IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DENNIS J. SHESKEY,

OPINION and ORDER

Plaintiff,

06-C-764-C

v.

MADISON METROPOLITAN SCHOOL DISTRICT,

Defendant.

- -

Plaintiff Dennis Sheskey is now 43 years old. In August, 2005 he submitted a registration form for a low impact aqua fitness class offered to residents of the Madison, Wisconsin metropolitan area who are 50 years old and older. The class was part of the 50+ Fitness Program operated by Madison School and Community Recreation, a department of defendant Madison Metropolitan School District.

Plaintiff's registration was rejected because he did not meet the program's age requirement. Plaintiff has now brought this lawsuit, in which he alleges that defendant's use of age in determining eligibility for the 50+ Fitness Program is improper and that he should have been admitted to the program because he is disabled. Although plaintiff's legal theory is somewhat difficult to discern, read liberally, his contention is that defendant's policies

violate the Age Discrimination Act of 1975, the Americans with Disabilities Act, the Rehabilitation Act of 1973 and the equal protection clause of the United States Constitution.

Now before the court are the parties' cross motions for summary judgment. I conclude that defendant's refusal to allow plaintiff to register for a class offered as part of its 50+ Fitness Program did not violate the Americans with Disabilities Act, the Rehabilitation Act or the equal protection clause of the United States Constitution. In addition, I conclude that plaintiff did not provide proper notice with respect to his Age Discrimination Act claim. Therefore, defendant's motion for summary judgment will be granted in full and plaintiff's motion will be denied.

None of the facts of this case are in dispute, for two reasons. First, in support of his motion for summary judgment, plaintiff proposed only two facts, neither of which defendant disputed. Next, plaintiff did not file a response to defendant's motion for summary judgment. Instead, on the day his response was due, plaintiff filed a motion to withdraw his case. When plaintiff was informed that such a withdrawal would be with prejudice because the case had proceeded as far as it had, plaintiff reversed course and asked the court to decide the case on the present record. Plaintiff has not filed a response to defendant's motion for summary judgment and has not disputed any of defendant's proposed facts. Therefore, facts fatal to plaintiff's case, with which plaintiff may or may not agree, have been

treated as undisputed.

Although plaintiff is proceeding on his claim pro se, this does not excuse him from complying with this court's procedures. Plaintiff was informed of this court's rules regarding summary judgment at the outset of the case. Among the important warnings included in those procedures are that "the court will not consider facts contained only in a brief" and that "unless the responding party puts into dispute a fact proposed by the moving party, the court will conclude that the fact is undisputed." Procedure to be Followed on Motions for Summary Judgment, I.B.4, II.C. Plaintiff's disregard for the court's procedures is unfortunate, because he was given a substantial extension of time in which to prepare his response to defendant's motion for summary judgment after he informed the court that he was overwhelmed by the requirements of preparing his response.

One final matter requires discussion before I set forth the undisputed facts. On August 7, 2007, more than two weeks after plaintiff filed his reply to defendant's response to his motion for summary judgment, plaintiff moved to amend his reply brief. In his motion, plaintiff stated that he did not intend to change any arguments or statements, but simply to aver to the truthfulness of statements and attached documents. Defendant did not oppose plaintiff's motion and it will be granted. However, plaintiff should be aware that simply averring to the "truthfulness" of his statements and attachments does not excuse him from compliance with the court's requirements regarding proposed facts.

From the parties' proposed findings of fact, I find the following facts to be material and undisputed.

FACTS

A. Parties

Plaintiff Dennis Sheskey lives in Madison, Wisconsin. Defendant Madison Metropolitan School District is a school district organized under chapter 120 of the Wisconsin statutes. Madison School and Community Recreation is a department of defendant. (For the remainder of this opinion, I will refer to the Madison Metropolitan School District and Madison School and Community Recreation interchangeably as defendant when no distinction is necessary.)

B. Recreational Programs Offered by Defendant

Through Madison School and Community Recreation, defendant offers a year-round program of recreation and enrichment opportunities to people in the Madison metropolitan area. Defendant offers classes and programs that are intended for all age groups, including programs for preschool children, school-age children, adults and senior adults. Defendant also provides programs that do not have age requirements. Defendant encourages individuals with disabilities to participate in all programs for which they are eligible;

defendant uses an assessment program to determine the accommodations necessary to allow participants with permanent disabilities to participate in particular programs.

Defendant provides a nutritional and fitness program for "senior adults" called the Goodman-Rotary 50+ Fitness Program. The 50+ Fitness Program defines "senior adults" as adults who are age 50 and older. This definition was set in reliance on Madison General Ordinance § 3.23(5)(c), which permits "public accommodations and amusements" to offer special services to people aged 50 and above, and the age-based eligibility requirements for the American Association of Retired Persons. Enrollment in the 50+ Fitness Program is limited to "senior adults."

The 50+ Fitness Program is operated through a partnership among Madison School and Community Recreation, the Madison Rotary Foundation and the Goodman Rotary Board. It was established through an endowment. The objectives of the 50+ Fitness Program are to provide senior adults with fitness and nutrition programs that are safe, affordable, accessible and age appropriate and to help provide a higher quality of life for the senior adult population in the Madison area.

In senior adults, physical activity maintains or improves balance, joint mobility and cognitive functioning, prevents development of disease, and reduces risk of distress, anxiety and depression. The fitness classes provided by the 50+ Fitness Program are designed especially to accommodate a wide range of physical abilities, fitness levels, physical

limitations and conditions such as arthritis, loss of strength and loss of flexibility. The instructors for the 50+ Fitness Program are trained to provide appropriate activities for senior adults, who are more likely than younger ones to have physical limitations such as arthritis, loss of strength and loss of flexibility.

Defendant uses the age-based eligibility requirements for the 50+ Fitness Program as an approximation of physical characteristics that are more prevalent in senior adults. The current registration form is cost-effective to administer and simple. It would be impractical, intrusive and expensive for defendant to measure physical characteristics individually for each applicant to the program because it would require each applicant to undergo a physical examination.

C. Plaintiff's Attempt to Register for the 50+ Fitness Program

On approximately August 3, 2005, plaintiff submitted a registration form for a class offered by defendant through the 50+ Fitness Program and called "Aquatic Exercise – Arthritis Foundation Joint Effort." Plaintiff included his birth date, May 20, 1964, on his registration form. Because plaintiff was 41 years old at the time, he did not qualify for participation in the class.

On approximately August 5, 2005, a program assistant for defendant contacted plaintiff to tell him that he did not qualify for enrollment in the class he had selected and

to suggest that he enroll in one of the water fitness classes offered to adults age 18 and over. Plaintiff declined to enroll in a different class and asked that he be allowed to enroll in the 50+ Fitness Program. Later that day, plaintiff spoke with the program coordinator, who reiterated that he would not be allowed to enroll in the class he had selected because he did not meet the age requirement. She also encouraged him to select another adult water fitness course. He did not.

On December 5, 2005 plaintiff filed a complaint against defendant with the United States Department of Education, Office of Civil Rights. In that complaint, plaintiff alleged that defendant had discriminated against him on the basis of age and disability when it prohibited him from enrolling in the 50+ Fitness Program because he did not meet an age requirement. The parties engaged in mandatory mediation. The Department of Education Office of Civil Rights made no determination within 180 days of plaintiff's filing of his complaint. On July 17, 2006 plaintiff filed a second complaint with the Department of Education. (It is not clear what the Department of Education did, if anything, in response to plaintiff's second complaint. However, that case was closed pending resolution of the present action.) Plaintiff filed this lawsuit on December 28, 2006. He did not provide defendant with notice of his intent to file a federal lawsuit.

DISCUSSION

A. Age Discrimination Act of 1975

Plaintiff contends that defendant's refusal to allow him to participate in the 50+ Fitness Program violated the Age Discrimination Act of 1975, a rarely litigated federal statute that provides that "no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." 42 U.S.C. § 6102; 34 C.F.R. § 110.10. Plaintiff contends that defendant's general policy of determining eligibility on the basis of age violates the Act as well.

Although the language of the statute is broad on its face, if plaintiff's interpretation is correct, then thousands of programs designed to assist older Americans are invalid because they exclude younger people. National parks would be prohibited from offering a reduced fee "Senior" pass to older Americans; retirement communities that receive federal funding would be required to admit people of all ages. This is an anomalous result. Therefore, it is not surprising that regulations interpreting the statute reject this outcome explicitly. 34 C.F.R. § 110.16 ("If a recipient operating a program or activity provides special benefits to the elderly or to children, the use of age distinctions is presumed to be necessary to the normal operation of the program or activity, notwithstanding the provisions of § 110.12."). However, I need not reach the merits of plaintiff's claim, because he failed to provide proper notice before filing this lawsuit.

The Age Discrimination Act requires that a plaintiff "shall give notice by registered mail not less than 30 days prior to the commencement of the action to the Secretary of Health, Education and Welfare [Health and Human Services], the Attorney General of the United States, and the person against whom the action is directed." Id. at § 6104(e)(1). In support of its motion for summary judgment, defendant proposed as fact that plaintiff did not provide notice of his intent to bring a federal lawsuit. In his reply brief in support of his motion for summary judgment, plaintiff argues that he did provide proper notice. However, he proposed no fact in support of this assertion. As noted above, this court's procedures make clear that facts included only in briefs will be disregarded. Therefore, I find that plaintiff has not met the statutory requirements necessary to pursue his claim under the Age Discrimination Act and I will grant defendant's motion for summary judgment on that claim.

B. Americans with Disabilities Act and Rehabilitation Act

Next, plaintiff contends that defendant violated his rights under the Americans with Disabilities Act, 42 U.S.C. §§ 12131–12134, and the Rehabilitation Act of 1973, 29 U.S.C. § 794. Both statutes prohibit discrimination against qualified persons with disabilities. Title II of the Americans with Disabilities Act is concerned with public entities, which are prohibited from excluding qualified persons with disabilities from participation in or

receiving the benefits of the services, programs or activities offered by the entity and from discriminating against qualified disabled persons. 42 U.S.C. § 12132. "Public entity" includes any department, agency or instrumentality of a state or local government. 42 U.S.C. § 12131(1)(B).

The Rehabilitation Act prohibits organizations that receive federal funds from discriminating on the basis of disability. Community Services v. City of Milwaukee, 465 F.3d 737. To that end, section 504(a) provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a). Although the statute itself does not contain a general accommodation requirement, the United States Supreme Court has held that it requires meaningful access to state benefits and therefore that "reasonable accommodations in the grantee's program or benefit may have to be made." Alexander v. Choate, 469 U.S. 287, 301 (1985).

The protections of both the Americans with Disabilities Act and the Rehabilitation Act may be invoked only by a person who is a "qualified individual with a disability." In the context of these statutes, the term means

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets

> the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131.

The Rehabilitation Act provides that the ADA standards are to be applied to determine whether the Rehabilitation Act has been violated. 29 U.S.C. § 794(d). Therefore, I will consider them together.

A person is disabled within the meaning of the Americans with Disabilities Act if he suffers from a physical or mental impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(2). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(I) (1998). A major life activity is "substantially limited" when the person is unable to perform it or is significantly restricted in the manner, condition or duration in which she can perform it in comparison to the general population. Kampmier v. Emeritus Corp., 472 F.3d 930, 938 (7th Cir. 2007), citing 29 C.F.R. § 1630.2(j).

Although plaintiff contends that defendant violated his rights under the Americans with Disabilities Act and Rehabilitation Act, he has adduced no evidence that he was entitled to protection under those statutes. He has come forward with no evidence that he was "disabled" as defined in the statutes. In fact, it is not clear what the basic nature of plaintiff's claimed disability is. Therefore, it is impossible to evaluate whether he is

substantially limited by it.

However, even if plaintiff had shown that he was disabled and entitled to protection under the Rehabilitation Act or the Americans with Disabilities Act, he could not prevail on his claim because his underlying legal theory is flawed. The statutes require covered entities to provide "reasonable accommodations" that are needed for those with disabilities to obtain the same opportunities that those without disabilities automatically enjoy. U.S. Airways, Inc. v. Barrett, 535 U.S. 391 (holding that employer not required to make disability-based exceptions to seniority rule). They do not require that a person with disability receive whatever accommodation he desires, regardless whether he meets uniform eligibility requirements imposed on everyone. Id. at 404-05. Nor do they require the modification of an existing policy or practice when the plaintiff would not have been eligible even if he were not disabled. Wisconsin Community Services, 465 F.3d at 752. In this case, defendant has adduced evidence that it offers water fitness classes that are open to adults of all ages. In fact, plaintiff was encouraged to sign up for classes for which he *was* eligible. The fact that plaintiff was not allowed to register for a class for which he did not meet age eligibility requirements does not support his claim of discrimination on the basis of disability.

Finally, as plaintiff himself argues, his age and not his disability, was the reason that he was denied enrollment in the 50+ Fitness Program. To prevail ultimately on a claim

under the Americans with Disabilities Act or the Rehabilitation Act, a plaintiff must demonstrate that he was discriminated against *because of his disability*. E.g., EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 796 (7th Cir. 2005). If it is true, as the parties agree, that plaintiff was denied enrollment in a particular class because of his age, it is impossible for plaintiff to make this showing.

C. Equal Protection

The Fourteenth Amendment states that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Am. 14. As the United States Supreme Court has explained, this is "essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). In situations in which no fundamental right or suspect classification is implicated, equal protection claims are reviewed by courts using a rational basis standard of review. Smith v. City of Chicago, 457 F.3d 643, 650 (7th Cir. 2006).

Age is not a suspect classification under the equal protection clause. Gregory v. Ashcroft, 501 U.S. 452, 470 (U.S. 1991); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 (1976). Nor does plaintiff have a fundamental right to participate in recreational programs offered by defendant. Therefore, defendant need provide only a rational basis for its age classification. Murgia, 427 U.S. at 314. Rational basis is not a

searching standard of review. Eby-Brown Company v. Wisconsin Department of Trade and Consumer Protection, 295 F.3d 749, 754 (7th Cir. 2002) (holding that action must be upheld, so long as it bears rational relation to legitimate end).

In this case, defendant's age requirements pass muster. Defendant has adduced evidence that senior adults face greater risks of certain health problems and the risks are reduced by regular exercise. Assisting senior adults in avoiding health problems is a legitimate goal. To this end, defendant limits access to some of its offered classes to people whom it categorizes as senior adults. It provides specialized fitness classes to senior adults because the classes can be tailored to the health needs of older people. These health problems would be impractical and intrusive to identify on a person-by-person basis. Defendant identifies senior adults as individuals who are at least 50 years old. It bases this requirement on Madison ordinances and the eligibility requirements for membership in the American Association of Retired Persons. Defendant's age restrictions are reasonable. Therefore, defendant's motion for summary judgment will be granted on this claim as well.

ORDER

IT IS ORDERED that

1. Plaintiff Dennis Sheskey's motion to "Amend his Reply of his Motion for Summary Judgment" is GRANTED.

2. The motion for summary judgment of defendant Madison Metropolitan School District is GRANTED in full.

3. Plaintiff's motion for summary judgment is DENIED.

4. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 26th day of September, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge