COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and JOSE MELO,
Complainants

v. Docket No.: 10-NEM-01104

KENPAC FISHING CORP.,
Respondent

Appearances: Goncalo M. Rego and Juan Vasques Navarro, Esqs. for Jose Melo
Pamela F. Lafreniere and Paul Muniz, Esqs. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 5, 2010, Jose Melo ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") charging that he was subjected to disability discrimination in violation of G.L. c. 151B, section 4(16). A probable cause finding was issued on July 30, 2011 and the case was certified to public hearing on January 4, 2012. A public hearing was held on September 13 and 18, 2013.

The following witnesses testified at the public hearing: Complainant, Christopher Turner, Kevin Sobolewski, and Luis Pacheco. The parties submitted nine (9) joint exhibits. Complainant submitted one (1) additional exhibit and Respondent submitted five (5) additional exhibits.

Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant is a resident of Massachusetts who has worked as a fisherman for approximately twenty-two years. He testified that from 2005 to 2010, he contracted to work as a deck hand on several boats owned and captained by Luis Pacheco, principal of Respondent Kenpac Fishing Corp.
2. Luis Pacheco bought his first fishing boat, the Falcon, in 1987. He subsequently bought another boat, the Prince of Peace, in or around 2004. He bought a third boat, the Sharon K in 2006.
3. Pacheco testified that Complainant started working on the Prince of Peace in or around 2004. Pacheco described Complainant as a good worker for the first two to three years of their association but states that Complainant's work ethic thereafter went "downhill" and he "slacked-off" in 2009. Transcript at 208, 210-212.
4. Although Pacheco decided that he was "all done" with Complainant in September of 2009, he nonetheless gave Complainant "another shot" in 2010 when Complainant showed up looking for work. Transcript at 209. Pacheco permitted Complainant to work on a "trip-to-trip" basis in 2010. Transcript at 212.
5. On April 5, 2010, Complainant burned his left leg with a welding torch while working onboard the Sharon K which, at the time, was docked in the New Bedford MA harbor. Prior to the accident, Pacheco had ordered Complainant to change into protective gear, but Complainant had not done so. Transcript at 212.
6. Immediately following the accident, Complainant drove himself to St. Anne's Hospital in Fall River. He did so rather than go to the nearest hospital in New

Bedford. Complainant was treated for a second degree burn on his leg. Joint Exhibit 1. He was instructed to wash the affected area with soap and water twice daily, apply Silvadene cream after washing, and call his regular physician for an appointment in three to five days. Id. Complainant received a work release form from the hospital which stated that he could return to work on April 6, 2010 (i.e., the next day) provided that he kept his burn area clean and dry. Joint Exhibit 9.

7. On April 6, 2010, Complainant asked Pacheco not to report the incident to the vessel's marine insurance company. Instead, Complainant asked to be compensated for financial losses allegedly resulting from the accident out of the proceeds from the vessel's next fishing trip Complainant asserted that he could not join due to his injury. Transcript at 214. Pacheco refused, stated that he had already reported the incident to the insurance agent, and advised Complainant to file a claim with the insurance agent. Transcript at 213.
8. Complainant testified that he saw his primary care physician on April 7, 2010 and was told that he needed to rest his leg for at least three weeks, apply cream two to three times per day, and not wear anything on the burn because the ointment would come off. I do not credit that Complainant's testimony that his primary care physician said he needed to rest his leg for at least three weeks and not wear anything on the burn and note that Complainant failed to produce any written record of the alleged instructions.
9. On April 12, 2010, the Sharon K departed, without Complainant, on a two-week fishing trip. The boat returned to port on or around April 26, 2010. Transcript at 220.

10. Complainant testified that on or around April 22, 2010, he went to the dock to talk to Pacheco about returning to work. Transcript at 53. Complainant said that he had to be home for another two to three weeks and then could work on a "closed area"[1] fishing trip of six to seven days duration. Transcript at 55. Complainant states that he subsequently told Pacheco on May 3, 2006 that he could go back to work without any restrictions but that Pacheco responded by saying, "I have no more work for you." Transcript at 58-60.
11. According to Pacheco, he and Complainant spoke on May 3, 2010 following the Sharon K's return to dock on April 26, 2010, and Complainant said at that time that he would only go on a closed area fishing trip even though he was medically-cleared to return to work without restriction. Transcript at 220-222. Pacheco testified that he told Complainant he couldn't just go on closed area trips and in response, Complainant quit. Transcript at 225. I credit Pacheco's version of the conversation over that presented by Complainant.
12. On Thursday, May 6, 2010, Complainant met with Respondent's insurance agent, signed a general release, and received $2,500.00 to compensate him for "maintenance, care, and cure" under the Jones Act (federal maritime law). Respondent's Exhibit 2; Joint Exhibit 8. The release states, *inter alia*, that Complainant releases and forever discharges Kenpac Fishing Corp. and others "of each and every right or claim which I now have, or hereafter have, because of any matter or thing which happened before the signing of this paper . . . because of any and all injuries and/or illnesses suffered by me on or about April 5, 2010 . . ."

[1]Closed area trips are within prescribed government locations, involve between two and five days of fishing, and are approximately seven days dock to dock whereas open area trips are longer. Transcript at 218. Closed area trips do not generally occur until July of each year. Transcript at 216, 223.

Prior to executing the release, Neil Stoddard, an agent of Marine Safety Consultants, offered Complainant the opportunity to talk to an attorney and get a second medical opinion paid for by the insurance company. Stoddard explained that the check for $2,500.00 was in exchange for Complainant giving up the right to any further money for the burn injury or for anything else which happened prior to the signing of the release. Respondent's Exhibit 2. Complainant agreed to the terms.

13. On Monday, May 10, 2010, Complainant filed a complaint of disability discrimination with the MCAD charging that Respondent refused to hire him back due to his leg injury.
14. On May 12, 2010, the Sharon K left for another two-week fishing trip. Before the vessel returned, Complainant had accepted a position on another fishing vessel, the Santa Barbara. Transcript at 124.
15. During the following year, beginning in March of 2011, Complainant was hired on five occasions to work on a different fishing vessel, the Miss Shauna on five occasions.

III. CONCLUSIONS OF LAW

Handicap Discrimination

M.G.L. c. 151B, sec. 4 (16) makes it unlawful for an employer to discriminate against a qualified handicapped person who can perform the essential functions of a job with or without a reasonable accommodation. A handicapped person is one who has an impairment which substantially limits one or more major life activities, has a record of an impairment, or is regarded as having an impairment. See M.G.L. c. 151B, sec. 1 (17);

Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap – Chapter 151B, 20 MDLR Appendix (1998) ("MCAD Handicap Guidelines") at p. 2.

Complainant asserts that he became handicapped on April 5, 2010 as a result of a burn to his leg, was cleared to return to work on a "closed area" fishing trip in late April of 2010, and was cleared to work without restriction on May 3, 2010, but that Respondent refused to re-hire him in either capacity. Complainant maintains that the refusal was because of his having, or being regarded as having, a handicap.

To state a prima facie case of discrimination on the basis of handicap, Complainant bears the initial burden of alleging and producing some evidence to prove that he was: 1) a handicapped person; 2) capable of performing the essential functions of his job with or without a reasonable accommodation; and 3) was subject to an adverse employment action because of his handicap. See Godfrey v. Globe Newspaper Co., Inc., 457 Mass. 113, 120 (2010). Once an employee makes out a prima facie case, the burden shifts to the employer to establish that the adverse employment action was due to a reason other than handicap. See Godfrey, 457 Mass. at 120.

Complainant's injury was of short duration, did not impair his ability to perform any major life activities, and did not cause him to be regarded as impaired. See Hallgren v. Integrated Financial Corp., 42 Mass, App. Ct. 686 (1997) (a knee injury from which plaintiff recovered in a month without residual disability is not a handicap). Complainant incurred a second degree burn, drove himself to the hospital, was treated and released in under an hour, and was cleared to return to work the next day. These factors do not satisfy the standards for establishing a handicap.

Complainant testified that his primary care physician instructed him to remain out of work for several weeks and to keep the wound uncovered during this period, but there is no supporting documentation for such treatment. I find more credible the written instruction from the hospital emergency room that Complainant could return to work on April 6, 2010 (the following day) provided that he kept his burn area clean and dry, presumably by keeping it bandaged. In any event, whether Complainant had to miss one day or several weeks of work, his injury fails to qualify as substantially-limiting condition which impacts a major life activity. See ADA Amendments Act of 2008, Public Law # 110-325, sec. 2(b)(5), amending Americans with Disabilities Act of 1990, 42 U.S.C sec. 12101 et seq. For these reasons, the injury was neither an actual or perceived handicap.

Complainant argues that he is nonetheless entitled to a presumption of handicapped status pursuant to section 75B of M.G.L. c. 152, the Massachusetts Workers' Compensation law. Under the Massachusetts Workers' Compensation law, employers are required to provide insurance coverage to pay the costs of medical treatment and compensation for lost wages on behalf of employees who sustain job-related injuries. See Massachusetts General Laws Ch. 152, Sec. 25A. Section 75B states that: (1) Any employee who has sustained a work-related injury and is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of such job with reasonable accommodations, shall be deemed to be a qualified handicapped person under the provisions of chapter one hundred and fifty-one B.

As a seaman, however, Complainant is not covered by the Massachusetts Workers'

Compensation Act. Section 1(4) of Chapter 152 defines "employee" as "every person in the service of another under any contract of hire, express or implied, oral or written, *excepting (a) masters of and seamen on vessels* . . . (emphasis supplied). Because Complainant was not covered by the Massachusetts Workers' Compensation Act, he is not entitled to a presumption of handicapped status in relation to his injury.

Complainant, as a maritime employee, must look to the Jones Act, 46 U.S.C. Sec. 688, as the exclusive remedy for personal injuries sustained on the job. See Lindgren v. United States, 281 U.S. 38 (1930) (Jones Act covers entire field of liability for injuries to seamen and supersedes operation of all state statues regarding same); Clancy v. Mobile Oil Corp., 906 F. Supp. 42, 46-67 (D. Mass. 1995) (Jones Act provides relief for pecuniary losses suffered as a result of personal injury actions suffered by seamen).[2]

Pursuant to the Jones Act, Complainant received $2,500.00 in compensation for his injury and executed a release on Thursday, May 6, 2010 which absolved Kenpac Fishing Corporation "of each and every right or claim which I now have or hereafter have, because of *any matter or thing which happened before the signing of this paper* …

[2] Respondent argues that the Jones Act preempts state law discrimination claims regarding seamen, but such an assertion is overly broad. On the one hand, the First Circuit has cited the "strong national interest in the uniformity of labor laws," as a basis for determining that the NLRA preempts MCAD jurisdiction to entertain a charge of sex discrimination based on an employer's alleged interference with an employee's union activities. See Chaulk Services Inc. v. MCAD, 70 F3d 1361 (1st Cir. 1995); see also Local Union 12004 v. Commonwealth of Massachusetts, 377 F.3d 64 (1st Cir. 2004) (reversing and remanding for further proceedings addressing preemption claim based on NLRA). On the other hand, where matters constitute only a "peripheral concern" to federal policy but are a central concern under state law, they do not give rise to preemption. See Farmer v. United Brotherhood of Carpenters, 430 U.S. 290, 296-297 (1977) *citing* San Diego Unions v. Garmon, 359 U.S. 236, 243 (1959) ((holding that NLRA does not pre-empt state court action for intentional infliction of emotional distress). The latter holding controls the case at hand since the discrimination claim in this matter is, at best, tangential to the Jones Act.

A claim of preemption, moreover, fails for the additional reason that Complainant's cause of action under Chapter 151B is congruent with the Americans with Disabilities Act. Thus, the doctrine of partial preemption permits the state law claim to go forward. See Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983); Tompkins v. United Healthcare of New England, Inc., 203 F.3d 90, 96-97 (1st Cir. 2000) (claim under G.L. c. 151B is exempt from ERISA preemption to the extent that conduct prohibited by Massachusetts law would also violate Title VII).

because of any and all injuries and/or illnesses suffered by me on or about April 5, 2010." (emphasis supplied). Prior to signing the release, Complainant tried, unsuccessfully, to limit one or more future trips on Respondent's vessel to "closed areas." Having asked and been denied the limitation prior to signing the release, Complainant discharged that portion of the discrimination claim.

Even if the discrimination claim survived the signing of the release, the evidence establishes that Complainant's employment relationship with Captain Pacheco ended, not because of an actual or perceived disability, but because Complainant only wanted to go on "closed area" fishing trips following his accident despite being medically-cleared to work without restriction. Captain Pacheco testified credibly that he told Complainant he couldn't just go on closed area trips and in response, Complainant quit.

In sum, Complainant's attempt to re-define the parameters of his employment constituted an unreasonable demand which was unrelated to his leg injury and which fails to support a claim of handicap discrimination. Based on the facts established at the public hearing, Complainant's request to go on closed area fishing trips does not constitute an accommodation for an actual disability, much less a reasonable accommodation for an existing disability. See Russell v. Cooley Dickinson Hospital, Inc., 437 Mass. at 443, 454 (2002) (reasonable accommodation does not require employer to "fashion a new position"); Beal v. Selectmen of Hingham, 419 Mass. 535, 541-542 (1995) (employer may refuse to accommodate handicap that necessitates a substantial modification to standards of a job); Dziamba v. Warner and Stackpole, 56 Mass. App. Ct. 397, 405-406 (2002) (reduction in work hours not legally required where granting part-time schedule would require that employer reallocate the employee's duties and make

substantial changes in the job.

IV. ORDER

The case is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 6th day of May, 2014.

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Betty E. Waxman, Esq.,
Hearing Officer