she considered "to be different." (Resp. SAMF ¶ 137; Ex. 2, Aichner Dep. at 14:13-15; 15:19-25; 18:14-24.)

In 2006, the VA awarded Palmquist a 2006 Director's Team Excellence Award and he received a Special Contribution Award with a monetary payment. (SAMF ¶138; Def.'s Answer Interrogs. No. 7.) The United States points out that Palmquist's response to its Interrogatory No. 7 was: "The entire NHCU staff was nominated and approved for a 2006 Director's Team Award for \$400. The award was based on high patient satisfaction scores in areas of access, coordination of care, courtesy, education and information, emotional support, physical comfort." (Resp. SAMF ¶ 138; Ex. 42, Def.'s Answer Interrogs.)¹⁴

¹³ The United States asserts that this paragraph should be stricken because the pages cited do not contain the information in the paragraph. (Resp. SAMF ¶ 135.) In responding to the request to strike Palmquist indicates that the cited deposition testimony discusses and references Aichner Deposition Exhibit 2 (Pl.'s Resp. Strike Request at 1-2) and Palmquist has attached the exhibit (Doc. No. 54-2).

¹⁴ In Paragraph 139 of Palmquist's Statement of Additional Fact, Palmquist maintains that despite his excellent job performance, he was repeatedly denied promotion applications and opportunities at the Medical Center in Iron Mountain that he was qualified for. (SAMF ¶ 139.) He cites to his answer to the United States Interrogatory No. 5. I agree with the United States that this paragraph should be stricken. (See Resp. SAMF ¶ 139.)

b. Aichner's description of Palmquist's behavior at work

According to the United States, Palmquist had a hard time staying in his work area and wandered off. There were times that Aichner could not find him. (SMF ¶ 10; Aichner Dep. at 76:22-25; 157:14-25.) Aichner did not consider it a problem for Palmquist to stand and stretch or walk around the unit area during his work hours because of his back and knee condition (SAMF ¶ 166; Resp. SAMF 166), but she did have a problem with the fact that he would leave his work area and wander off without telling her where he was. (SMF ¶ 18; Aichner Dep. at 33:10-16; 113:17-25; 114:1-25; 115:1-25; 157:3-23; 158:1-18.)

Palmquist asserts that Palmquist's back and spine disabilities required that he periodically take breaks to stretch. (Resp. SMF ¶ 10; Pl.'s Resp. 1st Interrogs. No. 12; Palmquist Dep. at 20:11-23.) He would take approximately two to three five minute breaks per day to walk down the hall of his work area, stretch, and walk back. (Resp. SMF ¶ 10; Palmquist Dep. at 18:3-17.) In addition, Palmquist would stand behind his computer at times or when he had things to discuss with the charge nurse. (Resp. SMF ¶ 10; Palmquist Dep. at 20:24-25; 21:1-4.) At times he would be called to assist in other departments on other floors. (Resp. SMF ¶ 10; Palmquist Dep. at 8: 6-25; 9:1-11.) Palmquist denies that he would leave his work area and wander off without telling Aichner where he was. (Resp. SMF ¶ ¶ 10, 18; Palmquist Dep. at 69:13-18.)

The United States represents that sometimes Palmquist acted a bit childish in the workplace, such as when he would bark like a dog and joke around, and he was on the Internet when he should not have been. (SMF ¶ 11; Aichner Dep. at 63:13-25; 64s:1-4.) According to Palmquist, Aichner testified that she believes that in order to have a happy team, there is joking, and that she participated in joking around in the workplace. (Resp. SMF ¶ 11; Aichner Dep. at 22:15-18.) Although she could have documented Palmquist's conduct issues, Aichner preferred

to discuss behavior issues with her subordinates orally, and only documented behavior problems when an oral discussion did not result in improvement. (Resp. SMF ¶ 11; Aichner Dep. at 25:16-25; 26:1-10.) Aichner did not document any of these issues with Palmquist's performance on his evaluations. (Resp. SMF ¶ 11; Aichner Dep. at 26:8-10.)

Patricia Sydmark also worked with Palmquist at VAMC Iron Mountain as a medical support assistant in the same work area. (SMF ¶ 5; Resp. SMF ¶ 5.) According to the United States, Sydmark had to cover for Palmquist and do a lot of work for him. (SMF ¶ 12; Aichner Dep. at 45:25; 46:1-3.) Palmquist counters that Aichner assigned Sydmark's responsibility for preparing minutes to Palmquist and did not make any transfer of duties in the opposite direction from Palmquist to Sydmark. (Resp. SMF ¶ 12; Aichner Dep. at 59:9-19.)

According to the United States, Aichner spoke informally to Palmquist about his conduct, including the fact that there were times when she could not find him because he would leave the unit and the fact that he would bark like a dog and use the Internet during work for personal matters. (SMF ¶ 13; Aichner Dep. at 22:12-14; 23:19-25; 24:1-25; 25:1-15.) For his part, Palmquist admits that Aichner testified that she spoke informally to Palmquist about his conduct, but stresses there are no documented warnings regarding any of Palmquist's alleged behavioral issues. (Resp. SMF ¶ 13; Aichner Dep. at 26:8-10.) He points to his testimony that he did not wander around during work hours and Aichner's testimony that she used the internet for personal matters during work to look at sales coupons and may have watched funny animal videos during work hours. (Resp. SMF ¶ 13; Palmquist Dep. at 69:13-18; Aichner Dep. at 67:14-16; 68:1-4.) There is no dispute that Aichner was aware that Palmquist had problems with his back and knees. (SMF ¶ 14; Resp. SMF ¶ 14.)

c. Request for a chair¹⁵

On one occasion Palmquist asked Sherry Aichner for a chair for his back. She got him a chair. He did not like the one she got, but later informed her that he had found one that worked. (SMF ¶ 15; Aichner Dep. at 28:17-25; 29:1-25; 30:1-12; Resp. SAMF ¶¶ 159, 162.) Aichner reports that she had no problem getting a chair for Palmquist. (SMF ¶ 16; Aichner Dep. at 31:14-20; Resp. SAMF ¶¶ 159, 162, 165.) The United States points out that Palmquist testified that he made this request six to seven months after he started working at Iron Mountain. (Resp. SAMF ¶ 160; Palmquist Dep. at 89:19-25; 90:1-4.)

Palmquist explains that he requested a chair with more back support to accommodate his back and spine disabilities. (SAMF ¶ 160.) Palmquist admits that on one occasion he requested a new chair for his back and that Aichner allowed him to try one that another department was testing (SAMF ¶ 161; Resp. SAMF ¶ 161), but adds that the chair she allowed him to try did not work for him. He denies that he told Aichner that he found one that worked (Resp. SMF ¶¶ 15, 16; Pl.'s Resp. Interrogs. No. 11). Palmquist informed Aichner that the chair was not suitable for him or his workspace and he requested a different chair. (SAMF ¶ 162; Pl.'s Resp. Interrogs. No. 11.) When he informed Aichner that the chair did not work, she refused to forward his request for another chair to the appropriate VA official until he allowed the VA access to his medical records. (Resp. SMF ¶ 16; Pl.'s Resp. Interrogs. No. 11; SAMF ¶ 163); Aichner insists that she did not ask Palmquist for medical records to support his request for a chair (Resp. SAMF ¶ 163; Ex. 2, Aichner Dep. at 31:9-25, 32:1-7). Palmquist maintains that Aichner's attitude

¹⁵ Palmquist is not pressing a free standing failure to accommodate claim but he does argue that this interaction over the chair influenced/illustrates Aichner's attitude towards him, an attitude that is obviously material to the retaliation claim.

toward him changed completely for the worse following this request. (Resp. SMF ¶ 16; Palmquist Dep. at 89:19-25; 90:1-8; SAMF ¶ 165.)

Because he had already provided the VA with proof of his disability from his vocational rehabilitation counselor and by registering on the VA website, and because individuals in other departments received ergonomic chairs without having to prove they had a disability, Palmquist felt that this requirement was inappropriate and that he was being treated differently than others. (SAMF ¶ 163; Pl.'s Resp. Interrogs. No. 11.) There is no dispute that EEO Manager Maryanne Gibler testified that a simple chair request to accommodate an employee with a health condition should not require medical documentation. (SAMF ¶ 164; Resp. SAMF ¶ 164.) Nor is there a dispute that the chair was the only request for accommodation that Palmquist made to Sherry Aichner. He made no other requests for accommodation prior to March 2006. (SMF ¶ 17; Resp. SMF ¶ 17.)¹⁶

d. Application for Chief of Voluntary Services

In July 2004, Mark Palmquist applied for the job as Chief of Voluntary Services. (SMF ¶ 20; Resp. SMF ¶ 20.) Palmquist did not receive an interview for the position of Chief of Voluntary Services and he was not hired for that position. (SMF ¶ 21; Resp. SMF ¶ 21; SAMF ¶ 140.)

According to the United States, Palmquist did not receive an interview for the position of Chief of Voluntary Services because he did not meet the time-in-grade requirements to apply for

¹⁶ Paragraph 159 states that Palmquist was "denied his requests for reasonable accommodation for his disabilities at Iron Mountain." (SAMF ¶ 159.) The United States moves to strike. (Resp. SAMF ¶ 159.) In his response to that strike request Palmquist states: "Although Plaintiff made only one request for physical accommodation in the form of a chair with lumbar support during his employment at Iron Mountain, a jury could reasonably find that his repeated requests for affirmative action hiring preferences he was entitled to under federal law were also requests for accommodation based on his disabilities." (Pl.'s Resp. Request Strike at 4.) Paragraph 159 is not a statement of fact for purposes of the summary judgment record.

the position as an internal candidate. He applied as an external candidate. The selecting officials decided to only consider internal candidates. (SMF ¶ 22; Ex. 10, Sept. 14, 2004 Email; Ex. 11, Letter from Boss; Ex. 12, Oct. 8, 2004, Mem. regarding Palmquist Grievance; Resp. SAMF ¶ 140.) Palmquist admits that he did not meet the time-in-grade requirements to apply for the position as an internal candidate and applied instead as an external candidate. (Resp. SMF ¶ 22.) He expands by asserting that he contacted Ms. Charlene Nerone in Human Resources when he became aware that others were being interviewed for the position and he had not received an interview. Nerone told Palmquist that Mr. Paul Noury, the hiring official, was looking for individuals with “specific qualifications”; she did not tell Palmquist what those “specific qualifications” were. (Resp. SMF ¶22; Palmquist Dep. at 70: 25; 71:1-15; SAMF ¶ 141.)

Per the United States, Nerone may have told Palmquist that he did not receive an interview because Paul Noury was looking for "specific" qualifications for the position. However, on September 27, 2004, Janice Boss, Iron Mountain Medical Director, wrote a letter to Palmquist in which she explained in more detail that he was not selected because he was not the most qualified for the job. Boss stated: “After reviewing all the applications for the Chief, Voluntary Service position, the selecting official made the determination to interview only the internal Merit Promotion candidates and federal employees interested in transferring to the Iron Mountain VA Medical Center (VAMC) who had experience more directly related to the position. Recreation Therapy is organizationally assigned under Voluntary Service at this medical center. The candidate selected for the position has current recreation therapy experience within a Voluntary Service setting in a VA Medical Center.” (Resp. SAMF ¶ 141; Ex. 11, Letter from Boss.)

e. *EEO contact and the Union grievance with regards to the Chief of Voluntary Services position*

A VA employee with an employment complaint can file an EEO complaint or a grievance with the union but cannot do both. (SMF ¶ 23; Gibler Dep. at 36:8-25; 37:1-23; 65:20-23; Resp. SAMF ¶¶ 142, 144.) Palmquist qualifies this assertion, stating that although a complainant cannot simultaneously pursue both the grievance and the EEO processes, an employee with an employment discrimination complaint can make an informal complaint to the EEO officer and seek EEO counseling in deciding what course of action to take with his or her employment complaint. (Resp. SMF ¶ 23; Gibler Dep. at 36:8-25; 37:1-9; 38:25; 39:1-6.)

Maryanne Gibler was the EEO specialist, patient advocate, and alternative dispute resolution coordinator at VAMC, Iron Mountain. (SMF ¶ 24; Resp. SMF ¶ 24.) Part of Gibler's job duties, as an EEO specialist, involved counseling employees in making these course-of-action decisions. (Resp. SMF ¶ 23; Gibler Dep. at 38:20-25; 39:1-6.)

The United States insists that Palmquist did not go to Gibler about not getting an interview for the Chief of Voluntary Services position and he did not file an EEO complaint. (SMF ¶ 25; Gibler Dep. at 54:2-25; 55:1-9; 64:9-15; 65:1-3; 74:4-22; Resp. SAMF ¶¶ 142, 143). Instead, Palmquist filed a grievance with the Union for not getting an interview for the Chief of Voluntary Services Position. (Resp. SAMF ¶ 142; Ex. 12, October 8, 2004, Mem. regarding Palmquist Grievance.)

Palmquist represents that he sought EEO counseling with Gibler concerning his not receiving an interview. (Resp. SMF ¶ 23; Pl.'s Resp. Interrogs. No.5; Palmquist Dep. at 77:3-12.) Palmquist admits that he did not file a formal EEO complaint following his union grievance because his time had run out to do so. (Resp. SMF ¶ 25; Palmquist Dep. at 73:18-19; SAMF ¶

144.) Palmquist maintains that he filed an informal EEO complaint with Gibler prior to filing a union grievance. (Resp. SMF ¶ 25; Pl.'s Resp. Interrogs. No. 5; Palmquist Dep. 77:3-12; SAMF ¶ 142.) Gibler stated that it is possible she was aware of Palmquist's complaint in 2004 concerning the Voluntary Services position and cannot remember it now. She prepared an email to help Mr. Noury respond to Palmquist's union grievance. She handled union grievance mediations. (SAMF ¶ 147; Gibler Dep. at 74:23 - 77:17.) If an employee talks to her about a complaint and then decides to file a union grievance, she is less likely to remember that conversation than she would a complaint she actually handled through EEO process. (SAMF ¶ 147; Gibler Dep. at 79:3-8.) The United States responds by stating that Gibler was clear that she had no recollection of any conversations with Palmquist about his concerns about not getting an interview; she stated that it was possible that someone else made her aware that Palmquist had filed a Union grievance but she did not recall that happening either. (Resp. SAMF ¶ 147; Ex. 6, Gibler Dep. at 74:4-25; 75: 1; 76:18-23.)

There is no dispute that Palmquist filed a Union grievance. (SMF ¶ 26; Resp. SMF ¶ 26.) The United States insists that Aichner was not aware that Palmquist pursued a grievance for not getting this position, adding that there is no evidence that Aichner had anything to do with the hiring process and she was not the subject of his grievance. She also believed that Palmquist had a right to complain if he did not get an interview when he was entitled to one. (SMF ¶ 27; Aichner Dep. at 35:24-25; 36:1; 39:3-16; 91:15-23; 104:20-25; 105:1-2; 133:16-18; Ex.18, Oct. 5, 2004, Report of Contact; Ex. 12 Oct. 8, 2004, Mem. regarding Palmquist Grievance.) Palmquist concedes that there is no evidence that Aichner had anything to do with the hiring process for this posting and that she was not the subject of his grievance and that Aichner testified that Palmquist had a right to complain. (Resp. SMF ¶ 27.) Palmquist elaborates that

Aichner testified she was not aware that Palmquist pursued a grievance for not getting the voluntary services position, she was aware that Palmquist planned to go see EEO Manager, Ms. Gibler when he was not interviewed for the position. (Resp. SMF ¶ 27; Aichner Dep. at 39:20-25; 40; 41:1-16.)

The United States insists that Aichner testified that Palmquist did not tell her that he was going to make an EEO complaint. He told her he was going to see the patient representative. She does not know whether he actually went to see the patient representative or not and he never asked for leave from work to go visit the patient representative, which would have been required. It reiterates that at the time Gibler was the EEO specialist, patient advocate, and alternative dispute resolution coordinator. (Resp. SAMF ¶ 143; (Ex. 1, Aichner Dep. at 39:20-25; 40: 1-25; Ex. 6, Gibler Dep. at 5:1-25; 54:2-25; 55:1-9; 64:9-15; 65:1-3; 74:4-22).

On September 7, 2004, Palmquist wrote a letter to Congressman Bart Stupak that the United States describes as a letter complaining that he did not receive an interview for the Voluntary Services position. (SMF ¶ 28; Ex. 14, Sept. 7, 2004, Letter to Congressman Stupak.) According to Palmquist this letter addressed “the promotion and hiring practices” at Iron Mountain. Specifically, it referenced Iron Mountain’s failure to interview him for the voluntary services position, but contained other examples and information as well. (Resp. SMF ¶ 28; Ex. 14, Sept. 7, 2004, Letter to Congressman Stupak.) Palmquist wrote this letter about discriminatory hiring practices at Iron Mountain arising out of his failure to be given an interview for the Voluntary Services position. Specifically, he complained about "violations in current federal laws and the current Iron Mountain VA hospital's Disabled Veterans Affirmative Action Program. These laws and policies establish a program to promote and consider disabled veterans over 30%

for positions they are qualified for." (SAMF ¶ 147; Def.'s Ex. 14 at 2.)¹⁷ There is no dispute that Palmquist told Aichner about having contacted his congressman. (SAMF ¶ 147; Resp. SAMF ¶ 147.)

Also on September 7, 2004, Palmquist wrote a letter to Anthony Principi, Secretary of the Department of Veterans Affairs, enclosing his letter to Congressman Stupak. (SMF ¶ 29; Resp. SMF ¶ 29; SAMF ¶ 148; Resp. SAMF ¶ 148.) In his letter to Principi, Palmquist complements his supervisor Aichner, saying that she "does a wonderful job at wanting new programs and activities for the veterans" (SMF ¶ 29; Ex. 13, Sept. 7, 2004, Letter to Principi). For his part, Palmquist admits that the letter commended Aichner's interest in new programs and activities for veterans, but notes that this letter pre-dated Palmquist's request for accommodation, when Aichner's attitude toward Palmquist changed dramatically. (Resp. SMF ¶ 29; Palmquist Dep. at 89: 19-25; 90:1-8.)¹⁸ There is no dispute that Palmquist told Aichner about having contacted his congressman. (SAMF ¶ 147; Resp. SAMF ¶ 147.)

On October 5, 2004, union representative Benjamin Balkum met with Palmquist, Sandra Orchard, and Cynthia Gordon regarding the Chief of Voluntary Services Position. It is the United States' position that in that meeting Palmquist did not allege that he was discriminated against because of his disability but rather, alleged that the Master Agreement merit promotion was violated. (SMF ¶ 30; Ex.18, Oct. 5, 2004, Report of Contact; Ex. 12 Oct. 8, 2004, Mem. regarding Palmquist Grievance; Palmquist Dep. at 78:2-7; Resp. SAMF ¶ 142.) Palmquist counters that the Union alleged that the Master Agreement merit promotion was violated while Palmquist alleged that the VA failed to follow its affirmative action policies in place to help

¹⁷ The United States admits that this letter was sent by Palmquist. (Resp. SAMF ¶ 147.)

¹⁸ Apparently Palmquist's letter to Secretary Principi was responded to by Janice Boss, the Medical Center Director (SAMF ¶ 148.)

advance and promote the veterans with certain targeted disabilities and that “he should have been interviewed and that he should have veteran’s preference over all candidates on all lists because he is a disabled veteran.” (Resp. SMF ¶ 30; Ex.18, Oct. 5, 2004, Report of Contact; Palmquist Dep. at 71:25; 72; 73:1-19.)

On October 8, 2004, Palmquist’s grievance regarding the Chief of Voluntary Services Position was determined to be “nongrievable and “nonarbitrable.” (SMF ¶31; Resp. SMF ¶ 31.)

f. Chief of Patient Services position

According to Palmquist, in 2005, he “applied” for the position of Chief of Patient Services and submitted this application to Aichner. (SAMF ¶¶ 150, 151; Pl.'s Resp. Interrogs. No. 5.) Aichner notified Palmquist that he did not meet the grade and time requirements for the position. (SAMF ¶ 152; Pl.'s Resp. Interrogs. No. 5.) Palmquist explained to Aichner that, although he did not meet the time and grade requirements for the position, he qualified for the position based on his education and the VA's affirmative hiring standards for veterans with disabilities. (SAMF ¶ 153; Pl.'s Resp. Interrogs. No. 5.) Palmquist describes his application as having been blocked by Aichner and not submitted to the hiring authority. (SAMF ¶ 154; Pl.'s Resp. Interrogs. No. 5.) Aichner refused to fill out the required supervisor's employee appraisal. (SAMF ¶ 154; Pl.'s Resp. Interrogs. No. 5; Palmquist Dep. at 74:2-25.)¹⁹ When he contacted the Office of Resolution Management about Aichner's refusal to submit his application, Palmquist was told that there was nothing they could do as he had not "applied" for the position.

¹⁹ The United States asks the court to strike Paragraph 154 to the extent that it asserts that Aichner blocked Palmquist's application because this assertion is not supported by admissible evidence. (Resp. SAMF ¶ 154.) Palmquist responds that he has personal knowledge that Aichner did not forward the application to Human Resources and did not fill out his employee appraisal. (Pl.'s Resp. Request Strike at 2.)

(SAMF ¶ 155; Pl.'s Resp. Interrogs. Nos. 5 & 3.)²⁰ Aichner was aware of Palmquist's service connection based on being a disabled veteran, but not the percentage amount. She knew that his disability rating was significant enough that he qualified for preference in the hiring process.

(SAMF ¶ 167; Aichner Dep. at 88:5-23.) She was aware of his ten point hiring preference based on his being a disabled veteran. (SAMF ¶ 167; Aichner Dep. at 34:9-12; 35:1-7.)

The United States insists that Palmquist has not identified any witnesses or admissible documents that support his contention that he applied for the Chief of Patient Services job. In fact, in an email sent from Charlene Nerone to Terry Taylor, Nerone states Palmquist did not apply for the job and that even if he had applied for the job, he would not have qualified since he did not meet the time-in-grade requirements and did not possess the level of specialized experience that might qualify as a substitute for specialized experience required for the position. (Resp. SAMF ¶ 150; Ex. 44, Nerone Email re: Chief of PAS.) Furthermore, employees do not submit applications to their supervisor but submit them directly to Human Resources. (Resp. SAMF ¶¶ 151, 154; Ex.2, Aichner Dep. 37:1-11, 24-25; 38:1-4; 144:22-25; 145:1-17.) Aichner did not tell Palmquist he could not apply for the position. (Resp. SAMF ¶¶ 152, 154; Ex. 2. Aichner Dep. at 37:1-11, 24-25; 38:2-4; 144:22-25; 145:1-17.)²¹ According to the United States, Palmquist told Aichner that he was working towards a 100-percent service-connected disability rating but she had no idea what his service connection was. He told her at one time that he had a

²⁰ The United States requests that this statement also be stricken on the grounds that Palmquist's testimony as to what Aichner did with his request or what someone in the Office of Resolution Management told him is inadmissible hearsay. (Resp. SAMF ¶ 155.) I disagree. Palmquist could testify as to what he was told if it is not offered for the truth of matter asserted, but merely to explain how he was treated when he made inquiry of these people.

²¹ Palmquist maintains that he made repeated good faith, reasonable complaints to VA management that the denial of promotion applications and opportunities at the Medical Center in Iron Mountain was unlawful disability discrimination. (SAMF ¶ 156; Pl.'s Resp. Interrogs. No. 5.) Again the United States insists that Palmquist cannot testify to these facts as it is hearsay and inadmissible opinion testimony. (Resp. SAMF ¶ 156.) I do not consider this statement as being part of the summary judgment record; it is an attempt to introduce a legal conclusion that can only be made by the court upon review of the factual record.

ten percent preference. Aichner was aware that Palmquist commented that he believed that his disability rating was significant enough that he qualified for preference in the hiring process. However, since she was not involved in hiring she did not have any personal understanding of the significance, if any, of that. (Resp. SAMF ¶ 167; Ex. 2, Aichner Dep. at 88:5-23; 34:5-25; 35:1-25; 36:1-3).

2. The Nashville, Tennessee Veterans Service Representative Job Opening²²

An announcement for openings at the VA Regional Office in Nashville, Tennessee for Ratings Veterans Service Representatives was issued on January 25, 2005. (SMF ¶32; Resp. SMF ¶ 32.) On February 9, 2006, Palmquist applied as an external candidate. (SMF ¶33; Resp. SMF ¶ 33; SAMF ¶ 168; Resp. SAMF ¶ 168.)²³

According to the United States, when he applied for the job, Palmquist did not understand that the Ratings Veterans Service Representative position was a desk job. (SMF ¶ 34; Palmquist Dep. at 38:11- 12, 23-25; 39:1-9.) Palmquist responds that he believed that the position involved receiving and processing veterans' claims. He believed it was a position that required various responsibilities, such as filing, categorizing different aspects of the veterans claim process, and

²² A good portion of the facts recited below are not directly material to the retaliation claim pegged to the Aichner reference. The parties set forth many of these facts to advance and counter a 'cat's paw' theory of discriminatory intent. Palmquist has made it clear that the retaliatory act of which he complains is the Aichner reference (which he does blame for the fact that he was not selected for one of these representative positions). Under the legal standard for retaliation I apply here, the adverse action under Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) is the reference and there is no need for Palmquist to address whether or not there was a sufficient connection between the reference and the ultimate hiring decision. (See Def.'s Suppl. Br. at 5 n.6.) I do, however, retain these facts in this discussion to assist the Court should the theory shift. What is more, many of the facts provide direct and circumstantial evidence concerning the nature of the Aichner reference.

²³ Palmquist maintains that he applied for a promotion to this job posting because of the disability discrimination he was facing at the Medical Center in Iron Mountain. (SAMF ¶ 168; Pl's Resp. Interrogs. No. 5.) In addition to asserting that Palmquist's perceptions are not evidence, the United States denies that Palmquist was a victim of discrimination. (Resp. SAMF ¶168.) The fact is that Palmquist's motivation for this application is immaterial to the legal standards applicable to his retaliation claim.

phone intake. He did not think it was a requirement to sit at a desk continuously for the eight hour period. (SMF ¶ 34; Palmquist Dep. at 38 - 39.)

There were 11 positions for Veterans Service Representatives open to external candidates. (SMF ¶ 35; Resp. SMF ¶ 35.)²⁴ The job of Ratings Veterans Service Representative requires the ability to analyze medical evidence and make determinations and apply rules and regulations. (SMF ¶ 36; Resp. SMF ¶ 36.) The representative must be able to stay focused on the task at hand, follow directions and sit at his or her desk and read materials all day long. While standing to stretch periodically would not be a problem, leaving the work area during work hours would be. (SMF ¶ 37; Resp. SMF ¶ 37.) The employee must process a certain number of claims per month. (SMF ¶ 38; Resp. SMF ¶ 38.) The position involved an intensive training program. It takes two years to be considered fully trained. (SMF ¶ 39; Resp. SMF ¶ 39.)

Delores Tate and Glenda Taylor were responsible for interviewing the candidates, screening them and referring the most qualified to Jerry Mitchell. The majority of the interviews were conducted over the telephone. Some were done in person. (SMF ¶ 40; Resp. SMF ¶ 40.) Delores Tate was in the military until 1977. Tate started working for the VA in 1980. In 2006 she was a Ratings team coach. The representatives being hired in 2006 were to be supervised by Tate. (SMF ¶ 41 Resp. SMF ¶ 41.) In 2006, Glenda Taylor was a coach of the Appeals Team. (SMF ¶ 42; Resp. SMF ¶ 42.)

Seventy-two applicants applied for the eleven positions. The Human Resources Department at VA Regional Office in Nashville, Tennessee handled the initial screening. Only

²⁴ There was one position open to internal candidates. The internal candidates were evaluated separately and one individual was hired from that group.

thirty-three applicants were determined to be qualified and were referred for consideration. Twenty-one applicants were granted interviews. Twenty applicants were actually interviewed. (SMF ¶ 43; Resp. SMF ¶ 43; SAMF ¶ 170; Resp. SAMF ¶ 170.) Palmquist qualified for consideration for these positions. (SMF ¶ 44; Resp. SMF ¶ 44.)

During his employment at Iron Mountain, Palmquist was receiving compensation for a service connected disability rated at 40%. (SAMF ¶ 157; Resp. SAMF ¶157.) At the time that Palmquist applied for this position he had a 10 point veteran's preference. (SMF ¶ 45; Resp. SMF ¶ 45; SAMF ¶ 158.) Eligible veterans receive many advantages in Federal employment, including preference for initial employment and a higher retention standing in the event of layoffs. However, the veteran's preference laws do not guarantee the veteran a job, nor do they give veterans preference in internal agency actions such as promotion, transfer, reassignment, and reinstatement. (SMF ¶ 46; Ex. 40, Decl. Kathy Lee re: Veterans Preference ¶ 4; Resp. SAMF ¶ 158.) The United States further maintains that veterans who qualify as preference eligibles (meaning they typically must have served on active duty for at least 2 years during a period of war or in a campaign or expedition for which a campaign badge is authorized, or be disabled) are entitled to an additional 5 or 10 points added onto their earned rating in a competitive civil service examination. In all other situations (for example, selection from a merit promotion list or other "internal" action such as reassignment, transfer, or reinstatement), veterans' preference is not a factor. Palmquist's veteran's preference makes him eligible to apply under special appointing authorities such as those for disabled veterans, veterans readjustment appointment (VRA) eligibles, those veterans having completed substantially three or more years of service under honorable conditions, and severely handicapped individuals. In other words, Palmquist's veteran's preference allowed him to apply for the position in question, but otherwise

had no other effect. (SMF ¶¶ 47, 48; Decl. Kathy Lee re: Veterans Preference ¶ 5; Resp. SAMF ¶ 158.)

Palmquist responds as follows. He adds that in addition to the advantages veteran's preference laws create in federal employment, the VA's affirmative action programs mandate practices and policies that promote the hiring and retention of disabled veterans as well. (Resp. SMF ¶ 46; Palmquist Dep. at 72:17-20.) Since 2000, the Iron Mountain facility has consistently failed to meet its affirmative action goals for hiring individuals with targeted disabilities. (Resp. SMF ¶ 46; Gibler Dep. at 15:14-23.) The VA testified in this case that, based on affirmative action programs in place to aid in the hiring and retention of disabled veterans at the Iron Mountain facility, if two applicants had the same qualifications and were both highly qualified, but one had a disability and the other did not, they would lean toward hiring the applicant with a disability. Thus, if a five point preference eligible (a veteran without a disability) were competing with Palmquist, who is a ten point preference eligible (a veteran with a disability) for the same job and had similar qualifications to Palmquist, Palmquist's status as a ten point disabled veteran could make the difference in the hiring decision, at least at Iron Mountain. (Resp. SMF ¶¶ 46, 47, 48; Gibler Dep. at 16:21-24.) Preference eligible veterans were listed on the vacancy announcement for the Nashville position as the first recruitment category. (Resp. SMF ¶ 47; Def.'s Ex. 15, VA Position Announcement.) Thus, a veteran who qualifies as a preference eligible also has the opportunity to apply for certain positions based on this status. (Resp. SMF ¶ 47.) Palmquist admits that his veteran's preference makes him eligible to apply under special hiring authorities and was one of the bases upon which he was entitled to apply for the Nashville position. (Resp. SMF ¶ 48; Def.'s Ex. 15, VA Position Announcement.) Palmquist was not only a ten point preference eligible, his status as a 30% or more disabled

veteran was also a basis for him to qualify to apply for the Ratings Veterans Service Representative position. (Resp. SMF ¶ 48; Def.'s Ex. 15, VA Position Announcement; Palmquist Dep. 37:14-21.) Gibler testified that, based on affirmative action programs in place to aid in the hiring and retention of disabled veterans at the Iron Mountain facility, if two applicants had the same qualifications and were both highly qualified, but one had a disability and the other did not, they would lean toward hiring the applicant with a disability. (Resp. SMF ¶ 48; Gibler Dep. at 16:21-24.) It is thus inaccurate, Palmquist argues, to allege that Palmquist's ten point hiring preference would have no other effect. (Resp. SMF ¶ 48.)

Delores Tate and Glenda Taylor screened the applicants that were referred for consideration and interviewed applicants either telephonically or in person for these positions between March 3, 2006, and March 14, 2006. (SMF ¶ 49; Resp. SMF ¶ 49.) Tate and Taylor made recommendations to Jerry Mitchell, who made the ultimate hiring decision. (SAMF ¶ 185; Resp. SAMF ¶ 185.) According to Palmquist, Tate took a lead role in the decision-making process because she was to supervise the new hires. (SAMF ¶ 186; Taylor Dep. at 5:8-25; 6:1.) The United States responds that Taylor indicated that Tate took the lead but Tate did not agree that she took the lead. Tate did allow that the individuals hired were going to be working for her so she may have had a little more input. (Resp. SAMF ¶ 186; Ex. 3 Tate Dep. at 13: 22-25; 14: 1-5.)

Palmquist was interviewed telephonically by Tate and Taylor on March 3, 2006. (SMF ¶ 50; Resp. SMF ¶ 50.) According to the United States, at the end of each interview, Tate and Taylor told each of the applicants, including Palmquist, that they were not to contact either Ms. Tate or Ms. Taylor but should wait to hear from them. (SMF ¶ 51; Ex. 3, Tate Dep. at 143:16-25; 144:1-9; Ex. 5, Taylor Dep. at 18:4-10; Resp. SAMF ¶¶ 175, 177, 207.) Palmquist denies

that Taylor and Tate gave him these instructions and highlights that there is no record of them having given the instruction. (Resp. SMF ¶ 51; Palmquist Dep. at 43: 22-24; Tate Dep. at 47:1-5; 48:8-11; SAMF ¶¶ 175, 177.)

The interviews consisted of a standard list of questions that were asked of each applicant. (SAMF ¶ 173; Resp. SAMF ¶ 173.) The United States adds that other matters were covered as well during the interviews. (Resp. SAMF ¶ 173; Ex. 3, Tate Dep. at 46:20-25; 47:1-25; 48: 1-7.) The interview questions were listed on a separate sheet for each interviewee, and Tate wrote down notes about each applicant's answers to the questions asked. (SAMF ¶ 174; Resp. SAMF ¶ 174.) Nowhere on the interview question sheet does it state that applicants were instructed not to contact Tate and Taylor following the interview. (SAMF ¶ 176; Resp. SAMF ¶ 176.)

Tate stated that there was a three step selecting process. (SAMF ¶ 171; Resp. SAMF ¶ 171.) Tate felt that Palmquist did a good interview. If he had not, he would not have made it to the next step, which was the interview of his supervisor. (SAMF ¶ 172; Resp. SAMF ¶ 172.)

On March 6, 2006, Palmquist sent an email to Tate. He also sent an email to Taylor at that same time. (SMF ¶ 52; Ex. 17, First Email to Tate; Palmquist Dep. at 43:9-21; Ex. 5, Taylor Dep. at 18:4-14; 19:1-25; 20:1-21; Ex. 3, Tate Dep. at 49:7-17; 141:16-25; 142:7-25; 143:1-6; Resp. SMF ¶ 52; SAMF ¶ 181; Resp. SAMF ¶ 181.) The first email he sent was dated March 6, and it thanked them for the opportunity to interview and let them know he was still interested in the position. (SAMF ¶ 182; Palmquist Dep. at 43:9-21; Def.'s Ex. 17.) In addition to thanking Tate and Taylor for the interview, Palmquist let them know that he was a Nationally Advanced Emergency Medical Technician. (SAMF ¶ 183; Resp. SAMF ¶¶ 182, 183, 207.) The second email dated March 19 checked the status of the hiring decision. (SAMF ¶ 184; Resp. SAMF ¶ 184.)

a. The Aichner Reference

According to the United States, on March 9, 2006, Tate spoke with Sherry Aichner about Palmquist. (SMF ¶ 53; SAMF ¶ 178; Resp. SAMF ¶ 178.) Aichner recalls the interview lasting 45 minutes to one hour. (SAMF ¶ 179; Resp. SAMF ¶ 179.) However, Tate recalls the interview being shorter than 45 minutes to one hour. (SAMF ¶ 180; Resp. SAMF ¶ 180.) The average interview lasted approximately ten minutes. Tate took notes of their conversation but not everything that Aichner said is contained in Tate's notes. (SMF ¶ 53; Ex. 19, Hiring Notes Re: Palmquist; Ex. 2, Aichner Dep. at 107:23-25; 108:1-12; 110:1-25; 111-113; 151:20-25; 152:1-8; 154: 18-25; 155:1-7; 158:19-25; 159:1-6; Ex. 3, Tate Dep. at 35:24-25; 36:1.) Palmquist responds that although not everything Aichner said is contained in Tate's notes, Tate testified that she attempted to put the most significant information of each applicant on the summary sheet containing the reference notes. (Resp. SMF ¶ 53; Tate Dep. at 32:10-20.)

Tate's overall impression was that Aichner's reference was good and that she was honest in her assessment of Palmquist. Aichner said a lot of good things to Tate about Palmquist and it was her impression that Aichner wanted Mark Palmquist to get the job. (SMF ¶ 54; Ex. 3, Tate Dep. at 35:24-25; 36:1; 104:23-25; 105:1-16; 107:1-5.) It was Tate's impression that Aichner was "painfully honest." (Resp. SMF ¶ 54; Tate Dep. at 104:25; 105:1-2.) Aichner maintains that she hoped that her reference would help Palmquist get the Ratings Veterans Service Representative job. (SMF ¶ 55; Ex. 2, Aichner Dep. at 134:19-22; 140:11- 19.) Aichner told Tate that Palmquist was very knowledgeable, educated, a quick learner and knew the rules and regulations and knew a lot about service-connected disabilities and the rights. She also told her that he was a strong patient advocate. (SMF ¶ 56; Ex. 2, Aichner Dep. at 136:20-24.)

Palmquist adds that Tate testified that compared to the other applicants, vis-à-vis whom they received completely favorable references, in Palmquist's reference there was some non-favorable information. (Resp. SMF ¶ 54; Tate Dep. at 107:9-11; 108:10-14.) Aichner, Palmquist argues, may have testified she hoped that her reference would help Palmquist get the position, but her statements about Palmquist are very negative and a jury could reasonably find, based on other evidence, that Aichner did not hope her reference would help Palmquist. (Resp. SMF ¶ 55; Def.'s Ex. 19, Hiring Notes Re: Palmquist.) While Palmquist admits that Aichner told Tate that Palmquist was very knowledgeable of computer and gathering statistical data, he denies that Aichner made any of the other claimed comments because none of those statements were recorded by Tate who testified that she attempted to put the most significant information of each applicant on the summary sheet containing the reference notes. (Resp. SMF ¶ 56; Tate Dep. at 32:10-20; Def.'s Ex. 19, Hiring Notes Re: Palmquist.)

There is no dispute that Aichner told Tate that Palmquist was very knowledgeable about the computer and gathering statistical data. (SMF ¶ 57; Resp. SMF ¶ 57.) Aichner told Tate that Palmquist was pro veteran to the point that he goes overboard and oversteps the boundaries of his job. (SMF ¶ 58; Resp. SMF ¶ 58.) Aichner told Tate that Palmquist used his service connected preference and watches carefully to make sure he gets an interview and on one occasion he went to the patient representative when he did not get an interview. She thought it was important for Tate to know this information so that Palmquist's rights were taken into account. (SMF ¶ 60; Ex. 19, Hiring Notes Re: Palmquist; Ex. 2, Aichner Dep. at 116:18-25; 117:1-25; 129:1-25; 156:17-25; 157:1-2.) Palmquist admits that Aichner made statements similar to those alleged in the first sentence to Tate. Aichner admitted she was referring to all the positions Palmquist had applied for that she was aware of, including the voluntary services

position. She was also referring to Palmquist's disabled veteran's preference with these comments. (Resp. SMF ¶ 60; Aichner Dep. at 117: 11-24.) Palmquist points out that he had already been interviewed by the time Aichner gave this reference and urges that a jury could reasonably find implausible Aichner's current explanation of her motivation, especially because there was no need for Aichner to word her comments so unfavorably if she was merely trying to protect Palmquist's rights. (Resp. SMF ¶ 60, citing SMF ¶¶ 50, 53.)

According to the United States, Tate did not know what a patient representative was when Aichner mentioned it. She believed that Aichner was referring to the fact that Palmquist had once complained about not getting an interview. Since Palmquist had received an interview for the Tennessee job, Tate did not think it mattered. (SMF ¶ 61; Ex. 3, Tate Dep. at 102:10-21; 103:3-5; 144: 24-25; 145:1-25; 146:1-7.) Palmquist qualifies this statement by indicating that Tate stated that Aichner told her that Palmquist felt that because he had a 10-point veteran's preference, it would automatically qualify him for an interview, and if he did not automatically get that interview, then he would go to his patient representative. (Resp. SMF ¶ 61; Tate Dep. at 102:10-18.) Tate was aware of Palmquist's ten point hiring preference when she interviewed him and was aware that "a ten percent would be a veteran with a disability." (Resp. SMF ¶ 62; Tate Dep. at 134:22-25; 135:1-5.)

There is no dispute that Aichner told Tate that Palmquist had applied for several positions at the facility but had not gotten them. (SMF ¶ 62; Resp. SMF ¶ 62.) The United States maintains that Aichner told Tate that she liked Palmquist but that she needs someone sitting at his or her desk and acting a little bit more grown up. She noted that Palmquist could not sit still as he liked to know what was going on in areas that do not concern him or his job. She gave the example of a "Code Red" in the hospital, when he left his area of responsibility and ran to find

out what was going on. (SMF ¶ 63; Ex. 19, Hiring Notes Re: Palmquist; Ex. 2 Aichner Dep. at 121:10-25; 122:1-25.) Palmquist acknowledges that Aichner made these statements to Tate but he denies that he could not sit still and liked to know what was going on in areas that did not concern him and denied that he left his area of responsibility during a “Code Red” in the hospital to find out what was going on. (Resp. SMF ¶63; Palmquist Dep. at 75:17-25; 76:1-16.)

According to the United States, Aichner believed she had to be honest in her reference to Tate that Palmquist did not always act maturely. (SMF ¶ 64; Ex. 2, Aichner Dep. at 133:25; 134:1-18; 153:25, 154:1-17.) Aichner was aware that it would be inappropriate to comment in a reference on an employee’s prior complaint of discrimination. (SMF ¶65; Ex. 2. Aichner Dep. at 119:9-25; 120:1-8). Palmquist responds that his record cite states in part that Aichner thinks that for this position, “maturity counted.” She further believed that “you need to be honest because that reflects back on me and it would reflect back on the VA system.” (Resp. SMF ¶ 64; Aichner Deposition at 134:1, 6-8.) Aichner stated she felt her comments about Palmquist using his service connected preference and watching carefully to make sure he gets an interview was an appropriate response. (Resp. SMF ¶ 65; Aichner Dep. at 118:12.) She also stated that she would not have given out information about a sexual harassment complaint Palmquist made, however, because she would have no right to tell anybody about an EEO complaint. (Resp. SMF ¶ 65; Aichner Dep. at 118:23-25; 119:1-21.)

b. The hiring decision

On March 15, 2006, Jerry Mitchell, Delores Tate, and Glenda Taylor discussed the candidates and Tate's and Taylor's recommendations concerning who was "best qualified." (SAMF ¶ 187; Resp. SAMF ¶ 187.) The hiring decision was made on or around March 15, and

Human Resources Center was notified of the selectees on or around March 17. (SAMF ¶ 201; Resp. SAMF ¶ 201.)

Tate prepared a summary of the qualifications of the finalists that were interviewed to assist in making the best choice possible. She attempted to put the most significant information about each applicant on the summary. (SAMF ¶ 189; Resp. SAMF ¶ 189.) Mitchell accepted Tate and Taylor's list of recommended hires that did not include Palmquist; Mitchell "tries to give his managers the people they want." (SAMF ¶ 197; Resp. SAMF ¶ 197.)

Tate gave Mitchell a packet containing all the summaries and interview notes. (SAMF ¶ 190; Resp. SAMF ¶ 190.) The summary prepared about Palmquist includes notes of Tate's interview of Aichner. Among other things, those notes include the following statements about Palmquist made by Aichner, which Tate found significant enough to include on his summary sheet: (1) Mr. Palmquist was "pro-veteran to the point that he goes overboard/overstep the boundaries of his job;" (2) it was "hard to get him to sit—tendency to wander around a bit"²⁵; (3) Mr. Palmquist "uses his service connected preference and watches carefully to make sure he gets

²⁵ According to Palmquist, Aichner's statements about sitting at a desk and Palmquist's inability to sit still refer to his need for accommodation due to his service-related back and spine disabilities. (SAMF ¶ 196; Pl.'s Answer Interrogs. No. 12; Palmquist Dep. at 69:1-6.) The United States requests that the court strike this paragraph, insisting that Palmquist is not competent to testify about what Aichner meant by her comments. (Resp. SAMF ¶ 196.) It also denies the statement asserting that Aichner was clear that she was not referring to Palmquist's need for accommodation for his back problems but was referring to the fact that he had a tendency to wander around the VA facility and would leave his work area often without permission and she could not find him. Aichner did not consider it a problem for Palmquist to stand and stretch or walk around the unit area during his work hours because of his back, but she did have a problem with the fact that he would leave his work area and wander off without telling her where he was. (Resp. SAMF ¶ 196; Ex. 2, Aichner Dep. at 33:10-16; 113:17-25; 114:1-17; 115:1-25; 157:3-25; 158:1-18.)

The parties have also included the following facts on this issue. Aichner told Tate that it was hard to get Palmquist to sit and that he had a tendency to wander around. When she said this she was referring to the fact that he wandered out of his work area without telling her where he was going. (SMF ¶ 59; Ex. 19 Hiring Notes Re: Palmquist; Ex. 2, Aichner Dep. at 115: 5-17; 157: 14-23). Palmquist insists that the record cite only supports the assertion that Aichner thought that what she meant by her statements to Tate was that Palmquist wandered out of his work area without telling her where he was going. Palmquist maintains that a jury could reasonably find, based on other evidence, that these comments referred instead to Palmquist's need to periodically stand, walk, and stretch due to his back and spine conditions. (Resp. SMF ¶ 59; Palmquist Dep. at 15:21-25; 16:1-6; 20:11-25; 21:1-4; 69:1-6; Pl.'s Resp. Interrogs. No. 12.) I am not clear how this factual interchange materially advances either party's position.

an interview;"²⁶ (4) Ms. Aichner "gave an instance where he didn't get an interview, so he went right away to the patient Representative;"²⁷ and (5) Ms. Aichner told interviewers that she "needs someone sitting at desk and acting a little bit more grown up." (SAMF ¶ 191; Def. Ex. 19; Tate Dep. at 32:17-20.)²⁸ The United States responds that the highlighted portion of this document leaves out Tate's notes that Aichner explained that Palmquist "couldn't sit still as he likes to know what's going on in areas that don't concern him or the job. She gave the example of a "Code Red" in the hospital, and he left his area of responsibility and ran to find out what was going on." The notes also reflect that Aichner said that Palmquist is very knowledgeable of computers and gathering statistical data. (Resp. SAMF ¶ 191; Def. Ex. 19.) The Aichner reference was a factor in the decision to not hire Palmquist. (SAMF ¶ 198; Resp. SAMF ¶ 198.)²⁹ Comparing Palmquist's reference from Aichner with other applicants' references, Tate testified that the other applicants received completely favorable references, while Palmquist received "some non-favorable information." (SAMF ¶ 199; Resp. SAMF ¶ 199.)

During that discussion, Tate told Mitchell that she was upset with Palmquist for not following instructions and contacting her in an email after the interview. (SMF ¶ 66; Ex. 4,

²⁶ Palmquist maintains that Aichner's comment about Palmquist using his service-connected preference and watching carefully to make sure he gets an interview refers to all the positions Palmquist had applied for that she was aware of, including the Voluntary Services Position. (SAMF ¶ 194; Aichner Dep. at 117:11-20.) The service connected preference referenced by Ms. Aichner was his ten point hiring preference based on Mr. Palmquist's status as a disabled veteran. (SAMF ¶ 195; Pl.'s Answer Interrogs. No. 12; Aichner Dep. at 117:11-24.) The United States responds that Aichner's comments refer only to the jobs for which he did not get an interview and which Aichner knew about, which was only the Chief of Voluntary Services position. Aichner does not remember discussing the Chief of Patient Services position with Palmquist. (Resp. SAMF ¶ 194; SMF ¶ 27; Ex. 2, Aichner Dep. at 37: 12-15.) It also adds that Palmquist's answer to interrogatories is not proper support for his statement concerning what Aichner meant by her comments about hiring preferences; Aichner stated during her deposition that the "service connected preference" was Palmquist's "disabled veterans preference." (Resp. SAMF ¶ 195; Ex. 2. Aichner Dep. at 117:21-24.)

²⁷ The Patient Representative at Iron Mountain, referenced by Aichner in her interview, was MaryAnne Gibler. Gibler was also the EEO Manager at Iron Mountain. (SAMF ¶ 193; Resp. SAMF ¶ 193.)

²⁸ Aichner admits she made these statements to Tate. (SAMF ¶ 192; Resp. SAMF ¶ 192.)

²⁹ The United States does qualify this additional statement by maintaining that only selected parts of the reference were considered. (Resp. SAMF ¶ 198; Ex. 4. Mitchell Dep. at 40-43.)

Mitchell Dep. at 34:1-25; 35:1-13; 126:13-25; 127:1-6; Ex. 5, Taylor Dep. at 21:1-17; Resp. SAMF ¶¶ 175, 177, 207, 209, 210.) On March 15, 2006, Tate and Taylor recommended eleven candidates for the Ratings Representative position. Palmquist was not recommended for the job. (SMF ¶ 67; Resp. SMF ¶ 67.) In making their recommendations Tate and Taylor considered a variety of factors, including interviews of applicants and interviews of applicants' past and present supervisors. (SMF ¶ 68; Resp. SMF ¶ 68; SAMF ¶ 204; Resp. SAMF ¶ 204.) Additional factors considered included educational background, medical knowledge, legal background, employees supplemental, interview process, employment history, training and similarly type jobs, and references. (SAMF ¶ 205; Resp. SAMF ¶ 205.) Another factor Tate now claims to have considered was the ability of applicants to follow instructions during the interview process. (SAMF ¶ 206; Resp. SAMF ¶ 206.)

The United States asserts that Tate testified she had no problem with hiring someone with a back problem and that she had no information as to whether Palmquist had a condition that made it difficult for him to sit without taking breaks. (SMF ¶ 69; Ex. 3, Tate Dep. at 100:10-25; 101:1; 138:20-23.) The United States asserts that Tate did not recommend Palmquist for the position in large part because he was advised not to contact them after the interview and he sent her an email with additional information. This demonstrated to her that he had difficulty following directions. Tate insists that the reference from Aichner was not the reason she did not refer Palmquist to Mr. Mitchell for the job. (SMF ¶ 70; Ex. 3, Tate Dep. at 35:25, 36:1; 41:16-25; 42:1-20; 46:11-19; 60:14-25; 61:1-3, 24-25; 62:1-17; 64:6-16; 65:1-13; 123:8-18; 126:21-25; 127:1-6, 16-20; Ex. 4, Mitchell Dep. at 41:20-24; Resp. SAMF ¶¶ 200, 207.) At that meeting Tate reported to Mitchell that while the reference for Palmquist was not a bad one, there had

been a mention of the fact that he moves around and does not stay focused. (Resp. SAMF ¶ 188; Ex. 4, Mitchell Dep. at 41:10-25.)

Palmquist responds that Tate did not document her concerns with Palmquist's emails after the interview.³⁰ She testified that the first time she documented a concern with an email from Palmquist was after he made a complaint of discrimination and she was aware of it. (Resp. SMF ¶ 66; Tate Dep. at 43: 14-25, 45:10-17; SAMF ¶ 209, 210.) Palmquist reiterates that he was not advised not to contact the interviewers following the interview. (Resp. SMF ¶¶ 66, 70; Palmquist Dep. at 43:22-24.) He describes his email as not containing additional information, but as containing information already included on his application form. (Resp. SMF ¶¶ 66, 70; Def's Ex. 16, Section E-Other Qualifications; Def's Ex. 17, Palmquist Email; Resp. SAMF ¶ 207; SAMF ¶ 207.) He points to evidence that Aichner's reference also was a factor that played a part in Palmquist not being recommended for hire, (Resp. SMF ¶¶ 66, 70; Tate Dep. at 123: 8-18; Mitchell Dep. at 41:10-19; 43:1-3), noting that Tate previously testified that the emails were not the main reason Palmquist was not selected. (Resp. SMF ¶¶ 66, 70; Def.'s Ex. 27; SAMF ¶ 200.) Tate now claims that it was very inappropriate for Palmquist to email her and that it was very unfair to the other applicants who were not federal employees and who could not look up her email address to email her additional information about their qualifications. (SAMF ¶ 207; Tate Dep. at 42:9-18.) Palmquist opines that other applicants who were not federal

³⁰ On March 19, 2006, Palmquist sent a second email to Tate. (SMF ¶ 75; Resp. SMF ¶ 75; SAMF ¶ 202; Resp. SAMF ¶ 202.) Palmquist represents that the United States has maintained that Palmquist's second email was one of the reasons he was not selected for the position. (SAMF ¶ 211; Def.'s Resp. Interrogs. Nos. 4 & 17; Taylor Dep. at 24:16-21; Mitchell Dep. at 30:2-10.) The United States responds by asserting that it was only the first email that was received before the hiring decision. (Resp. SAMF ¶ 211; Ex. 17, First Email to Tate; Ex. 1, Palmquist Dep. at 43:9-21; Ex. 5, Taylor Dep. at 18:4-14; 19:1-25; 20:1-21; Ex. 3, Tate Dep. at 49:7-17; 141:16-25; 142:7-25; 143:1-6.) As the United States is taking the position that it was the sending of a single email that impacted the decision by Tate and Taylor not to recommend Palmquist to Mitchell, I do not see how the fact that Palmquist sent a second email could inure to Palmquist's benefit in resolving this summary judgment dispute.

employees could have sent her additional information about their qualifications in ways other than email following the interviews. (SAMF ¶ 208; Tate Dep. at 131:9-25; 132; 133:1-14.)³¹ Palmquist insists that at this meeting Tate reported to Mitchell that Palmquist had received an unfavorable reference. (SAMF ¶ 188; Mitchell Dep. at 41:10-15.)

Furthermore, Palmquist argues, other applicants who were hired for the Nashville position did not follow written directions in the application process. (Resp. SMF ¶¶ 66, 70; Tate Dep. at 108:16-25; 109:1-9; SAMF ¶ 212.) For example, Mr. Wells did not fill in item 11, declaration for federal employment, on the application form. Tate was aware of this deficiency in his application and noted it in her summary about him. (SAMF ¶ 212; Tate Dep. at 108:16-25; 109:1-9.) The United States responds that Wells did not fill in item 11 on his application but provided the information to Tate during the interview. (Resp. SAMF ¶ 212; Ex. 2, Tate Dep. at 108:16-25; 109:1-9.)

Per Palmquist, other successful applicants were less qualified than Palmquist, who had a master's degree in Public Administration and Administrative Law. (SAMF ¶ 213; Defendant's Ex. 16.) For example, Mr. I. had only a high school diploma and Tate admitted that I's educational background was unusually weak compared to the other applicants. (SAMF ¶ 213; Tate Dep. at 112: 19-23, 114:19-25; 115:1.) The United States responds that while there were some candidates, including I., who did not have the same education qualifications as Palmquist, educational background was not the only basis for determining if a candidate was qualified and it was not necessarily an advantage to be more educated. (Resp. SAMF ¶ 213; Ex. 5, Taylor Dep. at 11:7-13; Ex. 3, Tate Dep. at 21:20-25; 71:19-25; 74:16-25; 111:25; 112:7-23; 113:3-9.)

³¹ The United States responds that Tate was not sure if the other applicants could have sent her additional information but Palmquist was the only candidate that did not follow their instructions to not contact them after the interview. (Resp. SAMF ¶ 208; Ex. 3, Tate Dep. at 131:9-14; 142:1-25; 143:1-6; 144:11-23.)

Palmquist highlights that in this testimony Tate denied knowing that Palmquist had a disability that made it hard for him to sit without taking breaks and that Tate does not think the need to stand up briefly to take breaks would significantly interfere with someone performing the job properly. (Resp. SMF ¶ 69.) He points out that Tate was aware of Palmquist’s ten-percent disabled veteran’s preference when she interviewed him and included on Palmquist’s summary sheet that he had a ten-percent disabled veteran’s preference, and, thus, she had knowledge that he had a service connected disability. (Id.; Tate Deposition at 134:22-25; 135:1-5; Def.’s Ex. 19, Hiring Notes Re: Palmquist.) Tate testified that compared to the other applicants, they received completely favorable references, and in Palmquist’s reference, there was some non-favorable information. (Resp. SMF ¶ 70; Tate Dep. at 107:9-11; 108:10-14.) He reiterates that it was Tate’s impression that Aichner was “painfully honest.” (Resp. SMF ¶ 70; Tate Dep. at 104:25; 105:1-2.)

Per the United States, Glenda Taylor did not recommend Palmquist because he was not focused on answering the questions during the telephone interview and he sent emails to Tate and Taylor after being told not to contact them. (SMF ¶ 71; Ex. 5, Taylor Dep. at 17:14-25; 18:1- 14; Resp. SAMF ¶ 175.) Palmquist denies this statement by maintaining that Tate and Taylor reported to Mitchell that Palmquist did a good interview. (Resp. SMF ¶ 71; Mitchell Dep. at 34:18-20.)

There is no dispute that Palmquist was the only applicant who emailed or communicated with Tate and/or Taylor after the interviews. (SMF ¶ 72; Resp. SMF ¶ 72.) Mitchell made the final decision as to who should be hired for the Ratings Representative position. He hired the individuals that Tate and Taylor had recommended. Palmquist was not offered the position. (SMF ¶ 73; Resp. SMF ¶ 73.) According to the United States, Mitchell does not remember

seeing Tate's notes about Palmquist but remembers her saying that the reference was not bad but that he had trouble focusing. She did not dwell on that point but on the fact that he had sent her an email. (SMF ¶74; Ex. 4, Mitchell Dep. at 40:2-14; 41:10-25;42:1-25; 43:12-14.) While Palmquist admits that Mitchell testified to these statements, Tate provided her notes about Palmquist to Mitchell, however, and a jury could reasonably find, based on this, that a decision not to hire Palmquist was based at least in part on the reference. (Resp. SMF ¶ 74; Tate Dep. at 128: 19-25.) He maintains that Mitchell relied heavily on recommendations from Tate and Taylor and accepted their recommendations immediately; he did not go back and reconsider the candidates that applied and were not chosen. (Resp. SMF ¶74; Mitchell Dep. at 6:10-16, 39:8-16.)³²

³²

Post-notification facts

Through a March 20, 2006, letter, Palmquist was notified that he was not selected for the Ratings Representative position. (SMF ¶ 76; Resp. SMF ¶ 76; SAMF ¶ 203; Resp. SAMF ¶ 203.) No one in Tennessee said anything to Palmquist to make him think that he had not gotten the job because of his disability. (SMF ¶ 77; Resp. SMF ¶ 77.) When Palmquist received notice that he was not selected for the Nashville position, he believed he was not selected due to his disability. According to Palmquist, when a disabled veteran with Palmquist's rating is not selected for a position, the Office of Personnel Management is supposed to receive a report from the hiring facility stating the reasons for non-selection. Palmquist did not receive such a letter. The absence of this letter prompted Palmquist to initiate an EEO complaint to find out the reason for his non-selection. (SAMF ¶ 214; Palmquist Dep. at 51:3-25; 52:1-15.) The United States admits that upon receiving the letter from Tennessee indicating that he did not get the Ratings Representative Job, Palmquist immediately believed it was because of his disability without any other information from anyone about the actual hiring decision suggesting that that was the case. (Resp. SAMF ¶ 214; Ex. 1, Palmquist Dep. at 51:3-21; 52:2-6.)

After Palmquist was notified that he did not get the job, he went into Aichner's office and was very angry with her, yelling at her because he believed that she had not given him a good reference. (SMF ¶ 78; Ex. 2, Aichner Dep. at 135:12-15; Resp. SAMF ¶ 217.) Palmquist then went with his union representative, Ben Balkum to ask Aichner whether she gave Nashville a bad employment reference. She told him that she did not provide Nashville with a bad reference. (Resp. SMF ¶ 78; Palmquist Dep. at 54: 1-21; SAMF ¶ 217.) The United States indicates that her reference was not bad or good. (Resp. SAMF ¶ 217; Aichner Dep. at 135:12-15; Ex. 43: Notes of Meeting between Balkum, Palmquist and Aichner.)

There is no dispute that Palmquist believed Aichner's denial that she gave him a bad reference and in reliance on her denial he believed that the Nashville hiring authorities may have chosen not to hire him based on his disabilities instead. (SAMF ¶ 218; Resp. SAMF ¶ 218.) Consequently, on May 2, 2006, Palmquist filed a formal EEO complaint against the Nashville VBA alleging disability discrimination in its failure to hire him. (SAMF ¶ 219; Resp. SAMF ¶ 219.)

Palmquist initiated an EEO complaint in order to find out why he did not get the Veterans Service Ratings Representative job. (SMF ¶ 79; Resp. SMF ¶ 79.) Palmquist contacted his local EEO officer, Mr. Cantrell, who began an investigation. (SAMF ¶ 215; Resp. SAMF ¶ 215.) During the initial stages of that investigation, Mr. Cantrell contacted Nashville and learned that Palmquist was not hired for the Nashville position because he received

3. Facts Relevant to the Question of the Disability

a bad reference from his immediate supervisor, Sherry Aichner. He then communicated this information to Mr. Palmquist. (SAMF ¶ 216; Palmquist Deposition at 53:7-25; see also Resp. SMF ¶ 78; Palmquist Dep. at 51:3-25; 52.)

On May 2, 2006, Mark Palmquist filed his First EEO Complaint (200L-0320- 2006101841). (SMF ¶ 80; Resp. SMF ¶ 80.) On May 15, 2006, Mark Palmquist's First EEO Complaint (No. 200L-0320- 2006101841) was accepted. (SMF ¶ 81; Resp. SMF ¶ 81.) On July 27, 2006, Investigative Summary of Palmquist's First EEO Complaint (No. 200L-0320-2006101841) issued. (SMF ¶ 82; Resp. SMF ¶ 82.)

Per Palmquist, on about July 31, 2006, Palmquist received written proof that his immediate supervisor at the Medical Center in Iron Mountain gave him a "very bad" reference in connection with his application to the promotion at the Nashville regional office. He was provided with a copy of the summary sheet prepared by Ms. Tate, including her notes of the reference provided by Ms. Aichner. (SAMF ¶ 220; Palmquist Dep. at 65:2-23.) The case file concerning his application for the promotion at the Nashville regional office showed that his application was strong in all respects except that his immediate supervisor gave him a very bad reference, including a very negative reference to his prior complaints about disability discrimination, and very negative references to his disabilities. (SAMF ¶ 221; Palmquist Dep. at 68:16-25; 69:1-6, 13-25; 70:12-25; 71:1-4.)

The United States reiterates that Aichner's reference included positive and negative comments about Palmquist. Tate's overall impression was that Aichner's reference was good and that she was honest in her assessment of Palmquist. Aichner said a lot of good things to Delores Tate about Palmquist and it was Tate's impression that Sherry Aichner wanted Palmquist to get the job. (Resp. SAMF ¶¶ 220, 222; Ex. 3, Tate Dep. at 35:24-25; 36:1; 104:23-25; 105:1-16; 107:1-5.) Tate did not recommend Palmquist for the position in large part because he was advised not to contact them after the interview and he sent her an email with additional information. This demonstrated to her that he had difficulty following directions. His reference from Aichner was not the reason she did not refer him to Mitchell for the job. (Resp. SAMF ¶ 221; Ex. 3, Tate Dep. at 35:25, 36:1; 41:16-25; 42:1-20; 46:11-19; 60:14-25; 61:1-3, 24-25; 62:1-17; 64:6-16; 65:1-13; 123:8-18; 126:21-25; 127:1-6, 16-20; Ex. 4, Mitchell Dep. at 41:20-24.) Glenda Taylor did not recommend Palmquist because he was not focused on answering the questions during the telephone interview and he sent emails to Tate and Taylor after being told not to contact them. (Resp. SAMF ¶ 221; Ex. 5, Taylor Dep. at 17:14-25; 18:1-14.)

On August 2, 2006, Mark Palmquist initiated contact with an EEO counselor on a Second EEO Complaint and on August 18, 2006, he filed a Second EEO Complaint (No. 200J- 0585-2006103209). (SMF ¶ 83; Resp. SMF ¶ 83; Resp. SAMF ¶ 222.) Palmquist contacted an appropriate EEO Counselor for the VA concerning the newly discovered evidence that his immediate supervisor had provided him with a very bad job reference concerning his application for the promotion at the Nashville regional office, "in retaliation" for his earlier complaints about disability discrimination. (SAMF ¶ 222; Palmquist Dep. at 76:17-25; 77:1-2.) This complaint was against the Iron Mountain facility based on what Palmquist describes as "the retaliatory reference." (SAMF ¶ 223; Resp. SAMF ¶ 223.)

On September 20, 2006, Mark Palmquist's Second EEO Complaint (No. 200J- 0585-2006103209) was accepted. (SMF ¶ 84; Resp. SMF ¶ 74.) On September 21, 2006, the Final Agency Decision denying Mark Palmquist's First EEO Complaint (No. 200L-0320-2006101841) was issued. (SMF ¶ 85; Resp. SMF ¶ 85.)

The Togus Position

According to the United States, Sherry Aichner was asked to give a reference for Palmquist when he applied for the job at the VA Medical Center, Togus. She gave him a positive reference and he got the job. (SMF ¶ 86; Ex. 2, Aichner Dep. at 142:14-25; 143:1-25.) Although Palmquist admits that he got the job, he asserts that Aichner initially refused to provide the requesting official at Togus VA with a reference about Palmquist. (Resp. SMF ¶ 86; Palmquist Decl. ¶¶ 1-7.)

On about October 29, 2006, Palmquist began working as a patient advocate at VAMC Togus. (SMF ¶ 87; Resp. SMF ¶ 87.) On November 1, 2006, the acceptance letter for Palmquist's Second EEO complaint (No. 200J-0585-2006103209) was rescinded and the case was dismissed. (SMF ¶ 88; Resp. SMF ¶ 88.) On April 10, 2007, the Final Agency Decision was issued on Palmquist's August 18, 2006, Second EEO Complaint. (SMF ¶ 89; Resp. SMF ¶ 89; SAMF ¶ 224; Resp. SAMF ¶ 224.)

Mark Palmquist served in the U.S. Marines from 1984 to 1990-1991. During his military service overseas, Palmquist suffered several combat related injuries. For example, Palmquist was in a Jeep rollover in Cuba and sustained injuries on a couple of missions in Panama. (SAMF ¶ 120; Resp. SAMF ¶ 120.)

Palmquist states that he suffers from the following impairments that he claims substantially limit a life activity: (1) traumatic brain injury; (2) spinal bifida, spinal stenosis, facet disease, and spinal fusions; (3) varicose veins and post phlebitis syndrome due to trauma; (4) chondromalacia of the patella; (5) traumatic arthritis; (6) sleep apnea; and (7) migraine headaches. (SMF ¶ 90; Resp. SMF ¶ 90; SAMF ¶ 121; Resp. SAMF ¶ 121.)³³

While employed at Iron Mountain, Palmquist was unable to sit for long periods of time and needed to take breaks to get up and stretch and walk. At times, he also stood while doing his work. (SAMF ¶ 120; Resp. SAMF ¶ 120.)

According to Palmquist, due to his back conditions, Palmquist has difficulty walking at times. He sometimes has paralysis in his legs. Walking ten feet is difficult at times. (SAMF ¶ 122; Palmquist Dep. at 15:21-25.) If he sits for long periods of time, his back will ache severely. He has good days and bad days, but on his bad days, his pain is severe. (SAMF ¶ 122; Deslauris Dep. at 16:1-6.) He indicates that he cannot climb due to the pressure on his spine and

³³ In Paragraph 126 Palmquist states that in addition to his back and spine impairments, Palmquist also suffers from several other conditions and disorders, including traumatic brain injuries, varicose veins and post phlebitis syndrome due to trauma, chondromalacia of the patella, traumatic arthritis, sleep apnea, and migraine headaches. (SAMF ¶ 126; Pl.'s Answer 1st Interrogs. No. 7.) The United States argues that this paragraph should be stricken as it is supported by Palmquist's answer to the interrogatory and not by medical records or declarations from treating physicians. (Resp. SAMF ¶ 126.) Palmquist responds that he is qualified to testify about his own health conditions and disorders based on his personal knowledge, citing Federal Rule of Evidence 602. (Pl.'s Resp. Request Strike at 1.) For purposes of my recommendation on this motion for summary judgment the statement is not stricken; however, because I concluded that the retaliation claim does not require Palmquist to prove that he is disabled under the Rehabilitation Act, it has no impact on my legal analysis.

back, and he cannot bend to pick things up easily. (SAMF ¶ 124; Palmquist Dep. at 92:4-18.) He can comfortably lift only ten to fifteen pounds. (SAMF ¶ 124; Palmquist Dep. at 22:16-17.)³⁴

Palmquist's back conditions currently interfere with his ability to play with his son and make it difficult for him to do laundry, shovel snow, and other chores, play golf, and put on socks and shoes. (SAMF ¶ 125; Palmquist Dep. at 22:3-25; 23:1-6; 92; 93:1-5.) These limitations were the same when he lived in Michigan. (SAMF ¶ 125; Palmquist Dep. at 23:4-6.)³⁵

a. Nurse Practitioner Esancy³⁶

Christine Esancy is a nurse practitioner at VAMC Togus. She has worked at Togus for 18 years. (SMF ¶ 91; Ex. 33, Esancy Dep. at 3:10-20.) Palmquist qualifies by stating that Esancy has only been a nurse practitioner for three years. (Resp. SMF ¶91; Esancy Dep. at 3: 10-22.) Esancy has been Palmquist's primary care provider since he has been living in Maine. (SMF ¶ 92; Resp. SMF ¶ 92.) Esancy reports that Palmquist's weight, which is around 400 pounds, puts a lot of stress on his joints and limits his activities and his ability to exercise properly. (SMF ¶ 93; Ex. 33, Esancy Dep. at 8:5-10.) Esancy has recommended that he lose weight but Palmquist has not done everything she has recommended in order to lose weight, including diet, exercise

³⁴ The United States asserts that Palmquist testified during his deposition that he can comfortably lift 10-15 pounds depending on the day. While his back problems and his weight may limit his ability to bend, Palmquist is still able to bend. (Resp. SAMF ¶ 124.) It does not cite to the portions of the Palmquist Deposition it is relying on.

³⁵ The United States responds that Paragraph 125 does not accurately and completely summarize the deposition testimony cited. In the pages cited, Palmquist testifies that his back condition interferes with his ability to play with his son and that he has to do laundry in small amounts. Sometimes lifting is difficult and his son will get the laundry out of the dryer for him and put it in the basket for him and bring the laundry upstairs for him. He stated that he has trouble picking up socks and that he leaves his shoes tied. When asked "Are there any other specific ways in which your back affects your activities at home that you haven't already mentioned?" Palmquist responded "No." Palmquist testified that his problems with short-term memory were the same when he lived in Michigan. (Resp. SAMF ¶ 125; Ex. 1, Palmquist Dep. at 22:3-25; 23:1-6). Later on in his testimony he stated that he had trouble golfing and that he is unable to shovel snow. (Resp. SAMF ¶125; Ex. 1, Palmquist Deposition at 22:3-25; 23:1-6, 92:19-25; 93: 1-5.)

³⁶ The United States has misspelled Esancy's name as "Essancy."

and lap band surgery. (SMF ¶ 94; Ex. 33, Esancy Deposition at 8:25; 9:1-10.) Sometimes Palmquist complains that he is experiencing pain from his back but he does not go see Esancy with complaints about his back very often. He is able to walk around the hospital a lot. He goes to work regularly and is able to do his job. (SMF ¶95; Ex. 33, Esancy Dep. at 10:4-14; Resp. SAMF ¶ 122.) Palmquist walks from his work area to Esancy's work area on a daily basis, sometimes just to socialize with people in her area. Esancy's work area is two hallways away from Palmquist's office. (SMF ¶96; Ex. 33, Esancy Dep. at 10:16-25, 11:1- 11.) Esancy has not observed Palmquist having any difficulty walking around Togus and he does not walk with a limp. (SMF ¶ 97; Ex. 33, Esancy Dep. at 11:12 18; 36:6-7; Resp. SAMF ¶ 122.) Palmquist has not complained to Esancy about having any difficulty sitting at work. (SMF ¶ 98, Ex. 33, Esancy Dep. at 11:23-25; Resp. SAMF ¶ 122.) The only thing that Palmquist has mentioned to Esancy about his back pain affecting his daily life is that sometimes his son has to help him get out of bed. (SMF ¶ 99; Ex. 33, Esancy Dep. at 13:17-25; 14:1-3; SAMF ¶ 122.) According to Esancy, Palmquist uses a machine that helps him breathe at night because of sleep apnea. He is able to sleep with the machine. (SMF ¶ 100; Ex. 33, Esancy Dep. at 12:10-25; 13:5.)

Palmquist adds that his health conditions also limit his activities and his ability to exercise to therapeutic swimming and some walking, (Resp. SMF ¶ 93; Palmquist Dep. at 92:4-25; 93; 94:1-17), and notes that Esancy also stated that Palmquist has lost some weight and indicated that he swims a lot and he tries to watch what he eats. (Resp. SMF ¶ 93; Esancy Dep. at 8:13-15.) He maintains that the record cite does not support that Esancy has recommended that Palmquist lose weight or that he has not done the things she recommended. (Resp. SMF ¶ 94.) The cited testimony states that Palmquist tells Esancy he has trouble sleeping because of his back and that sometimes when he sees her, his back is painful. He argues that the record also

supports only that Palmquist does not go to see Esancy very often, that she sees him “up walking around a lot” and that “he comes to work and does seem to be able to do his job.” (Resp. SMF ¶ 95; Esancy Dep. at 10:4-14.) Palmquist has work to do in Esancy’s area and sometimes goes to her area to address providers about patient complaints. (Resp. SMF ¶ 96; Esancy Dep. at 10: 21-23.) Esancy has encouraged Palmquist to walk because it is good for chronic pain and helps him to lose weight. (Resp. SMF ¶ 96; Esancy Dep. at 30:1-7.) The cited testimony states only that Esancy has not observed Palmquist walking from his work area to her work area, but she sees him walking in the hallway and he does not appear to have difficulty. Esancy also only stated Palmquist does not have a noticeable limp. (Resp. SMF ¶ 97.) Although Esancy stated that Palmquist has not complained to her about having difficulty sitting at work, she did volunteer that she sees him up and walking and suggested that she’s not sure whether it is because he has trouble sitting for a long period of time. (Resp. SMF ¶ 98; Esancy Dep. at 10:9-12.) Esancy stated that she could not think about specific things Palmquist has mentioned he cannot do because of his back pain and then volunteered that sometimes his son has to help him get out of bed. (Resp. SMF ¶ 99.) Esancy states that she thinks the machine helps his sleep apnea and went on to testify that she does not think most of Palmquist’s sleep issues are related to the apnea. (Resp. SMF ¶ 100; Esancy Dep. at 13:1-5.)

Esancy does not think that Palmquist has complained to her that brain injuries affect his daily life. (SMF ¶ 101; Resp. SMF ¶ 101; Ex. 33, Esancy Dep. at 14:4-10.) Palmquist’s hypertension is well controlled by medication. (SMF ¶ 102; Resp. SMF ¶ 102.)

According to the United States, while Palmquist's back problems and his weight may limit his ability to bend, Palmquist is still able to bend. He has not complained to Esancy that he is unable or substantially limited in his ability to bend. (SMF ¶ 103; Ex. 33, Esancy Dep. at

16:11-19; Resp. SAMF ¶ 124.) Palmquist has not complained to Esancy that he is substantially limited in his abilities to climb (she believes he is able to climb),³⁷ stoop, lift or stretch and she believes he is capable of doing all those activities. (SMF ¶ 104; Ex. 33, Esancy Dep. at 16:20-25; 17:1-22; 30:8-21.) Esancy signed Palmquist's application for handicapped plates because at the time he complained that he had trouble walking without back pain. She does not think he is severely limited by his back at all times. She believes he has good days and bad days. She signed the application because on the bad days she wanted him to have the option of parking closer. (SMF ¶ 105; Ex. 33, Esancy Deposition at 18:13-25; 14:1-4; 28:19-22.)

Palmquist counters that he does have restrictions concerning his ability to bend. He cannot pick up things off the ground easily, and when golfing, he is unable to get the ball out of the hole or set the ball on the tee before hitting it. (Resp. SMF ¶ 103; Palmquist Dep. at 22:16-17; 92:4-25; 93:1.) Furthermore, he argues, the cited testimony supports only that Esancy thinks Palmquist is able to bend. (Resp. SMF ¶ 103.) Esancy testified that she never discussed with Palmquist whether any of his conditions substantially limit his ability to climb, stoop, lift, or stretch. She further testified that she would think he probably has to do all those things, but that they might be difficult sometimes. Specifically, his back might inhibit his ability to lift. (Resp. SMF ¶ 104; Esancy Dep. at 17:1-13.) She also stated that some days might be more difficult than others depending on his level of pain. (Resp. SMF ¶ 104; Esancy Dep. at 30:18-20.) The cited testimony states that at the time Esancy signed the handicap plate certification in January 2007, Palmquist was complaining of having extra pain when walking. (Resp. SMF ¶ 105; Esancy Dep. at 18:18-21.) She further testified that although she doesn't think he is severely

³⁷ (See Resp. SAMF ¶ 124.)

limited in his ability to walk all the time, at times he is. (Resp. SAMF ¶ 105; Esancy Dep. at 28:19- 20.) Esancy went on to state that when she checked the box indicating that Palmquist was “severely limited in his ability to walk due to an arthritic, neurological or orthopedic condition” that she believed that he was severely limited in his ability to walk and that his conditions that severely limit his ability to walk are permanent conditions and she does not believe his conditions will improve. (Resp. SMF ¶ 105; Esancy Dep. at 25- 26.)

There is no dispute that it is standard for patients with chronic back pain to have good and bad days. (SMF ¶ 106; Resp. SMF ¶ 106.) Palmquist has not complained to Esancy about knee pain nor does she recall treating him for knee pain. (SMF ¶ 107; Resp. SMF ¶ 107; Ex. 33 Esancy Deposition at 32:19-25; 20:1.)

b. Dr. Patterson

Dr. Kathleen Mary Patterson has been a neuropsychologist at Zablocki VA Medical Center for the past ten years. (SMF ¶ 108; Resp. SMF ¶ 108.) In 2000 Dr. Patterson evaluated Palmquist in connection with a vocational rehabilitation assessment. (SMF ¶ 109; Resp. SMF ¶ 109.) Based on her evaluation of Palmquist in 2000 Patterson diagnosed him with cognitive disorder, NOS. (SMF ¶ 110; Resp. SMF ¶ 110; Resp. SAMF ¶127.)

According to the United States, Patterson did not find that there were any residuals from his prior brain injuries. (SMF ¶ 110; Ex. 34, Patterson Dep. at 10:3-25.) Palmquist denies that Patterson did not find there were any residuals from his prior brain injuries. He indicates that Patterson testified that based on the pattern of Palmquist’s performance in 2000, it was possible that the executive problems and visual spatial difficulties that he exhibited were residuals of traumatic brain injuries, but this was not definitive enough to call them residuals of traumatic brain injury. (Resp. SMF ¶ 110; Patterson Dep. at 10:14-25; 20:3-11SAMF ¶ 127.) Palmquist

insists that he has had several traumatic brain injuries and that Patterson diagnosed him with a mathematics learning disability and mild cognitive disorder in 2000. (SAMF ¶ 127; Patterson Dep. at 9:2-13; 10:4-25.)

It was Dr. Patterson's view that Palmquist's cognitive disorder did not substantially limit his major life activities and that he only had subtle impairments. (SMF ¶ 111; Resp. SMF ¶ 111; Resp. SAMF ¶127.) It was also her view that Palmquist was not substantially limited in his ability to concentrate, remember things, learn, work, and communicate and interact with others. (SMF ¶ 112; Ex. 34, Patterson Deposition at 18:24-25; 19:1-16; Resp. SAMF ¶ 127.)³⁸

c. Dr. Riley

Dr. Robert Riley is a neuropsychologist at VAMC Togus. (SMF ¶ 113; Resp. SMF ¶ 113.) On January 18th and 22nd, 2008, Dr. Riley and an intern working with Dr. Riley, Matthew Bridgeman, performed an evaluation of Palmquist's cognitive skills. Palmquist was referred for the evaluation because of concerns that his cognitive functioning had decreased following a head injury he received in November 2007. (SMF ¶ 114; Resp. SMF ¶ 114.) There is no dispute that Palmquist reported that since the 2007 injury he had trouble remembering things like the passwords to the computer system. (SMF ¶ 116; Resp. SMF ¶ 116.) Palmquist did not mention that his cognitive difficulties had any impact on his home life. (SMF ¶ 117; Resp. SMF ¶ 117.)

According to the United States, Riley concluded after the evaluation that Palmquist suffered from a mild cognitive disorder. His findings were consistent with what Dr. Patterson

³⁸ Palmquist qualifies this statement, arguing that the cited testimony supports that it was Dr. Patterson's view as of 2000 that Palmquist's condition involved subtle impairments and she did not believe they limited these activities. (Resp. SMF ¶ 112.) Given that the deposition testimony does support the United States' statement this qualification is too subtle for me.

found in 2000. (SMF ¶ 115; Ex. 35, Riley Dep. at 8:14-21; 11:11-13; Resp. SAMF ¶ 128.)

Palmquist insists that, despite Riley's assertion of consistency, not all of his findings are consistent with the 2000 exam. For example, Riley did conclude that Palmquist's weaknesses could be reasonably attributed at least in part to his history of several traumatic brain injuries. (Resp. SMF ¶ 115; Riley Dep. at 35:15-21; SAMF ¶ 128; Resp. SAMF ¶ 128; Riley Dep. at 9-11.)

Riley characterized Palmquist's limitations on his ability to concentrate and remember as mild, and his limitations on his ability to learn as mild to moderate. Riley did not believe that Palmquist's cognitive difficulties affected in any significant way his ability to get his work done, care for himself, and communicate and interact with others. (SMF ¶ 118; Resp. SMF ¶ 118.) Palmquist describes his cognitive impairments as affecting his short term memory and his concentration. (SAMF ¶ 129; Resp. SAMF ¶ 129.) Palmquist does therapeutic swimming/water lap walking and lives with his nine-year-old child on his own. (SMF ¶ 119; Resp. SMF ¶ 119; Ex.1, Palmquist Dep. at 4:2-10; 93:14-19.)