

STRICT ATTENDANCE POLICY FOR SCHOOL CHOIR PROMPTS ADA CLAIM

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As illustrated by the *Baird* decision described herein, rules and policies governing participation in public programs must be tempered with reasonable accommodations for those individuals who have a physical or mental condition which might qualify as a “disability” under the Americans with Disabilities Act (ADA). With the benefit of 20/20 hindsight, one can certainly speculate how the public agency in *Baird* might have avoided extensive litigation in the federal courts if agency personnel had been a bit more flexible in responding to plaintiff’s expressed concerns.

LAX ENFORCEMENT OF ATTENDANCE POLICY

In the case of *Baird v. Rose*, No. 98-2064 (4th Cir.1999), plaintiff Nancy Baird brought this action on behalf of her minor daughter Kristen Elisabeth Baird (Baird) against Baird's former teacher Susan Elizabeth Rose, Principal Inez Cohen, and the Fairfax County School Board (collectively, "The Board") alleging claims for discrimination under Title II of the Americans with Disabilities Act (ADA) and intentional infliction of emotional distress under Virginia law. The facts of the case were as follows:

In the spring of 1996, while she was in the seventh grade at Rocky Run Middle School in Fairfax, Virginia, Baird auditioned for and was accepted to participate in show choir for the 1996-1997 school year. Show choir was a song and dance class for which grades were given; students learned song and dance routines and then performed them, sometimes in competition with other schools. Rose was the instructor for show choir.

During auditions for show choir, Rose expressed concern to Baird's father that Baird's frequent absences posed a potential problem for her participation in show choir. Baird's father informed Rose that although Baird suffered from recurrent sinus infections that caused her to miss school frequently, she would have no difficulty keeping up with show choir.

During the following school year, Baird continued to miss school regularly due to her ongoing medical problems. In January 1997, however, she auditioned for a lead role in the Rocky Run Middle School spring play, a musical. Rose and two drama teachers had joint responsibility for assigning roles. Rose advised Baird that she would not be considered for a lead role due to her frequent absences. Following the initial audition, which involved no singing but only dramatic readings, Baird was asked to return to

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audition for an alto role although she is a soprano. On January 30, 1997, Baird learned that she had been chosen for only a minor role.

On January 31, 1997, Baird was absent from school due to a sinus infection, and her mother telephoned Rose to confirm that Baird had a bona fide medical excuse. The following day, Baird took an overdose of ibuprofen. The overdose triggered by Baird's belief that Rose had arranged for her to fail in her efforts to secure a lead role in the spring play by convincing the drama teachers to ask her to audition for an alto role Rose knew Baird could not perform rather than a soprano role for which she was more qualified.

On February 7, 1997, Baird was diagnosed as suffering from severe depression and was placed on a treatment plan that included medication and counseling. On February 12, 1997, Baird's mother informed a counselor at the school of Baird's diagnosis. On that day and the following day, Baird was absent from school. Baird's mother gave her permission for the counselor to inform Baird's teachers of the diagnosis, and on February 13, 1997 Rose learned that Baird had been diagnosed with severe depression. The next day, when Baird returned to school, Rose announced to the entire class that Baird would not be permitted to participate in the next show choir performance, which was scheduled for February 25, 1997, explaining to Baird that this "would be best." Rose thereafter assigned Baird's part to another student and forbade Baird to participate in rehearsal.

Baird's mother subsequently confronted Rose and asked that Baird be permitted to participate as usual. Rose stated that Baird did not know the dance routines well enough due to her absences. Baird's mother told Rose that her daughter in fact did know the routines, that she was capable of performing them, and that it was important to Baird's mental health and recovery that she be allowed to continue her participation in show choir. Baird's mother asked Rose to give Baird an opportunity to demonstrate that she was able to perform the dance routines. Rose refused, stating that she felt it would be best for Baird, given her depression, not to participate in show choir and that individuals who suffer from depression could not be counted on to meet their responsibilities.

On February 16 and 17, 1997, Baird's family doctor and psychologist submitted letters to Principal Cohen stating that Baird was fit to perform in show choir and that it could be detrimental to her mental health to be denied the opportunity to do so. On February 18, 1997, Baird's mother contacted Principal Cohen and requested, among other things, that Rose give Baird the opportunity to demonstrate her knowledge of the dance

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routines despite her absences and that Rose permit Baird to participate in the upcoming performance. Baird's mother stressed to Principal Cohen her concern that Rose might take further action that would cause Baird additional distress.

Instead of granting these requests, Principal Cohen informed Rose that she must either prohibit from participation in the performance all students who had been absent in accordance with Rose's written absence policy--which previously had not been enforced--or permit all students to perform. Later that day, Rose announced to the show choir class, in Baird's presence, that Rose was being forced to adhere to her previously published strict attendance policy although she did not wish to do so. Rose then pronounced that not only was Baird prohibited from participating in two of the three numbers in the upcoming performance, but three other students who had "legitimate" absences would be excluded from one number as well. Rose then asked the class members if they understood why she was being forced to adhere to the strict attendance policy, and other students commented that someone was taking advantage of the lax enforcement of the attendance policy and that someone did not know the routines and would slow down the performance of the group.

Humiliated, Baird left the class and telephoned her mother. Upon her mother's arrival at the school, Baird was exhibiting signs of severe emotional distress, crying uncontrollably and shaking. Baird's mother removed her from school for the rest of that day. After leaving school, Baird was unable to stop crying and a tranquilizer was prescribed by her doctor.

Baird's mother requested that Principal Cohen permit another adult to observe show choir class until Baird could be reassured that Rose would not embarrass her in front of her classmates again. When Baird's mother received no response, she took time off from work to observe the class herself. The following day Baird's grandmother attempted to attend show choir class but was prevented from doing so. Principal Cohen then contacted Baird's mother and informed her that she was barred from the school unless she received advance permission to be there. Rose, with Principal Cohen's approval, required Baird to sit during rehearsals through February 25, 1997. Baird also was not permitted to fully participate in the February 25 performance.

Due to the stress of this situation, Baird began to suffer severe sleeplessness, inability to sleep alone, decreased appetite, exhaustion, difficulty concentrating, fear of humiliation by other students, fear of humiliation by Rose, and a dramatic increase in the occurrence of physical illnesses. In addition, the quality of Baird's schoolwork began to suffer as a

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result of her exhaustion, difficulty concentrating, and increased physical illnesses. Her grades fell dramatically.

Baird alleged a violation of the ADA and intentional infliction of emotional distress. A federal district court dismissed Baird's claims. In so doing, the federal district court found as follows that "the allegations of Baird's complaint demonstrated that she was not discriminated against on the basis of her depression":

It is conclusive that the ultimate action of denying Baird participation in the school play was not based solely, if at all, on her alleged disability (viz., depression), but was supported by a valid and uniformly enforced policy of absenteeism. Absenteeism was not only the articulated basis for defendants' initial action--before Baird's diagnosis with depression, but was also the basis for excluding three other students from various parts of the show.

Baird appealed. On appeal, Baird argued that "discrimination on the basis of her disability was a motivating factor in her exclusion from show choir" sufficient to establish a violation of the ADA.

### DISABILITY BASED DISCRIMINATION?

Within the context of the ADA, the federal appeals court noted that "disability" is defined as follows:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment"). 42 U.S.C.A. § 12102(2)

In this particular instance, the court noted that there was no dispute that Baird had adequately alleged that she "suffered from a disability-depression." As described by the court, "depression may qualify as a disability depending on whether it is chronic and on its severity." Accordingly, the appeals court found that Baird's allegations concerning her depression were adequate to demonstrate the requisite impairment under the ADA.

As cited by the federal appeals court, Title II of the ADA states, in pertinent part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C.A. § 12132. Moreover, the court noted that plaintiff must provide the following evidence to establish a violation of the ADA:

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[A] plaintiff must show (1) that he has a disability; (2) that he is otherwise qualified for the benefit in question; and (3) that he was excluded from the benefit due to discrimination solely on the basis of the disability.

As cited by the court, the term "qualified individual with a disability" is defined by the ADA as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position [or program benefits] that such individual holds or desires." 42 U.S.C.A. § 12111(8) (West 1995).

Assuming Baird "was otherwise qualified to participate in show choir classes or performances" with reasonable accommodations, the specific issue was whether "Baird was excluded from show choir 'by reason of' discrimination on the basis of her depression."

### NEUTRAL RULE - PRETEXT FOR DISCRIMINATION?

On appeal, the Board asserted that "Baird's participation in show choir was denied on a nondiscriminatory basis--her absenteeism and her lack of knowledge of the routines--not on her disability." According to the Board, there was no dispute "that other students who had been absent were excluded along with Baird." As a result, the Board claimed "the application of this neutral rule means that Baird was not discriminated against" on the basis of her disability. In so doing the Board cited precedent case law which has held that "the application of a neutral rule that does not distinguish between the disabled and the non-disabled does not violate the ADA."

The appeals court acknowledged that "the application of a neutral rule that applies to disabled and non-disabled individuals alike cannot be considered discrimination on the basis of disability." Accordingly, the appeals court agreed that the Board would not violate the ADA "if Baird was excluded from participation because of her absences or lack of familiarity with the routines to perform them."

However, under the circumstances of this particular case, the appeals court found Baird had alleged sufficient facts which would indicate that "the application of the neutral absenteeism policy... was a pretext for discrimination and that the true reason for Baird's exclusion was her disability." Specifically, the court noted that the neutral absenteeism policy "had never been applied until after Rose attempted to exclude Baird on the basis of her depression." According to the court, "[t]he *post hoc* [i.e., after the fact] application of a neutral rule does not excuse discrimination when the neutral rule would not have been enforced but for the discrimination."

As noted by the appeals court, Baird was alleging that "her exclusion from show choir did not occur until after Rose had been informed of Baird's depression, and Rose expressly relied, at least in part, on

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Baird's depression in determining that she could not participate in show choir.” In the opinion of the appeals court, Baird’s allegations were “adequate to allege that she was excluded from show choir because of her depression.”

Baird frequently had been absent prior to Rose's notification of Baird's disability, but Rose had never excluded her from show choir before. Further, Rose's absenteeism policy had never been enforced until after Rose made the decision to exclude Baird and was not enforced uniformly against all students who had been absent until after Principal Cohen informed Rose that she must apply the policy uniformly or not at all.

Having concluded that Baird's complaint sufficiently alleged that she was discriminated against because of her depression, the federal appeals court held that the district court had erred in dismissing Baird's claim of illegal discrimination under the ADA..

### INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Baird also asserts that the federal district court erred in dismissing her claim of intentional infliction of emotional distress. Under Virginia law, intentional infliction of emotional distress requires the following:

(1) the wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous and intolerable in that it offends generally accepted standards of decency and morality; (3) the wrongdoer's conduct caused the emotional distress; and (4) the emotional distress was severe.

In the opinion of the court, Baird had alleged sufficient facts, which, if proven at trial, would establish that Rose’s conduct was intentional or reckless and that this conduct had caused severe emotional distress. The specific issue was, therefore, whether Rose’s conduct was “outrageous” under the circumstances of this case. As noted by the court, the requirement that the allegedly offensive conduct be outrageous was “aimed at limiting frivolous suits and avoiding litigation in situations where only bad manners and mere hurt feelings are involved.” Accordingly, liability for intentional infliction of emotional distress would require conduct which “has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”

In this particular instance, Baird claimed the Board' alleged conduct was sufficiently outrageous because “Rose was a school official who was abusing her position and because Rose had reason to know that Baird was particularly susceptible.” Specifically, Baird argued that “Rose--in her capacity as Baird's teacher and during a class to which Baird was assigned--intentionally attempted to humiliate Baird, a

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child, knowing that she was suffering from clinical depression.” Citing *Restatement (Second) of Torts* § 46, cmts. e, f (1965), the appeals court acknowledged that an abuse of one’s authority could constitute outrageous misconduct for purposes of establishing a claim for intentional infliction of emotional distress:

[T]he extreme and outrageous character of the conduct may arise from an abuse by the actor of a position which gives him actual authority over the other and that conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of knowledge of special susceptibility.

Applying these principles to the facts of the case, the federal appeals court found that Baird’s claim had alleged sufficient facts which, if proven at trial, would indicate conduct “so outrageous as to exceed the bounds of decent society.” The appeals court, therefore, found that the federal district court had erred in dismissing Baird’s claim for intentional infliction of emotional distress.

Accordingly, the appeals court reversed the lower court’s dismissal order and remanded (i.e., sent back) Baird’s claim for further trial proceedings in which Baird would have an opportunity to prove her ADA claim as well as her claim for intentional infliction of emotional distress.