

# PUBLICATION

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## **Eighth Circuit Rules That Sleep Apnea Testing Does Not Violate Disabilities Act**

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**On October 12, 2016, the U.S. Court of Appeals for the Eighth Circuit, which hears appeals from federal courts in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota, ruled that a trucking company did not violate the Americans with Disabilities Act (ADA) when it stopped giving work to a driver who refused to submit to in-lab sleep apnea testing.**

Under regulations promulgated by the Federal Motor Carrier Safety Administration (FMCSA), drivers must undergo medical examinations at least every two years. Two FMCSA advisory committees – the Medical Review Board (MRB) and the Motor Carrier Safety Advisory Committee (MCSAC) – have recommended that the FMCSA change its certification standards to address risks posed by drivers who have obstructive sleep apnea. Specifically, in February of 2012, the MRB and the MCSAC recommended that any driver with a body mass index (BMI) greater than 35 receive only a conditional DOT medical certification pending an additional examination for obstructive sleep apnea. (Note that in 2016 the MRB changed its recommendation and now recommends a sleep study be administered to drivers who either have (1) BMIs of 40 or above, or (2) BMIs of 33 or above plus additional risk factors.)

Crete Carrier Corporation (Crete) implemented a program in 2010 by which any driver with a BMI of 35 or greater was required to submit to an in-lab sleep apnea test, and in July 2013 Crete took Plaintiff Parker out of service as a driver after he refused the test. In response, the driver sued Crete, alleging that the test was an unlawful medical examination under the ADA and that Crete stopped giving him work because it regarded him as disabled.

The ADA prohibits employers from requiring a medical examination unless it is job-related and consistent with business necessity. When an employer requires a class of employees to submit to a medical examination, it must also show that it has "reasons consistent with business necessity" for defining the class the way it has. The Eighth Circuit affirmed the U.S. District Court in Nebraska and found that the in-lab sleep study was job-related and consistent with business necessity because it was necessary to determine whether an individual had a condition that poses a public safety hazard by increasing the risk of accidents. The Court also found that it was reasonable to define the class as any driver with a BMI of 35 or above given the correlation between a high BMI and obstructive sleep apnea.

The ADA also prohibits employers from discriminating against employees "regarded as having...an impairment." To bring a "regarded as" claim, the employee must show that the employer regarded him as having a disability; that he was qualified to perform the essential functions of the job, with or without reasonable accommodation; and that the employer took an adverse employment action against him because of the perceived disability. The Court found for Crete on this claim as well, reasoning that Crete took the Plaintiff out of service because he refused to undergo the in-lab sleep apnea study, a lawful examination and a legitimate, non-discriminatory reason that Parker could not show was a mere pretext for unlawful discrimination.

This case is a win for employers who require medical examinations of a certain class of employees, but whether a medical examination complies with the ADA varies with the facts of each case. Determining whether

a medical examination is job-related and consistent with business necessity, especially where a specific class of employees has been singled out, is a difficult undertaking that entails significant risks.

For additional information on these risks and how best to avoid them, please contact Steve Powers or any of the members of Baker Donelson's Transportation Group.