

# Court Finds That Drooling Cook Can Proceed With ADA Case

Those who might think that the EEOC's Guide on food handling and the ADA goes too far may want to read a recent Minnesota case involving a Fuddruckers restaurant. The restaurant terminated one of its cooks allegedly because she "drooled and spit into food that she prepared and served to customers." The employee, who suffers from a stuttering disorder that sometimes causes excessive salivation, sued for disability discrimination—and a federal district court decided that she has enough evidence to take her case to a jury. *Andresen v. Fuddruckers, Inc.*, No. 03-3294.

The plaintiff, Barbara Andresen, worked for Fuddruckers in a food service role for a total of 16 years. Andresen apparently suffered from a lifelong stuttering disorder. Up until 2001, she had no job performance issues. However, in 2001, Fuddruckers assigned two new managers to her location in order to improve a public image of the location

as being "unsanitary." The new managers began highlighting performance problems with Andresen, including reports that she sometimes drooled into the food. As part of their plan of corrective action, the managers required Andresen to wear a surgical mask while working in food preparation. Andresen

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and Fuddruckers disagreed as to whether she was in compliance with the performance plan. Andresen claimed to have complied with all of Fuddruckers' requests, but the restaurant contended that she failed to wear the surgical mask

and failed to meet other job performance requirements.

After Fuddruckers terminated her employment, Andresen sued under the Americans with Disabilities Act ("ADA"). She claimed that her termination was actually due to her stuttering disorder. Fuddruckers countered by arguing: (a) the stuttering was not an ADA-cognizable "disability;" and (b) Andresen was terminated because her drooling into food caused a health hazard. In denying summary judgment to the restaurant, the court first concluded that Andresen's stuttering was severe enough that it could substantially limit her ability to speak—and thus could be considered a disability under the ADA. It then considered whether the termination was due to Andresen creating a health hazard. In support of its position, Fuddruckers had cited sworn testimony that at least three customers had complained about Andresen's drooling,

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## Foodborne Illnesses - continued from page 1

ees who work around food, in an attempt to protect the public from diseases transmissible through food. The FDA Food Code discusses the following four pathogens (the "Big 4 pathogens") which are considered communicable diseases by the Center for Disease Control ("CDC"):

- (1) *Salmonella* Typhi;
- (2) *Shigella* spp;
- (3) Shiga toxin-producing *Escherichia coli*; and
- (4) Hepatitis A virus.

The FDA Food Code provides that employees who have been diagnosed with a disease due to one of the Big 4 pathogens should not work in food service. It also states that employees with certain symptoms (diarrhea, fever, vomiting, jaundice, or sore throat with fever) should be restricted from food handling duties. Not every person who has such symptoms is covered by the ADA, but, when a person is disabled by one of the diseases caused by a Big 4 pathogen, the employer must consider the ADA in addition to the provisions of the FDA Food Code. According to the Guide, this means that, if the employee is disabled by one of the diseases listed in the Food Code, the employee should be excluded from the food establishment only if the employer determines that:

- (1) there is no reasonable accommodation that would

eliminate the risk of transmitting the disease while allowing the employee to remain in her food handling position; or

- (2) all reasonable accommodations are too difficult or expensive and there is no vacant position not involving food handling to which the employee can be reassigned.

The third part of the EEOC's guidance notes that employers must also comply with ADA rules restricting medical inquiries to employees, including questions about diseases transmissible through food. For instance, employers may not ask medical questions of applicants until a conditional offer of employment has been made. Once a conditional job offer is made, they may ask medical questions and require medical exams, as long as they treat all applicants for the same type of job in the same way. According to the guidance, an employer may ask current employees medical questions only when there are concrete reasons to believe that the employee cannot perform the job or poses a risk to workplace safety due to a medical condition.

It is recommended that employers involved in the food industry review the Guide in its entirety. It is available at [http://www.eeoc.gov/facts/restaurant\\_guide.html](http://www.eeoc.gov/facts/restaurant_guide.html).

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# Kidney Failure May Be Disability Within Meaning Of ADA

**A**lthough the Americans with Disabilities Act (“ADA”) has now been in effect for more than a dozen years, the courts continue to wrestle with the question of what constitutes an impairment that “substantially limits major life activities.” In *Fiscus v. Wal-Mart Stores*, the plaintiff was diagnosed with renal (kidney) failure. As a result of medical restrictions related to her condition, Fiscus went on disability leave. While on disability leave, Fiscus had a kidney transplant. Although she expected to return to work on March 30, 2000, Fiscus was discharged on March 15, 2000 for failing to return to work within the one year maximum leave of absence available under Wal-Mart’s policies. After filing a charge with the EEOC, Fiscus brought suit in federal court in Pittsburgh, Pennsylvania.

The lower court granted summary judgment in favor of Wal-Mart, finding that the activities of processing bodily waste and cleansing blood were merely “kidney functions” and do not constitute a “major life activity” under the ADA. Fiscus appealed, and the Third Circuit Court of Appeals reversed. *Fiscus v. Wal-Mart Stores, Inc.*, 385 F.3d 378.

In analyzing the claims of Fiscus, the Court of Appeals

rejected the lower court’s finding that impaired elimination of bodily waste and the inability to clean the blood were simply characteristics of kidney failure. Instead, the court stated that such conditions are the “effect of kidney failure in the same way that impaired thinking is the effect of organic brain disease.” The court went on to explain that kidney function was an activity “central to the life process” and, therefore, a major life activity. The court therefore remanded the case for the lower court to determine “whether dialysis eliminated any substantial limitation on the major life activities of cleansing blood and caring for oneself, bearing in mind collateral and side effects.”

The fact the Third Circuit determined that kidney disease could constitute a disability within the meaning of the ADA is not a surprise to most employment lawyers. The principal importance of the case is the analysis that the court went through, demonstrating once again that the courts will generally provide a very broad interpretation to the term “major life activities.”

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## Labor Management

### Labor Board Is Short-Handed

**T**he five-member National Labor Relations Board is now down to three members, as both Ronald Meisburg (R) and Dennis Walsh (D) have left the Board. Member Ronald Meisburg, who has more than 20 years of experience as a management attorney, was given a recess appointment in December 2003. When the Senate adjourned its 2004 session on December 8, Member Meisburg’s appointment automatically expired. Meisburg is not eligible for another recess appointment, but he has been re-nominated for a regular term.

On December 16, the regular term for Member Dennis Walsh expired. Walsh, who had been a union attorney before his appointment to the NLRB, would be eligible for a recess appointment. Whether President Bush intends to re-nominate Walsh for a regular term was not known at the time of publication, but the Democrats have been pushing for a re-nomination in return for their approving Meisburg’s nomination.

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and both co-workers and supervisors witnessed her drooling into food. But the court found that there were inconsistencies in the reasons given for terminating Andresen, and therefore a jury could conclude that the real reason for Andresen’s termination was her stuttering condition. The court noted that, although Fuddrucker’s contended that it terminated Andresen because of her drooling, company termination documents made no mention of drooling as the reason for termination. Also, the court noted that Fuddrucker’s made no attempt to accommodate Andresen’s condition by placing her in a job that did not involve close contact with food. Accordingly, the court granted Andresen the right to go to trial to prove that

the reason for termination articulated by the restaurant was really a pretext for discrimination.

While this case involves unusual facts, it underscores the importance of engaging in an interactive dialogue with employees who have medical conditions that impact their ability to perform their jobs, and documenting that dialogue. Additionally, Fuddrucker’s ability to defend against Andresen’s claims suffered because of inconsistencies in the documentation of its reasons for terminating her employment, highlighting the need for supervisors to be trained to accurately document both the facts underlying disciplinary decision and the reasons for their actions.

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