

# What We Know

## ARTICLES & INSIGHTS

### ABOUT THE AUTHOR



[Connie Elder Carrigan](#) is a partner in the firm, with a practice concentration in Business Law. Her focus is assisting clients with issues regarding employment law, business advice and litigation, construction law, equipment leasing and creditor bankruptcy. Connie has lectured on topics ranging from employment law, bankruptcy, and equipment leasing to construction law.

## Fourth Circuit Clarifies Application of Disability Regulations to Federal Motor Carriers

July 15, 2016 | by

In *Lisotto v. New Prime Inc.*, the United States Court of Appeals for the Fourth Circuit concluded in a ruling on May 3, 2016, that certain provisions within the Federal Motor Carrier Safety Administration (FMCSA) regulations do not always apply when issues arise under the Americans with Disabilities Act (ADA).

John Lisotto, a South Carolina Department of Corrections employee, applied for a job as a long-distance truck driver with Prime, Inc. (Prime). He was an experienced commercial driver, with about seven years of prior driving experience throughout the United States. A few weeks after applying for the position, Lisotto received an email from a Prime recruiter approving him for an orientation program and informing him of components of the hiring process, including a drug screening.

Previously diagnosed with narcolepsy, Lisotto was taking a type of amphetamine as medication to control his symptoms. Before his orientation with Prime, Lisotto obtained a letter from his personal physician explaining his diagnosis and prescribed medication. The physician also stated that “the prescribed medication would not adversely affect [Lisotto’s] ability to safely operate a commercial motor vehicle.”

Once Lisotto arrived at Prime’s orientation, he reported for his physical examination and drug test. He explained his medical condition and prescription to Prime’s medical examiner and gave him the letter from his personal physician. Prime’s medical examiner noted that Lisotto would need to stop taking his current medication for at least one month and switch to an alternative prescription to treat his narcolepsy. He advised Lisotto to take the new alternative prescription for at least six weeks and “document[] [his] stability” on the new medication before starting work for Prime. At no point did Prime’s medical examiner indicate to Lisotto that he would be disqualified from working at Prime because of his condition.

Lisotto continued with orientation, and about an hour after his medical examination, a nurse informed him that “he could not work for Prime because he had tested positive for amphetamines.” Like the medical examiner, the nurse told Lisotto that he should switch

medications and wait for six weeks to determine the impact of the new drugs. At that point, Lisotto returned home and followed those directions—his personal physician changed his prescription to the new drug approved by Prime.

In the meantime, Prime's Medical Review Officer (MRO) told Lisotto that he needed to speak to Lisotto's personal physician about his diagnosis and medication. The MRO informed Lisotto that if he didn't hear from the personal physician within five days, he "would report 'a positive drug test for amphetamines' to the Department of Transportation." Lisotto called his personal physician, and the doctor called the MRO but received no response.

After staying on the new medication for approximately six weeks with no negative side effects, Lisotto called Prime's recruiter to inform her. An employee told Lisotto, "You cannot work for Prime because you tested positive for amphetamines." Lisotto wrote to the MRO to "reevaluate" the drug test and explain his change in medication. The MRO responded two months later, stating that "Even though you had a prescription for amphetamines, in my opinion, you have a disqualifying medical condition since narcolepsy is a safety concern."

Subsequently, Lisotto participated in a sleep study in which he learned he had sleep apnea, not narcolepsy. Because of this change in diagnosis, he was able to stop taking medication that helped him to stay awake during the day. With his change in diagnosis, Lisotto wrote to Prime's MRO explaining the change in circumstances and asking the MRO to "clear [his] name" so he could resume driving trucks again. Unable to obtain employment because "he had a record of abusing amphetamines," Lisotto became homeless.

Lisotto received a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC) and filed suit against Prime under the ADA. Prime filed a motion to dismiss based on (1) Lisotto's failure to exhaust all remedies under the FMCSA regulations and (2) Its contention that Lisotto was not a "qualified individual" under the ADA. The United States District Court of South Carolina dismissed the complaint based on Lisotto's apparent failure to exhaust administrative remedies with the FMCSA before filing suit; neither the district court nor the Fourth Circuit addressed whether or not Lisotto was a "qualified individual" under the ADA.

The FMCSA provision in question states that application may be made to the FMCSA to determine a driver's medical qualifications if "[t]he applicant...submit[s] proof that there is a disagreement between the physician for the driver and the physician for the motor carrier concerning the driver's qualifications." Prime argued—and the district court agreed—that Lisotto should have first presented his claim to the FMCSA based on this provision rather than taking his suit directly to the district court. Because he failed to bring his claim to the FMCSA first, Prime and the district court reasoned, Lisotto's complaint in the district court was properly dismissed.

However, the Fourth Circuit disagreed. The language in the FMCSA provision states that there must be a "disagreement" between physicians; Prime argued that the disagreement occurred between Lisotto's physician, Prime's physician, and the MRO.

Lisotto based his claim on Prime's failure to hire him on the basis of an "erroneously verified positive drug test," as well as the MRO's failure to correct the results. Lisotto did not allege that Prime failed to hire him because of the MRO's opinion that narcolepsy was a safety concern; an MRO is supposed to "act as an independent and impartial 'gatekeeper' and advocate for the accuracy and integrity of the drug testing process" pursuant to FMCSA regulations, not offer opinions as to medical conditions on behalf of a company.

The Fourth Circuit determined that "there was no 'disagreement' about [Lisotto]'s medical qualifications" and that "the only reasonable inference to be drawn from the complaint is that Prime did not reject [Lisotto]'s application outright because he had narcolepsy; rather, Prime anticipated that [Lisotto] would return to orientation and be considered for employment once he switched his medication." Because the evidence in the complaint, which had to be taken as true in favor of Lisotto, indicated that Lisotto's personal physician and Prime's medical examiner *agreed* as to Lisotto's diagnosis and medication concerns, Lisotto did not need to proceed with administrative remedies with the FMCSA. The suit was based on "Prime's failure to hire [Lisotto] due to his positive drug test," not whether or not physicians disagreed as to his medical condition and its possible impact on his job performance.

In reaching its conclusion, the Fourth Circuit characterized Prime's actions regarding drug testing and its treatment of Lisotto's situation as "hurdle-jumping." Because Lisotto did not allege that Prime did not hire him based on the MRO's opinion as to his qualifications, no disagreement between physicians occurred. The Fourth Circuit vacated and remanded the case to the district court for further proceedings.

An important takeaway from this decision is that a positive drug screen does not automatically call for disciplinary action. If an applicant or employee informs an employer that the medicine that caused the positive result is being taken for prescribed medical purposes, and the individual is otherwise qualified for the position, taking adverse action against that individual on the basis of the positive drug screen has ADA implications.

If you have questions regarding this court decision or other legal issues, please feel free to contact Connie Carrigan at [ccarrigan@smithdebnamlaw.com](mailto:ccarrigan@smithdebnamlaw.com)

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