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## **Eighth Circuit Upholds Trucking Company's Sleep Study Requirement Based on Driver BMI**

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On October 12, 2016, the U.S. Court of Appeals for the Eighth Circuit found in favor of a large transportation employer's driver sleep study testing requirement in a lawsuit challenging the practice under the Americans with Disabilities Act (ADA). The plaintiff driver in *Parker v. Crete Carrier Corporation* alleged that his employer violated the ADA by adopting a program requiring a class of its truck drivers, which included him, to undergo in-lab sleep studies.<sup>1</sup> After medical advisory recommendations made to the Federal Motor Carrier Safety Administration (FMSCA) linked obstructive sleep apnea (OSA) to an increased risk of vehicle crashes, the employer implemented the sleep study requirement using driver Body Mass Index (BMI) as the sole criteria for participation. The plaintiff refused to participate, and claimed that the sleep study requirement was an unlawful medical examination. He also alleged that the employer discriminated against him on the basis of a perceived disability, OSA, after it suspended him. The Eighth Circuit, however, rejected his arguments, concluding that the employer's program reasonably identified a class of drivers at risk for OSA and that the testing itself was job-related and consistent with business necessity. The decision is particularly important to the transportation industry, which has struggled with whether, and how, to address sleep apnea among commercial drivers in particular. However, the Eighth Circuit's decision is actually important to employers outside of the transportation industry as it provides a clear roadmap on what any employer must do to ensure that its medical testing program meets ADA requirements.

### **Medical Exams under the ADA**

The ADA generally prohibits employers from requiring employees to submit to medical examinations or inquiries unless those examinations or inquiries are "shown to be job-related and consistent with business

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<sup>1</sup> The Eighth Circuit's opinion can be found at: <http://media.ca8.uscourts.gov/opndir/16/10/161371P.pdf>

necessity.”<sup>2</sup> The employer’s policy in *Parker* required a sleep study for any driver with a BMI of 35 or greater. The plaintiff, who met this criterion, did not dispute that sleep studies might be appropriate for some drivers, but alleged that the employer violated the law when it failed to consider his individual characteristics in requiring him to participate in the study. Specifically, the driver argued that because he had a good safety record, had no documented sleep issues at work, and had recently received a Department of Transportation (DOT) medical certification, he should not be subject to the testing requirement. When his employer declined to excuse him from participation in the sleep study, he obtained a note from his private physician stating that the physician did not personally think a sleep study was necessary. However, despite the fact that the driver submitted his own physician’s note, he was still required to undergo the sleep study.

Rejecting the argument that decisions to seek medical information from employees must be made on an individualized basis, the court confirmed that medical examinations may be lawfully required of a class of workers, as long as the employer has a “reasonable basis for concluding that the class poses a genuine safety risk and the exam requirement allows the employers to decrease that risk effectively.”<sup>3</sup>

### **OSA, Safety and Diagnostic Sleep Studies**

Through the admission of evidence, including expert testimony, the employer was able to establish critical facts in support of its program. Specifically, the employer demonstrated that: (1) untreated OSA markedly increases the risk of accidents; (2) an in-lab sleep study is the best way to prove or disprove an OSA diagnosis; (3) obesity (as expressed in terms of BMI) is the primary anatomic risk factor and is closely correlated with a diagnosis of OSA; and (4) OSA can be treated, thereby reducing the accident risk otherwise associated with the condition.

Based on the employer’s showing, the Eighth Circuit concluded that the sleep study requirement was job-related “because it deals with a condition that impairs drivers’ abilities to operate their vehicles.”<sup>4</sup> The court further held that the requirement was “consistent with business necessity” because it would “determine whether an individual has [OSA], a condition that poses a public safety hazard.”<sup>5</sup> The court went on to find that the sleep study itself “is no broader or more intrusive than necessary” because an in-lab exam is the best way to diagnose OSA. The court agreed the scope of the employer’s program was reasonable “given the correlation between high BMIs and [OSA]” and because the tests enabled the employer to decrease the safety risk posed by drivers with OSA by ensuring that affected drivers received treatment.

Rejecting the plaintiff’s argument that his individual attributes merited an exception from the sleep study requirement, the court noted that none of the plaintiff’s other individual attributes “establish that he does not suffer from sleep apnea” or otherwise undermine his employer’s “reasonable basis for concluding that he poses a genuine safety risk.”<sup>6</sup> The court’s ruling confirmed that the sleep study requirement was lawful under the ADA, affirming a Nebraska district court’s grant of summary judgment for the employer on the medical-examination claim.

The Eighth Circuit also briefly addressed the plaintiff’s alternative argument that his suspension for refusing the sleep study was unlawful because his employer regarded him as having an impairment, conduct prohibited by the ADA. The plaintiff had alleged that his employer regarded him as having OSA, that he

<sup>2</sup> 42 U.S.C. § 12112(d)(4)(A).

<sup>3</sup> *Parker*, No. 16-1371, slip op. at 7 (8th Cir. Oct. 12, 2016).

<sup>4</sup> *Id.* at 8.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 8–9.

was a qualified employee, and that the employer wrongfully suspended him for refusing to undergo an unlawful medical examination. Even assuming that the employee had satisfied the threshold requirements to state a claim, the court found that he could not prevail, because the sleep study requirement itself did not violate the ADA, and therefore, the employee's refusal to submit to the sleep study was a legitimate, nondiscriminatory reason for the suspension. According to the Parker decision, the employer was well within its rights to impose, and enforce, the in-lab sleep study requirement.

Of course, sleep study requirements, and resultant mandatory OSA treatments, remain controversial not only because of discrimination concerns, but also because of their high costs and potential intrusiveness. This debate will surely intensify as the FMSCA and Federal Railroad Administration explore possible new rules addressing OSA among commercial drivers and rail workers.<sup>7</sup> Setting aside the debate over OSA detection and treatment, however, the Eighth Circuit's precedent in *Parker* offers a remarkably clear outline of how any employer may establish and, if necessary, defend mandatory medical testing programs that comply with the ADA.

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<sup>7</sup> Press Release, FMSCA, *U.S. DOT Seeks Input on Screening and Treating Commercial Motor Vehicle Drivers and Rail Workers with Obstructive Sleep Apnea* (Mar. 8, 2016), available at: <https://www.fmcsa.dot.gov/newsroom/us-dot-seeks-input-screening-and-treating-commercial-motor-vehicle-drivers-and-rail-workers>. The deadline for public commentary in response to the advance notice of proposed rulemaking has passed.