

Kidney Failure May Be Disability Within Meaning Of ADA

Although 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

The 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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