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 JASON DAVENPORT,)
 Plaintiff,)
)
 v.) Civil Action No.
) 12-11740-NMG
 NATGUN CORPORATION,)
 Defendant.)
)

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advertised openings for the position of Laborer and Laborer Foreman during that time, plaintiff does not allege that he sought and was denied a position after he filed his MCAD complaint.

Plaintiff withdrew the MCAD complaint in order to pursue the instant case and filed a Complaint in Massachusetts Superior Court for Middlesex County in June, 2012. Defendant duly removed the case to this Court in September, 2012 and filed the pending motion to dismiss.

Plaintiff brings seven claims: Counts I and II allege violations of the Massachusetts Workers' Compensation Act, M.G.L. c. 152, §§ 75A and 75B ("MWCA"); Counts III and IV allege handicap discrimination under the Massachusetts Anti-Discrimination Statute, M.G.L. c. 151B ("Chapter 151B") and the Americans with Disabilities Act ("ADA"); Counts V and VI allege retaliation under both Chapter 151B and the ADA; and Count VII alleges a violation of the Federal Rehabilitation Act ("FRA").

II. Analysis

Defendant has moved to dismiss all counts for failure to state claims upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

A. Legal Standard

To survive a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a complaint must contain

"sufficient factual matter" to state a claim for relief that is actionable as a matter of law and "plausible on its face."

Ashcroft v. Iqbal, 556 U.S. 662, 667 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible if, after accepting as true all non-conclusory factual allegations, the court can draw the reasonable inference that the defendant is liable for the misconduct alleged. Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 12 (1st Cir. 2011). A court may not disregard properly pled factual allegations even if actual proof of those facts is improbable. Id. Rather, the relevant inquiry focuses on the reasonableness of the inference of liability that the plaintiff is asking the court to draw. Id. at 13. When rendering that determination, a court may not look beyond the facts alleged in the complaint, documents incorporated by reference therein and facts susceptible to judicial notice. Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011).

B. Counts I and II: Massachusetts Workers' Compensation Act Claims

Section 75A of the MWCA requires employers to grant a preference in favor of re-hiring injured employees, provided that suitable work is available. Section 75B of the MWCA prohibits an employer from discriminating against any employee because the employee obtained worker's compensation. Importantly, both provisions provide that if either right is "inconsistent with an applicable" collective bargaining agreement ("CBA") then the CBA

will prevail. See M.G.L.c. 152, §§ 75A, 75B.

Defendant argues that plaintiff's claims under the MWCA are preempted by Section 301(a) of the Labor Management Relations Act ("the LMRA") because plaintiff was a member of a branch of the AFL-CIO ("the Union") that was a party to a CBA with defendant. State law employment claims are preempted by Section 301(a) when the claim "plausibly can be said to depend upon the meaning of one or more provisions within" the CBA. See Haggins v. Verizon New England, Inc., 648 F.3d 50, 54-55 (1st Cir. 2011).

The preemptive force of Section 301(a), when coupled with the text of the MWCA requiring courts to search for inconsistencies between the statute and the CBA, is fatal to plaintiff's MWCA claims. See Sullivan v. Raytheon Co., 262 F.3d 41, 50 (1st Cir. 2001) (noting § 75B claim preempted not because relevant CBA was inconsistent with claims asserted "but because it may be so and requires interpretation"). Although not expressly contained within the Complaint, plaintiff concedes in his opposition to defendant's motion that, as defendant's employee, he was a member of the Union. The CBA to which he was therefore a party contains provisions granting defendant the right to re-hire any employee who has previously worked for defendant for four months and to accept or reject any applicants referred to it by the Union once the pool of potential "re-hires" has emptied. The CBA also guarantees that any referrals so made

by the Union must be on a non-discriminatory basis. Because the Court is compelled to interpret those provisions to determine whether they conflict with Sections 75A and 75B of the MWCA before plaintiff may bring claims under that statute, the claims "plausibly" depend upon the meaning of the CBA. Cf. Sullivan, 262 F.3d at 50 (preempting plaintiff's claim where CBA provision granting broad supervisory discretion could conflict with section 75B). Accordingly, plaintiff's MWCA claims are preempted and will be dismissed.

C. Counts III and IV: Chapter 151B and American's with Disabilities Act Claims

Defendant contends that plaintiff's disability discrimination claims under Chapter 151B and the ADA must fail because plaintiff has not adequately alleged that he is disabled under either statute.

Chapter 151B is the Massachusetts analogue to the ADA and the definitions of "disability" under the ADA and "handicapped" under Chapter 151B are "virtually identical." Sensing v. Outback Steakhouse of Florida, LLC, 575 F.3d 145, 153-54 (1st Cir. 2009). The Court will, therefore, interpret plaintiff's Chapter 151B claim in accordance with federal case law interpreting the ADA. See id. (noting Massachusetts courts follow same practice).

To recover for disability discrimination under the ADA, a plaintiff must show that 1) he suffers from a disability within the meaning of that statute; 2) he was, nevertheless, qualified

for the job; and 3) he was discharged, in whole or in part, because of his disability. See Lessard v. Osram Sylvania, Inc., 175 F.3d 193, 197 (1st Cir. 1999). "Disability" has three statutory definitions:

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of that individual,
- (B) a record of such an impairment or
- (C) being regarded as having such an impairment.

Id. (citing 42 U.S.C. § 12102(2)). Among many others, "working" qualifies as a major life activity but it is only substantially limited if the plaintiff can show that his disability prevented him from performing a "class" or "broad range" of jobs. Id.

Plaintiff does not allege that his broken ankle in fact "substantially limited" his ability to work. To the contrary, plaintiff claims that his ankle injury had healed fully by December, 2009 and that he was not re-hired in spite of his recovery. Accordingly, plaintiff's allegations leave only the third definition, being "regarded as" disabled, at issue.

For an ADA plaintiff to be "regarded as" disabled he must show that defendant mistakenly believed that plaintiff 1) has a limiting impairment that plaintiff does not have, or that 2) plaintiff's actual, non-limiting impairment, limits one or more major life activities. See Roman-Oliveras v. Puerto Rico Elec. Power Auth., 655 F.3d 43, 49 (1st Cir. 2011). A plaintiff cannot

merely show that defendant perceived him as "somehow disabled" but must prove that defendant regarded him as "disabled within the meaning of the ADA." Ruiz Rivera v. Pfizer Pharmaceuticals, LLC, 521 F.3d 76, 83 (1st Cir. 2008).

Plaintiff alleges that defendant was aggravated about his broken ankle because it was the second time that he had been injured that year. Plaintiff argues that, consequently, defendant regarded plaintiff as "damaged goods" and fired him. That allegation permits an inference that defendant terminated plaintiff because it mistakenly believed his broken ankle had not, and would not, fully heal, in spite of plaintiff's own insistence that it had. When coupled with the allegations that plaintiff received positive performance reviews prior to the accident and defendant refused to hire him back for light duty or to resume his regular job, it may be inferred that defendant also mistakenly believed that plaintiff's broken ankle substantially limited his ability to work in a broad range of jobs. Cf. O'Leary v. InfraSource Transmission Services Co., 758 F. Supp. 2d 9, 26 (D. Me. 2010) (denying summary judgment where employer may have taken adverse employment action because employee's broken ankle took longer than usual to heal).

At this early stage in the litigation, the Court cannot say that plaintiff's disability discrimination claims fail to state a plausible claim for relief. Accordingly, defendant's motion to

dismiss those counts will be denied.

D. Counts V and VI: Retaliation Claims under Chapter 151B and the ADA

Defendant contends that plaintiff's retaliation claims under Chapter 151B or the ADA fail to demonstrate the requisite causal nexus because plaintiff was fired before he engaged in any protected activity, i.e. his filing of a complaint with the MCAD. See Sullivan, 262 F.3d at 48-49 (finding no causal nexus where employee's protected conduct, filing with MCAD, occurred three months after his firing). Here, plaintiff was terminated in January, 2010 and filed his MCAD claim approximately eight months later, in September, 2010.

Plaintiff argues that defendant constantly hires laborers but refused to rehire him after he filed an MCAD complaint. Plaintiff does not, however, allege he actually sought employment at Natgun after engaging in that protected activity. His position misconstrues an earlier decision by this Court in which it found that an employee who filed an MCAD complaint three days after being denied a promotion and who was not later promoted while the position remained open in spite of her subsequent application, could plausibly claim her denial was retaliatory. Flipp v. Town of Rockland, 613 F. Supp. 2d 141, 147 (D. Mass. 2009). The comparatively short amount of time that elapsed between Flipp's promotion denial and her complaint and the fact that she subsequently applied for that position distinguish that

case from plaintiff's circumstances here.

The Court declines to stretch the meaning of "retaliation" so far on the basis of plaintiff's tenuous allegations with respect to a causal nexus. Accordingly, defendant's motion to dismiss will be allowed as to those claims.

E. Count VII: Federal Rehabilitation Act Claim

Apart from demonstrating a qualifying disability, whether defendant is a recipient of federal financial assistance is an "indispensable jurisdictional element" of an FRA claim. Steir v. Girl Scouts of the USA, 383 F.3d 7, 13 (1st Cir. 2004).

Plaintiff alleges that defendant designs and builds storage tanks for municipalities which, in turn, receive federal assistance.

Plaintiff's claim fails as a matter of law because defendant is not such a "recipient." Under the FRA, a "recipient" of federal funds means any entity to which federal financial assistance is "extended directly or through another recipient" but excludes the "ultimate beneficiary of the assistance." Federal Rehabilitation Act Definitions, 45 C.F.R. § 84.3 (2005). As explained by the Supreme Court, the FRA prohibits disability discrimination by entities that Congress intended to receive federal financial assistance but does not reach those "who merely benefit from the aid." U.S. Dept. of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 607 (1986) (holding commercial

airlines not "recipients" of federal financial assistance directed at airport operators).

By the same token, assuming that municipalities that contract with defendant are the intended recipients of federal financial assistance, at best, defendant "merely benefitted" from that aid. Defendant's motion to dismiss plaintiff's FRA claim will, therefore, be allowed.

ORDER

In accordance with the foregoing, defendant's motion to dismiss (Docket No. 10) is, with respect to Counts III and IV, **DENIED**, but with respect to all other counts, **ALLOWED**.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated March 7, 2013