

Appendix ~~B~~ A

United States Court of Appeals
For the Eighth Circuit

No. 17-2767

Kenneth Edward Werbach

Plaintiff - Appellant

v.

University of Arkansas; Claretha Hughes; Michael T. Miller; Carsten Schmidtke

Defendants - Appellees

Appeal from United States District Court
for the Western District of Arkansas - Fayetteville

Submitted: April 3, 2018

Filed: April 26, 2018

[Unpublished]

Before WOLLMAN, COLLOTON, and SHEPHERD, Circuit Judges.

PER CURIAM.

Kenneth Werbach appeals the district court's¹ adverse grant of summary judgment in an action alleging that he was discriminated against by the University of

¹The Honorable P.K. Holmes, III, Chief Judge, United States District Court for the Western District of Arkansas.

Arkansas (where he was an online graduate student) and three faculty members, in violation of sections 503 and 504 of the Rehabilitation Act (RA) and Titles II and III of the Americans with Disabilities Act (ADA). We deny his motion to supplement the record with additional evidence. See Dakota Indus., Inc. v. Dakota Sportswear, Inc., 988 F.2d 61, 63 (8th Cir. 1993).

Having reviewed the record and the parties' arguments on appeal, we conclude that summary judgment was properly granted, as section 503 of the RA and Title III of the ADA do not apply to the instant case, see 29 U.S.C. § 793 (§ 503 of RA bars employment discrimination); 42 U.S.C. § 12181 (Title III of ADA bars discrimination by public accommodations and commercial facilities); most of Werbach's allegations did not allege discrimination based on a protected class; and, to the extent that he alleged disability-based discrimination, he did not present any evidence from which a reasonable trier of fact could conclude that the disability was the sole or motivating factor behind the challenged conduct, see 29 U.S.C. § 794 (§ 504 of RA bars discrimination "solely by reason" of disability by, *inter alia*, a state entity); 42 U.S.C. § 12131 (Title II of ADA bars discrimination based on disability by, *inter alia*, a state entity); Amir v. St. Louis Univ., 184 F.3d 1017, 1027, 1029 n.5 (8th Cir. 1999) (recovery under RA requires showing disability served as "the *sole* impetus" for adverse action; recovery under ADA requires showing defendant took adverse action based on plaintiff's disability) (emphasis in original).

The judgment is affirmed. See 8th Cir. R. 47B.

Appendix B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

KENNETH EDWARD WERBACH

PLAINTIFF

v.

No. 5:16-CV-05198

UNIVERSITY OF ARKANSAS, et al.

DEFENDANTS

OPINION AND ORDER

Before the Court is Defendants' motion (Doc. 50) for summary judgment. Defendants have filed a statement of facts (Doc. 51) and memorandum brief (Doc. 52) in support of their motion. Plaintiff has filed a response (Doc. 53). Plaintiff has not separately filed a response to Defendants' statement of facts. Although Plaintiff is proceeding pro se and his pleadings must be liberally construed, Plaintiff is still expected to be familiar with and abide by procedural rules. *McNeil v. United States*, 508 U.S. 106, 113 (1993); *Schooley v. Kennedy*, 712 F.2d 372, 373 (8th Cir. 1983). Under the Federal Rules of Civil Procedure and the local rules of this Court, Defendants' statement of facts is deemed admitted. Fed. R. Civ. P. 56(e)(2), W.D. Ark. R. 56.1(c). Pursuant to Rule 56(e)(3), the Court will grant Defendants' motion for summary judgment.

Plaintiff has filed a lawsuit claiming violations of Titles II and III of the Americans with Disabilities Act (ADA) and Sections 503 and 504 of the Rehabilitation Act. Plaintiff has named as Defendants the University of Arkansas and three of its employees—Claretha Hughes, Michael T. Miller, and Carsten Schmidtke. Plaintiff seeks only damages. (Doc. 31, p. 15).

Defendants' argument for dismissal of the University of Arkansas because it is an entity ineligible for suit is rejected. While the appropriate entity to name is probably the Board of Trustees of the University of Arkansas, dismissal on the grounds suggested by Defendants would be an abuse of discretion. *Accord Greenwood v. Ross*, 778 F.2d 448, 451–52 (8th Cir. 1985) (“The

Board of Trustees does not argue that it did not receive notice of appellant's complaint. The Board, having received actual notice of the suit and knowledgeable of the Board's relationship to UALR [University of Arkansas at Little Rock], would know that a suit against UALR was intended as a suit against the Board of Trustees.").

Regardless of the identity of the appropriate entity for suit, however, Plaintiff's claims still must fail. The Court need not reach the majority of Defendants' remaining arguments because, regardless of whether or not sovereign immunity applies, or whether or not any given Defendant qualifies as an entity subject to suit, the facts deemed admitted reveal that no Defendant's conduct was motivated by discriminatory animus on the basis of Plaintiff's disability or perceived disability. (Doc. 51, ¶¶ 11, 12, 20, 26, 31, and 32). Discriminatory animus is a required element of ADA and Rehabilitation Act claims. *See, e.g., Amir v. St. Louis Univ.*, 184 F.3d 1017, 1027 (8th Cir. 1999) (ADA Title III discrimination case requires a showing "that the defendant took adverse action against the plaintiff that was based upon the plaintiff's disability"); *Id.* at 1029, n.5 (recovery under Rehabilitation Act "imposes a requirement that a person's disability serve as the sole impetus for a defendant's adverse action against the plaintiff." (emphasis in original)); *Gorman v. Bartsch*, 152 F.3d 907, 912 (8th Cir. 1998) (ADA Title II discrimination case requires a plaintiff to show "that he is a qualified individual with a disability [or perceived disability] denied participation in, or the benefits of, the services, programs, or activities of a public entity *because of his disability.*" (emphasis added)). That is, Plaintiff must show that a Defendant's discriminatory action against him was because of Plaintiff's disability or perceived disability. On the undisputed facts, Plaintiff cannot make this showing.

IT IS THEREFORE ORDERED that Defendants' motion for summary judgment (Doc. 50) is GRANTED, and this case is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Defendants' motion to continue (Doc. 54) is DENIED AS MOOT.

Judgment will be entered accordingly.

IT IS SO ORDERED this 14th day of July, 2017.

P.K. Holmes, III

P.K. HOLMES, III
CHIEF U.S. DISTRICT JUDGE

Appendix C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 17-2767

Kenneth Edward Werbach

Appellant

v.

University of Arkansas, et al.

Appellees

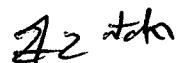
Appeal from U.S. District Court for the Western District of Arkansas - Fayetteville
(5:16-cv-05198-PKH)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Smith did not participate in the consideration or decision of this matter.

June 15, 2018



Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**Additional material
from this filing is
available in the
Clerk's Office.**