

School Found Liable in Off-Duty Injury of Student

By Jonathan Zaifert (Tampa)

“Be friendly, but do not be their friend,” is an old adage often used to remind parents and educators of their responsibilities when dealing with students. Today’s teachers and school administrators face the daunting task of trying to relate to high school students while maintaining a position of authority. The lines are often blurred and easily crossed with damaging, and in one instance deadly, results.

Tragedy Strikes

When Archbishop Coleman Carroll High School let out for summer vacation in 2001, the students were, naturally, ecstatic. The halls were abuzz with students making big plans as to how to spend their next three months of freedom. A group of students decided to kick off the summer by hosting a party at a student’s home. The party, which was supposed to mark the beginning of a summer of fun for the students, ended in tragedy.

Two students, Michael Sanchez-Agramonte and Gabriel Maynoldi were involved in an automobile accident on their way home from the party. The accident killed Sanchez-Agramonte and left Maynoldi paralyzed and brain damaged. The accident occurred when a vehicle carrying the two boys struck a tree while traveling approximately 80 miles per hour. The impact split the car in two, with each half coming to rest on either side of the tree.

Toxicology reports showed that Sanchez-Agramonte had a blood alcohol concentration of .22. Maynoldi’s blood alcohol concentration was determined to be .096. Both boys were considered to be over Florida’s legal limit, which is .08. The crash was so severe that law enforcement was unable to determine which boy was driving the car at the point of impact.

Should School Officials Have Stopped the Party?

According to the evidence presented at trial, before school officially let out, and prior to the accident, Principal Richard Fenchak became aware of the party which was held at the home of a student. The party was common knowledge among students and faculty alike as students were distributing fliers advertising the party, depicting a bottle of alcohol and inviting students to “Come end the school year the right way.” The party was so well advertised that faculty members made a lighthearted reference to the party on the public address system at school in an attempt to caution the students about the potential dangers posed by such a party, including drinking and driving. Tragically, despite the faculty’s good intentions, the message did not get through to each student.

The accident, which occurred more than seven years ago, made news again recently when a jury awarded Maynoldi’s family a \$14 million

verdict in which the school was deemed to be at least partially liable for the teenager’s injuries. The jury’s verdict appears to have been based on its belief that the school officials, who undoubtedly knew about the party, had a duty to stop it and failed to do so.

According to the evidence, Principal Fenchak stopped by the party in an attempt to break it up, according to testimony during the trial. Although Fenchak was not permitted inside the party, evidence showed that the party spilled onto the front yard and prior to leaving, Fenchak observed students who were obviously underage and clearly intoxicated, including Sanchez-Agramonte. According to testimony and media accounts, Sanchez-Agramonte was so impaired that he stumbled in front of Fenchak and collapsed onto a car belonging to another student, denting its hood. Fenchak also observed students with drinks and liquor bottles in hand. Upon leaving, Fenchak did not notify law enforcement or take any other action to break up the party.

The jury’s verdict is understandable given the tragic and senseless nature of an accident which ended one teenager’s life and rendered another permanently disabled. To be clear, there was plenty of fault to go around; the school, Maynoldi and his parents, the parents who owned the home, and the adult who purchased the alcohol. It’s not clear why Fenchak initially decided to go to the party nor why he did not call law enforcement when he arrived and saw his students obviously drunk and out of control.

This question apparently resonated with the jury, especially in light of a document signed by Maynoldi’s parents stating that the school would notify the police if it became aware of illegal activity by students (which would presumably include underage drinking). Despite the fact that the jury found a number of parties at fault, Maynoldi’s attorneys plan to ask the judge to assign the entire award to the school because it was the only named defendant the jury found to have been negligent; the other defendants were either dismissed, or settled, prior to trial.

What is not as clear in light of the jury’s verdict, is the impact that this decision, if it stands, will have on educators and administrators. The jury’s verdict, which the school’s attorneys plan to appeal, represents an extension of the boundaries of what is typically considered to be a school’s exposure to liability. It’s human nature to place blame, especially when a young life is lost and another changed forever. The school’s attorneys likely have stressed, and will continue to point out, that this party was not an official school sanctioned event and was held after school hours and off school property.

As a private school, Archbishop Carroll does not enjoy the immunity that public schools might, which is an issue all private school administrators must be aware of. Also, there should be a growing concern



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Don't Be Handicapped By The "New" ADA

By Myra Creighton (Atlanta)

Schools already receive a number of requests for accommodation based on students' or employees' mental or physical impairments. They can now expect to see more requests and potentially will have to provide more accommodations. On January 1, 2009, the amendments to the Americans With Disabilities Act (ADA) become effective.

While the ADA Amendments change a school's obligation with respect to reasonable accommodation in only one respect, there are significant changes to the definition of disability indicating that a far broader spectrum of impairments will constitute disabilities. Consequently, when faced with accommodation requests, schools will need to analyze the impairment in a different manner.

What the ADA Amendments Changed

Courts, and therefore schools, now must ignore mitigating measures an employee or student uses because of an impairment when determining whether the individual is disabled.

Essentially, except for eyeglasses or contacts, schools are required to "edit out" any benefits provided to the individual from medications, prosthetic devices, hearing aids, mobility devices, and learned adaptations. Thus, schools will be forced to speculate whether an employee or student would be disabled *without* the mitigating measure, rather than simply ascertaining whether the measure lessens the effects of the impairment. When faced with a mental impairment, schools will probably have to rely on an expert's opinion to know the effect of an impairment on an employee or student without the mitigating measure.

Although schools may not take mitigating measures into account when determining whether or not an employee or student is *disabled*, the mitigating measures most likely will be relevant in the analysis of whether or not the employee or student actually needs an *accommodation*. For example, if you have a student with a hearing impairment who can hear perfectly well with a hearing aid, that student will be disabled under the ADA Amendments (because you must ignore the hearing aid). But, the student will not need a reasonable accommodation of an interpreter or a note taker since the hearing aid allows the student to hear perfectly well.

Just about anything is now considered a "major life activity."

When originally enacted, the ADA was silent on what constituted a major life activity, i.e., an area of life that had to be adversely affected in order for someone to claim a disability. Many courts had rejected the EEOC's proposed list of such activities and others had added to the list. The ADA Amendments include a thorough list of activities that are considered major life activities, such as caring for oneself, eating, sleeping, reading, concentrating, thinking, communicating, and working.

Further, the ADA Amendments specifically add major bodily functions, such as the immune system, cell growth, digestive functions, reproductive functions, and neurological and brain functions, as major life activities. Thus, for example, diabetics who have an impaired endocrine system will likely be able to establish that they are disabled.

Schools will have to evaluate whether episodic impairments or impairments in remission are disabilities.

Under the ADA Amendments, impairments that are "episodic or in remission" can be a disability if "when active" the impairment would

substantially limit a major life activity. Again, this will require schools to rely on the employee's or student's physician.

Schools will need to apply a new definition to the term "substantially limited."

An impairment is a disability if it "substantially limits" a major life activity, such as walking, talking, etc. The ADA Amendments specifically reject the Supreme Court's pronouncements in numerous cases that resulted in a narrow reading of the term "substantially limited," and which found many individuals not disabled. Moreover, Congress has directed the EEOC to issue binding regulations and other interpretive guidance to lower the standard for the term so that it is consistent with Congressional intent. This will result in more employees and students falling within the protection of the law.

Students and employees will be able to more easily establish that the school "perceived" them as disabled.

In a significant departure from federal courts' interpretations of "regarded as disabled," the ADA Amendments do not require an employee (or a student) to prove that an employer regarded him

as substantially limited in a major life activity. Now, a "regarded as disabled" employee or student must demonstrate only that the school perceived the individual as having a physical or mental impairment. This is a much lighter standard.

Notwithstanding this significant amendment, the ADA Amendments state that "regarded as" is not applicable when an impairment lasts six months or less and is minor. Importantly, resolving a split among the federal circuit courts, the ADA Amendments provide that a "regarded as" disabled employee or student is not entitled to a reasonable accommodation.

The Bottom Line

The new ADA Amendments make a difficult law even more difficult to understand and apply. The end result will be that many more students and/or employees will be able to establish that they are disabled under the new law. Moreover, because many requirements of the ADA Amendments require you to speculate as to the individual's impairment, schools will need to work more closely with the student's or employee's physician in making a determination of whether or not the individual is disabled.

The best steps you can take to prepare for this change in the law are to ensure that you 1) have good policies that are communicated to students and employees regarding the accommodation process; 2) recognize that you will have to offer accommodations to a broader range of individuals; 3) have one or more well trained administrators designated as your ADA Coordinators who understand and keep educated in this area of law and will understand how to engage in the interactive process; 4) implement regular training of your staff on their obligations; and 5) retain a good lawyer to help ensure that you walk carefully through the new and constantly changing minefield.

For more information, email the author at mcreighton@laborlawyers.com or call 404.240.4285.



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that this verdict could provide precedent for extending liability to individual faculty members and administrators for injuries to students that occur outside of school hours and off school grounds, and are essentially beyond their control.

What Next?

The most important thing is ensuring that students are safe and this decision indicates that responsibility may not end when the school bell rings. It is important to take a step back and not jump to a quick reaction in light of the jury's verdict and the tragic events surrounding it. This decision has significant legal ramifications, the extent of which will not be clear until and unless an appellate court issues its ruling.

Assuming that this verdict stands, school officials will have to strike a balance which may be difficult to achieve. If faculty and administrators come off as "policing" the students, rapport can be lost and ultimately the faculty's role as educators could be undermined. On the other hand, if not careful and aware, school officials may find themselves legally responsible for a tragedy they could have prevented.

For now, administrators should be reviewing school, and applicable school board, policies with all members of the faculty. Everyone needs to

know what the school has committed to doing regarding off-duty conduct, and ensure that its actions comply with those promises. Administrators should also implement a protocol by which teachers or other staff members who become aware of potentially dangerous or illegal conduct, have a system in place in which they can alert a senior member of the administration who can take the appropriate action, including notifying parents and law enforcement if appropriate. This will help to ensure that teachers, who typically have the most daily interaction with students and are often in the best position to learn of parties and other activities, will comply with their reporting responsibilities while not feeling like they betrayed the trust of their students.

The school should also implement regular training for students to impress upon them the dangers of drugs and alcohol abuse and provide them with a safe way to communicate information about a planned event, either to a guidance counselor, trusted teacher, or anonymously. Engage parents in this process and follow the lead of some institutions whereby parents sign a contract with each other promising both not to allow students to have alcohol in their home and to report to participating parents any concerns with alcohol or drugs which a contracted parent becomes aware of.

The most important thing that teachers and administrators can do is to realize that they have been entrusted with a significant responsibility. This decision represents a feeling, by at least one jury, that the responsibility does not end when school lets out for summer.

For more information email the author at jzaifert@laborlawyers.com or call 813.769.7515.

"I'll Do It For Free!"

By John Thompson (Atlanta)

Many people are moved to volunteer their time to schools for religious, humanitarian, charitable, or other public-service reasons. No one wants to discourage these impulses, of course, but a school must be careful not to set itself up for a dispute over whether such a person is actually an employee for purposes of the federal Fair Labor Standards Act (FLSA). Being wrong about this could result in substantial exposure for things like minimum-wage and overtime payments, penalties for child-labor violations, and other liability.

What Does it Mean to "Volunteer"?

First, don't assume that the U.S. Labor Department or the courts will necessarily see volunteering time to a *public* school or school system in the same light as volunteers for *private* schools. For one thing, the FLSA itself provides that individuals who volunteer to perform services for a "public agency" (a term that typically includes government-operated schools) are not FLSA employees under certain circumstances. The statute contains no comparable exception that is available to private schools.

Also, DOL has said that its policy in all but "rare" situations is to limit volunteer status to people who perform activities for non-profit entities. Thus, a for-profit school might anticipate a high level of scrutiny should the status of a volunteer ever be in question.

DOL has recognized that, even outside of the public sector, there can be situations in which individuals may donate their services of a charitable



or public-service nature in a non-employee capacity if they do so without expecting or receiving pay or benefits, on a truly voluntary basis, and without any coercion or intimidation. This general principle can be misunderstood to mean that non-employee volunteer relationships are easily and reliably established. That is not so.

For one thing, DOL maintains that employees may not volunteer to do things for their employer which are the same as or are similar or related to their normal duties; instead, it says, this is compensable worktime.

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DOL takes the same view regarding time an employee spends even in dissimilar services of a public or charitable nature, if this occurs at the employer’s request, under its direction or control, or during the employee’s normal working hours.

Some Key Factors

Other considerations can affect whether a person’s efforts look more like volunteerism on one hand versus employment on the other. Among them are whether the activities:

- are truly undertaken for the individual’s own personal, humanitarian, charitable, religious, or public-service motives;
- are of a kind typically associated with volunteer work;
- are less than a full-time occupation for the individual;
- do not involve replacing regular employees or impairing employment opportunities;
- are subject only to “nominal” or “minimal” control by the recipient of the person’s efforts; and
- tend to occur at times suiting the individual’s own convenience, whether by schedule or otherwise.

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Office Locations

Atlanta

1500 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, GA 30326
phone (404) 231-1400

Charlotte

Suite 2020
227 West Trade Street
Charlotte, NC 28202
phone (704) 334-4565

Chicago

1000 Marquette Building
140 South Dearborn Street
Chicago, IL 60603
phone (312) 346-8061

Columbia

Suite 1400
1901 Main Street
Columbia, SC 29201
phone (803) 255-0000

Dallas

Thanksgiving Tower
Suite 4343
1601 Elm Street
Dallas, TX 75201
phone (214) 220-9100

Denver

Suite 3300
1999 Broadway
Denver, CO 80202
phone (303) 218-3650

Fort Lauderdale

Suite 800
450 East Las Olas Boulevard
Fort Lauderdale, FL 33301
phone (954) 525-4800

Houston

Two Allen Center
Suite 620
1200 Smith Street
Houston, TX 77002
phone (713) 292-0150

Irvine

Suite 400
18400 Von Karman Avenue
Irvine, CA 92612
phone (949) 851-2424

Kansas City

Suite 400
104 West 9th Street
Kansas City, MO 64105
phone (816) 842-8770

Las Vegas

Suite 650
3993 Howard Hughes Parkway
Las Vegas, NV 89169
phone (702) 252-3131

New Jersey

430 Mountain Avenue
Murray Hill, NJ 07974
phone (908) 516-1050

New Orleans

Suite 3710
201 St. Charles Avenue
New Orleans, LA 70170
phone (504) 522-3303

Orlando

1250 Lincoln Plaza
300 South Orange Avenue
Orlando, FL 32801
phone (407) 541-0888

Philadelphia

Radnor Financial Center
Suite 650
201 King of Prussia Road
Radnor, PA 19087
phone (610) 230-2150

Portland

Suite 1250
111 SW Fifth Avenue
Portland, OR 97204
phone (503) 242-4262

San Diego

Suite 950
4225 Executive Square
La Jolla, CA 92037
phone (858) 597-9600

San Francisco

One Embarcadero Center
Suite 2340
San Francisco, CA 94111
phone (415) 490-9000

Tampa

SunTrust Financial Centre
Suite 2300
401 E. Jackson Street
Tampa, FL 33602
phone (813) 769-7500

Schools should thoroughly evaluate volunteer relationships so that they can assess any possible exposure. The risk is probably highest as to people whom a school otherwise employs, especially if their volunteerism involves things that are the same as or resemble what they are paid to do. The danger is also likely to be substantial if what a volunteer does 1) either is or formerly was done by employees; 2) consists of things like general office work or other tasks which are an integral part of the school’s “core” functions; or 3) are not of the sort ordinarily seen as charity, humanitarianism, or public service.

Compensating volunteers also creates a much greater chance that employment will be found. This does not necessarily preclude things such as reimbursing volunteers for mileage or sometimes providing a free cafeteria lunch. But the peril increases as the kind and amount of direct or in-kind payments begin to take on the appearance of wages.

Another potential problem is exercising close control over volunteers. Obviously, a school will want to manage things to maintain standards of safety, security, and propriety appropriate to the environment. On the other hand, the relationship takes on employment characteristics when there are rigorous dress and grooming standards, extensive and ongoing training is required, the volunteer must follow a strict schedule, there is a job description with detailed duties, volunteers are subject to employee-like kinds of discipline, and so on. If school administration believes that a high degree of control is necessary, then this might be a sign that the activities are not suitable for a volunteer relationship.

Summing It Up

These illustrations show that it can often be hard to decide whether a particular relationship is one of volunteerism or FLSA employment. In many “gray area” situations, no single factor will permit you to know for sure which way this question will be resolved if there is a challenge. Practically speaking, the organization to which a person provides services bears the risk of being wrong in classifying the activities as non-compensable volunteer ones. This might seem unfair given the uncertainty, but it reflects a philosophy that the FLSA is interpreted broadly to ensure that its requirements reach everyone it is intended to protect.

Finally, different federal laws or the laws of a state or another jurisdiction might apply stricter standards in this area. You should carefully evaluate volunteer relationships under every applicable law that is implicated by those arrangements.

For more information email the author at jthompson@laborlawyers.com or call 404.231.1400.

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