NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

ANTHONY ALLEYNE, individually and on behalf of all others similarly situated, plaintiff, v. NEW JERSEY TRANSIT CORPORATION, defendants	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY DOCKET NO.: ESX L 62-18 Civil Action **OPINION**

Decided: August 28, 2020

Patricia Barasch, attorney for plaintiff, and Lindsey Krause (Nichols Kaster, PLLP) of the Minnesota bar, admitted pro hac vice (Schall & Barasch, LLC)

Domenick Carmagnola, Esq., and Stacy Landau, Esq., attorney for defendant (Carmagnola & Ritardi, LLC)

HONORABLE BAHIR KAMIL, J.S.C.

This matter comes before the court on a motion to certify class. The plaintiff, Anthony Alleyne, is an employee of NJ Transit, who alleges that NJ Transit subjected him to discrimination based on his disability. Alleyne alleges that several other NJ Transit employees were similarly subjected to discrimination as a result of NJ Transit's policies and practices, that included testing employees for possible sleep apnea and then requiring employees who preliminarily screened positive to undergo further testing and treatment at the employee's own expense. The plaintiff seeks to certify the following class:

> Individuals who were removed from service with NJ Transit and required to submit to sleep apnea testing, while employed by NJ Transit at any time from September 19, 2016 to present.

For the reasons discussed below, the motion is GRANTED.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Anthony Alleyne is an employee of defendant NJ Transit Corporation ("NJ Transit). On October 5, 2016, Alleyne attended his routine physical examination. During his physical exam, Alleyne's body mass index ("BMI") was measured, as well as his neck circumference. Dr. Homer Nelson, who was conducting the examination, then informed Alleyne that he believed Alleyne may have sleep apnea. Based on Dr. Nelson's suspicions, NJ Transit removed Alleyne from service that same day. At that time, Alleyne was employed as a locomotive engineer.

Once removed, Alleyne was required by NJ Transit to undergo further testing. One of the required testing was an overnight sleep study. Alleyne underwent the sleep study on October 11, 2016. Dr. Vipin Garg reviewed the results of that study and diagnosed Alleyne with "mild to moderate" sleep apnea and ordered a second overnight sleep study. Alleyne was informed that, based on the results of his tests, NJ Transit required him to wear a Continuous Positive Airway Pressure ("CPAP") machine and "maintain a certain level of compliance before [he] could return to work." He was also informed that the requirement to maintain "a certain level of compliance" would continue after his return to work. If he failed to comply, he could be removed from service again.

After undergoing these tests, Alleyne consulted with his personal physician and two other sleep specialists. The doctors he consulted "each opined that [Alleyne's] level of sleep apnea could be treated with weight loss, and that using a CPAP machine was unnecessary."

During the time he was out of service, Alleyne was required to wear a CPAP machine, and undergo medical examinations as a condition to returning to work at NJ Transit. (Id. ¶ 9). Alleyne paid out of pocket for the co-pays and costs for tests incurred from the required treatments and examinations. He paid $250 in out of pocket deductibles for the mandatory examinations and mandatory treatments. He also paid $140 in co-pays for visits to specialists. NJ Transit did not reimburse Alleyne for these costs. NJ Transit also did not compensate Alleyne for the time he spent out of service.

NJ Transit's requirements regarding sleep apnea testing and treatment, which were imposed on Alleyne, were part of a NJ Transit's "sleep apnea testing policy." The policy was created to "handle people who [NJ Transit] suspect[s]" of having sleep apnea, "or the medical department suspect[s] of having sleep apnea" and to have a "formalized policy" to treat those cases.

All "covered employees" and employees in "safety sensitive" positions, including locomotive engineers and trainmen, are subject to the policy. Under the policy, a Medical Services staff personnel screens the employee for sleep apnea. The screening may occur during the employee's routine annual medical exam or "a book of rules examination or fatigued operator examination." The screening involves "examin[ing] the employee's body mass index," measuring the circumference of the employee's neck, and also other factors "based on what medical observes and based on their conversation with the employee." There is also a questionnaire in which the medical personnel "ask the employees specific questions about their lifestyle," and whether they are sleeping, or are restful or tired.

If the medical department doctor believes the person may have sleep apnea, the employee is removed from service for medical reasons. That employee is also deemed by NJ Transit to be

"**medically not qualified"** for work. The employee is then scheduled for a sleep apnea test, the results of which are provided to NJ Transit's medical department.

If the sleep apnea test confirms the diagnoses, the employee is then required to wear a CPAP machine, maintain certain level of compliance with that machine as well as other requirements. Once the medical department of NJ Transit is satisfied that the employee has complied with the requirements, the employee is permitted to return to work. However, even if the employee is permitted to return to work, the employee must continue to comply with certain requirements relating to the use of a CPAP machine and undergo sleep studies on an annual basis.

Employees who are suspected of sleep apnea based on their examination during their annual routine medical exam, but subsequently test negative on their overnight sleep study test, are treated differently. NJ Transit permits these employees to return to work and compensates them for their time away from service. However, these employees are not compensated for out-of-pocket expenses related to medical exams, co-pays, and visits to physician.

According to plaintiff, there are approximately 1,700 employees at NJ Transit who would be considered "covered employees" or "safety sensitive" employees, and thereby potentially subject to NJ Transit's sleep apnea policy. Based on a letter drafted by NJ Transit, dated March 18, 2019, NJ Transit removed 124 employees from service under its sleep apnea policy.

On January 1, 2019, Alleyne filed a complaint against NJ Transit alleging that NJ Transit violated the NJ Law Against Discrimination, NJSA 10.5-2 et seq ("LAD") by discriminating against him for his disability. Alleyne's complaint also sought to bring the LAD claim as a class action pursuant to NJ Court Rule 4:32 et seq on behalf of himself and the following class:

Individuals who were removed from service with NJ Transit and required to submit to sleep apnea testing, while employed by NJ Transit at any time from September 19, 2016 to present.

On March 19, 2018, Alleyne moved to amend the complaint to add a claim under N.J.S.A. § 34:11-24.1 (1952), which was granted.

Alleyne now moves to certify the proposed class pursuant to R. 4:32-1. The plaintiff seeks injunctive and monetary relief. The complaint demands, in pertinent part, the following relief:

> 1. That the practices complained of herein be determined and adjudged to constitute violations of the New Jersey Law Against Discrimination, NJ Rev. Stat. 10.5-2 et seq.
> 2. That the practices complained of herein be determined and adjudged to constitute violations of NJ Rev. Stat. 34:11-24.1.
> 3. Enjoining, preliminary [sic] and permanently, NJ Transit's imposition of costs upon the Class associated with mandatory sleep apnea-related procedures and treatments;
> 4. Directing that NJ Transit account for, plaintiff and the NJ class Members all damages caused by NJ Transit;
> 5. Awarding to plaintiff and the NJ Class members all damages caused by NJ transit

II. DISCUSSION

A. CLASS CERTIFICATION – LEGAL STANDARD

NJ Court Rule 4:32-1 sets forth the requirements for class certification. Under subsection (a), a court will certify a class only if the following requirements are met: "(1) the class is so numerous that joinder of all members in impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class." R. 4:32-1(a). These requirements are commonly referred to as

"numerosity, commonality, typicality, and adequacy of representation." Delgozzo v. Kenny, 266 N.J. Super. 169, 184 (App. Div. 1993).

In addition to the requirements of subsection (a), for a class certification to be granted, the plaintiff must also satisfy one of the three requirements of subsection (b). These include, in pertinent part:

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The factors pertinent to the findings include:
>
> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and
>
> (D) the difficulties likely to be encountered in the management of a class action.
>
> [R. 4:32-1(b)(2)-(3).]

The party seeking class certification bears the burden of showing that the requirements of R. 4:32-1 have been met. Beegal v. Park West Gallery, 394 N.J. Super. 98, 109 (App. Div. 2007).

NJ Court Rule 4:32-1 is modeled after Rule 23 of the Federal Rules of Civil Procedure. Beegal v. Park West Gallery, 394 N.J. Super. 98, 109 (App. Div. 2007); see also Fed. R. Civ. P. 23 (federal rule governing class actions). While NJ courts have interpreted R. 4:32-1 more

liberally than its federal counterpart, Gross v. Johnson & Johnson-Merck Consumer Pharms. Co., 303 N.J. Super. 336, 341 (Law Div. 1997), the Federal Rule has nonetheless been a source of guidance for NJ courts when construing R.4:32-1, Delgozzo v. Kenny, 266 N.J. Super. 169, 188 (App. Div. 1993).

In reviewing a motion for class certification, the court "accept[s] as true all of the allegations in the complaint, and consider[s] the remaining pleadings, discovery (including interrogatory answers, relevant documents, and depositions), and any other pertinent evidence in a light favorable to plaintiff." Dugan v. TGI Fridays, Inc., 231 N.J. 24, 49 (2017) (quoting Lee v. Carter-Reed Co., L.L.C., 203 N.J. 496, 505 (2010)). The court also bears in mind the "numerous practical purposes" furthered by the class action device, "including judicial economy, cost-effectiveness, convenience, consistent treatment of class members, protection of defendants from inconsistent obligations, and allocation of litigation costs among number, similarly-situated litigants." Dugan, 231 N.J. at 46. NJ courts have "consistently held that the class action rule should be liberally construed" in light of these objectives. Id. at 46-47.

The court will begin by considering whether plaintiff's proposed class satisfies the requirements of subsection (a). It will then go on to consider the defendant's challenge to plaintiff's use of a hybrid certification. Finally, the court will consider whether plaintiff's proposed class action satisfies the requirements of subsection (b).

B. SUBSECTION (A) REQUIREMENTS

1. Numerosity

R. 4:32-1(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Under the federal rule's numerosity requirement, no minimum number of

members is required for class certification. Mielo v. Steak 'N Shake Operations, Inc., 897 F.3d 467, 486 (3d Cir. 2018). However, courts have recognized that, generally, numerosity is "satisfied where the proposed class contains more than 40 plaintiffs." Id.

In this case, plaintiff argues that, based on a letter written by NJ Transit, the class will consist of at least 124 members. The letter, dated March 18, 2019, states that "[b]ased on [NJ Transit's] records, there are one-hundred twenty four (124) people who were removed from service, required to submit to sleep apnea testing, and subsequently tested positive for sleep apnea." (Pl.'s Mot. to Certify Class, Ex. 12). It does not include employees who were taken out of service, subjected to mandatory testing, but ultimately tested negative for sleep apnea.

The defendant does not dispute plaintiff's claim that numerosity is satisfied. The court finds that, for the reasons stated by plaintiff, the numerosity requirement is met.

2. Commonality

R. 4:32-1(a)(2) requires that there be questions of law or fact common to the class. The threshold for commonality is low and a single common question can satisfy this requirement. See Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir.1994). Regarding the Federal Rule's commonality requirement, courts have stated that the plaintiff's mere "recital of questions that happen to be shared by class members" will not be sufficient since "any competently crafted class complaint literally raises common questions." Mielo v. Steak 'N Shake Operations, Inc., 897 F.3d 467, 487 (2018). Rather what the court must determine is whether the plaintiff has demonstrated "that the class members have suffered the same injury." Id.

According to plaintiff's second amended class action complaint, the following questions of law or fact are shared by the proposed members of the class:

1. Whether NJ Transit discriminated against the NJ Class Members on the basis of a disability or perceived disability in violation of NJ LAD, NJ Rev. Stat. § 10:5-12;
2. Whether the sleep apnea policy as described herein was directed at all NJ Class Members;
3. Whether NJ Transit's policy of requiring its employees to pay for the costs associated with sleep apnea testing and treatment is a violation of NJ LAD, NJ Rev. Stat. § 10:5-12 and NJ Rev. Stat. § 34:11-24.1
4. Whether monetary damages, injunctive relief, and other equitable remedies for the class are warranted; and
5. Whether punitive damages may be awarded.

The defendant argues that commonality does not exist in this case since the doctors who examined the NJ Transit employees used their discretion in determining whether the employee may have sleep apnea. Citing to Wal-Mart Stores, Inc. v. Dukes ("Wal-Mart"), 564 U.S. 338 (2011), the defendant argues that, as in Wal-Mart, this case "involve[s] the exercise of discretion alleged to be discriminatory and class members with individual characteristics leading to disparate answers to questions raised." According to the defendant, the class members were "examined under different circumstances, some for an annual examination while others as a result of a book of rules examination or fatigued operator examination." These differences "exclude many potential members from being eligible for relief."

The court does not find that this case is analogous to Wal-Mart as the defendant suggests. In Wal-Mart the plaintiff sought to certify a class of 1.5 million plaintiffs who were "current and former female employees of petitioner Wal-Mart who allege[d] that the discretion exercised by their local supervisors over pay and promotion matters violated Title VII by discriminating against women." Wal-Mart, 564 U.S. at 342. In this case, the NJ Transit's doctors used their discretion in determining whether the employee may have sleep apnea. However, the doctor's exercise of discretion is not the allegedly discriminatory act, as was the case in Wal-Mart. Rather the alleged discriminatory act is the failure of NJ Transit to compensate those who were removed

from service, after a doctor had determined that that employee possibly had sleep apnea. In this case, based on plaintiff's complaint, NJ Transit exercised little discretion since NJ Transit, *as a matter of policy*, did not compensate employees who it removed from service for their expenses related to required medical treatments and exams.

The court finds that there are several facts shared among the class members. The class members are all employees of NJ Transit who a NJ Transit Medical Staff personnel determined potentially may have obstructive sleep apnea. Each of the members were subjected to NJ Transit's sleep apnea policy. They were each removed from service upon suspicion of having sleep apnea, subsequently required to take additional sleep apnea tests, and were not reimbursed for their out of pocket expenses for these tests.

These set of facts give rise to common questions of law and suggest common injuries. The questions raised, as plaintiff has suggested, are whether NJ Transit's conduct of removing employees suspected of sleep apnea from service, imposing testing requirements, and not compensating the employees are acts of discrimination. Since the class members were required to take medical exams at the "request or direction of the employer," and paid for those exams out of pocket, there is also the question of whether NJ Transit violated the employees' rights under N.J.S.A. § 34:11-24.1. For these reasons, the court finds commonality requirement is satisfied as to plaintiff's LAD claim.

3. Typicality and Adequacy of Representation

The requirements of typicality and adequacy of representation are sometimes equated. In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 425 (1983). Both requirements focus on the class representative and "seek to assure that the action can be practically and efficiently maintained

[and] that the interest of the absentees will be fairly adequately represented." Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994) (citing General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13 (1982)). Typicality requires that the class representative "have the essential characteristics common to the claims of the class." Id. (quoting 3B Moore's Federal Practice, para. 23.06-2 (1982)). Typicality will fail if "the legal theories of the named representatives potentially conflict with those of the absentees." Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183 (3d Cir. 2001). However, "[i]f the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of factual differences." Id. at 184-85.

Adequacy of representation requires that the class representative "fairly and adequately protect the interests of the class." R. 4:32-1(a)(4). This requirement is satisfied if the following two factors are established: "(a) plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." Delgozzo v. Kenny, 266 N.J. Super. 169, 188 (App. Div. 1993) (quoting In re Asbestos School Litigation, 104 F.R.D. 422, 430 (Pa. E.D. 1984)).

The defendant does not dispute adequacy of representation but argues that typicality is not satisfied. defendant argues Alleyne's claim for discrimination under the LAD is based on obesity, which is not recognized as a disability under LAD. (Def.'s Opp'n Br. 14-15) (citing Dickson v. Community Bus Lines, 458 N.J. Super. 522 (App. Div. 2019)).

The court finds that typicality in this case is satisfied. Although obesity alone is not recognized as a disability under the LAD, sleep apnea may be considered a disability. Disability is defined broadly under the LAD to include "physical or sensory disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect, or illness."

N.J.S.A. § 10:5-5(q). Sleep apnea appears to fall within this definition. At the very least, the court cannot find that as a matter of law, sleep apnea does not fall within the definition of disability.[1]

Furthermore, this case is distinguishable from Dickson. In Dickson, the plaintiff sued his employer for hostile work environment, claiming that the "other drivers and his supervisors regularly made rude comments to him about his weight." Dickson, 458 N.J. Super. at 526. In this case the defendant knew or believed that plaintiff had sleep apnea. Unlike in Dickson, where the court found that the evidence did not support plaintiff's argument that his supervisor perceived him to be disabled, in this case NJ Transit deemed the employees who may have sleep apnea as "medically not qualified for work."

Even if the NJ Transit medical personnel considered weight as a factor, based on the record before the court, it appears that is not what triggered NJ Transit to remove the employee from service and require additional testing. Rather, it was the medical staff's determination that the employee may have sleep apnea that appears to trigger it.

In this case, NJ Transit removed Alleyne from service when it suspected Alleyne of having sleep apnea. Then NJ Transit failed to compensate for the costs Alleyne incurred from required medical tests and examinations. These essential facts are shared by all class members and

---

[1] In any case, whether sleep apnea falls within the definition of disability is a question that goes to the merits of plaintiff's claims. As plaintiff correctly points out, the issue of whether sleep apnea is a disability is more appropriately the subject of a summary judgment motion or a motion to dismiss. See also Dugan v. TGI Fridays, Inc., 231 N.J. 24, 48 (2017) (refusing to determine whether plaintiff's price-shifting allegations, "if proven, would give rise a CFA violation"); see also Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 107 (2007) (stating "class certification does not occasion an examination of the dispute's merits").

Alleyne, the proposed class representative. Therefore, typicality is satisfied as to plaintiff's LAD claim.

Typicality is also satisfied as to plaintiff's N.J.S.A. § 34:11-24.1 claim. NJ Transit did not compensate Alleyne for mandatory testing and treatment. Similarly, the class members, by definition, were employees who were required to submit to a sleep study. plaintiff alleges NJ Transit did not compensate Alleyne for his out-of-pocket expenses incurred by the required testing. This fact, which is essential to a claim under N.J.S.A. § 34:11-24.1, is shared by all members of the proposed class.

The court finds that adequacy of representation, which the defendant did not challenge, is also satisfied. The court has no basis for finding that the plaintiff's claims are antagonistic to the claims of the class members. Additionally, based on the documents submitted by the plaintiff's attorney regarding its firms practices and experience with class action litigation, this court is satisfied that the attorney for plaintiff is "qualified, experienced and generally able to conduct the proposed litigation." (Pl.'s Mot. to Certify Class Br. 13-14); (Pl.'s Mot. to Certify Class Ex. 1).

Having determined that the plaintiff's proposed class satisfies the requirements of subsection (a), the court must consider whether the proposed class satisfies the requirements of subsection (b). In this case, the defendant argues plaintiff's proposed "hybrid" form of class certification, in which plaintiff seeks to certify under two subsections of (b), is not appropriate under the facts of this case. Therefore, the court begins by addressing defendant's arguments regarding plaintiff's use of a "hybrid certification."

C. HYBRID CERTIFICATION

The defendant argues that plaintiff should not be granted a "hybrid certification" – a class certification in which some claims proceed under R. 4:32(b)(3) and others proceed under R. 4:32(b)(2) – since plaintiff's request for a hybrid certification was made "late" and, alternatively, because a hybrid certification is "unsuitable in the instant case." (Def.'s Opp'n Br. defendant argues that it has not been able to locate a case in which hybrid certification was permitted under similar facts. According to the defendant, while the court in Wilson v. County of Gloucester, 256 F.R.D. 479 (D.N.J. 2009) certified a hybrid class, this case is dissimilar to Wilson therefore hybrid certification should not be permitted in this case.

Regarding defendant's argument that plaintiff's request for a hybrid certification was made late, the court finds it is without merit. plaintiff's initial motion papers argued for certification under both R. 4:32(b)(3) and R. 4:32(b)(2). (See Pl's br. at 5). Furthermore, the plaintiff's proposed order for class certification, which was submitted with plaintiff's initial moving papers, shows that plaintiff sought a hybrid certification in its initial moving papers. Finally, the plaintiff appears to have sought hybrid certification in its second amended complaint, since he alleged in his complaint monetary relief as well as injunctive and declaratory relief. (See Second Am. Compl.). Therefore, it is not the case that plaintiff only argued hybrid certification in his reply papers as defendant argues. (See Pl.'s Mot. to Certify Class, Proposed Order) (part (1)(a) of the order proposes granting certification under R. 4:32-1(b)(3) and part (1)(b) proposes granting certification under R. 4:32-1(b)(2)).

The court also disagrees that this litigation is not well suited for hybrid certification. In Wilson, hybrid certification was employed to allow "efficient litigation." Wilson, 256 F.R.D. at 491.The court in Wilson noted that "certifying the equitable portion of this suit under (b)(2), and

the damages portion under (b)(3), allows for the best of both worlds." Id. The court also noted that R. 23(c)(4), which permits hybrid certification, "explicitly recognizes the flexibility that courts need in class certification by allowing certification 'with respect to particular issues' and division of the class into subclasses." Id. (quoting Bolin v. Sears Roebuck & Co., 231 F.3d 970, 976 (5th Cir. 2000)).

The court finds that, as in Wilson, this case is well suited for hybrid certification. As with the federal rule, NJ's rule also allows for certification to be granted as to certain claims. Compare R. 4:32-2(d) and Fed. R. Civ. P. 23(c)(4); see also Wilson, 256 F.R.D. at 491 (Noting that Fed. R. Civ. P. 23(c)(4) "explicitly recognizes the flexibility that courts need in class certification by allowing certification 'with respect to particular issues' and division of the class into subclasses.") (quoting Bolin, 231 F.3d at 976). Just as in Wilson, the plaintiff here seeks "an order enjoining the defendants from following [allegedly unlawful] policies and practices." See Wilson, 256 F.R.D. at 491. Such as claim is "particularly well-suited for certification" under R. 4:32-1(b)(2). Id. Furthermore, the plaintiff's damages claims are not merely incidental to the injunctive relief plaintiff is seeking. See generally Id. at 490-91 n. 19 (listing the factors considered in determining whether a plaintiff's damages claim is incidental to its claim for injunctive relief). Therefore, the court finds hybrid certification is permitted and appropriate in this case.

The court will consider the plaintiff's injunctive class actions claims under subsection R. 4:32-1(b)(2) and its damages claims under subsection R. 4:32-1(b)(3).

D. SUBSECTION (B) REQUIREMENTS

1. Damages Claims – (b)(3)

Under R. 4:32-1(b)(3), class certification is granted if the requirements of R. 4:32-1(a) are met and "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individuals members." Courts commonly refer to this as the predominance requirement.

"To determine predominance … the court decides whether the proposed class is sufficiently cohesive to warrant adjudication by representation." Dugan, 231 N.J. at 48. It is a "far more demanding" requirement than the commonality requirement of R. 4:32-1(a)(2). Id. In Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88 (2007), the Court provided three guiding principles for determining whether predominance is satisfied:

> First, the number and, more important, the significance of common questions must be considered. Second, a court must decide whether the "benefit from the determination in a class action [of common questions] outweighs the problems of individual actions." Third, predominance requires, at minimum, a "common nucleus of operative facts."
>
> [Iliadis at 108 (internal citations omitted).]

Notably, predominance does not require that there be "an absence of individual issues or that the common issues dispose of the entire dispute, or that all issues are identical among class members or that each class member is affected in precisely the same manner." Id. Nor is the predominance analysis a merely quantitative analysis – the court does not need to find that the "number of common issues exceeds the number of individual issues." Dugan, 231 N.J. at 48. Rather the court conducts a careful analysis of the facts and law, under which the court makes a "*qualitative* assessment of the common and individual questions." Id.

Since determining predominance requires a "careful analysis of the facts and law," the court begins with a review of the substantive law governing the plaintiff's claims.

a. Predominance Requirement

Law Against Discrimination

The New Jersey Law Against Discrimination ("LAD"), N.J.S.A. § §§ 10:5-1 to 10:5-49 was enacted with the over-arching goal of achieving "nothing less than the eradication of the cancer of discrimination." Fuchilla v. Layman, 109 N.J. 319, 335 (1988). The LAD is considered a "social remedial legislation" which "should be liberally construed" and "applied to the full extent of its facial coverage." Nini v. Mercer County Cmty. College, 202 N.J. 98, 108-109 (2010) (internal citations omitted).

Under the LAD, employers are prohibited from discriminating against employees based on actual or perceived disability. See N.J.S.A. § 10:5-12. The LAD provides that "[i]t shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination …[f]or an employer, because of the … disability … of any individual … to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Id. The LAD also prohibits an employer from denying "to an otherwise qualified person with a disability the opportunity to obtain or maintain employment, or to advance in position in his job, solely because such person is a person with a disability…" N.J.S.A. § 10:5-29.1.

Furthermore, under N.J.S.A. § 10:5-2.1 it states:

> Nothing contained in this act … shall be construed … to prohibit the establishment and maintenance of bona fide occupational qualifications … nor to prevent the termination or change of the employment of any person who in the opinion of the employer,

> reasonably arrived at, is unable to perform adequately the duties of employment ….
>
> [N.J.S.A. § 10:5-2.1.]

Accordingly, the LAD "disapproves employment discrimination against the handicapped 'unless the nature and extent of the handicap reasonably precludes the performance of the particular employment." Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 373-74 (1988) (quoting N.J.S.A. § 10:5-4.1). "The import of the [LAD] is that the handicapped should enjoy equal access to employment, subject only to limits that they cannot overcome." Id. (citing Andersen v. Exxon Co., U.S.A., 89 N.J. 483, 496 (1982)).

The LAD equally protects individuals with a disability and individuals perceived to have a disability. Rogers, 185 N.J. Super. at 112 ("[T]hose perceived as suffering from a particular handicap are as much within the protected class as those who are actually handicapped.").

The NJ Supreme Court has noted that "[b]ecause of the limits imposed by a handicap, the [LAD] must be applied sensibly with due consideration to the interests of the employer, employee, and the public." Jansen, 110 N.J. at 374. Regarding the need to balance interests, the Court in Jansen noted that the LAD leaves employers "with the right to fire or not to hire employees who are unable to perform the job, 'whether because they are generally unqualified or because they have a handicap that in fact impedes job performance.'" Id. The Court further stated:

> In deciding whether the nature and extent of an employee's handicap reasonably precludes job performance, an employer may consider whether the handicapped person can do his or her work without posing a serious threat of injury to the health and safety of himself or herself or other employees. That decision requires the employer to conclude with a reasonable degree of certainty that the handicap will probably cause such an injury. The mere fact that the applicant is an epileptic will not suffice. Otherwise, unfounded

> fears or prejudice about epilepsy could bar epileptics from the work force.
>
> The appropriate test is not whether the employee suffers from epilepsy or whether he or she may experience a seizure on the job, but whether the continued employment of the employee in his or her present position poses a reasonable probability of substantial harm.
>
> [Jansen, 110 N.J. at 374-75.]

"[T]here is no single prima facie case that applies to all discrimination claims." Victor v. State, 203 N.J. 383, 409 (2010). Rather the prima facie case the plaintiff must establish under the LAD will "vary depending on the particular employment discrimination claim being made." Victor v. State, 203 N.J. 383, 409-10 (2010). In a disability discrimination case, there are certain elements that must be established. Id. First, the plaintiff must show that the plaintiff's disability, perceived or actual, falls within the definition of disability under LAD. Victor v. State, 203 N.J. 383, 410 (2010); see also N.J.S.A. § 10:5-5(q) (providing definition of "disability").

Second, the plaintiff must show "that he or she can do the job." Jansen, 382; see also Victor, 410 (describing the second element of a prima facie case as requiring "plaintiff to demonstrate that he or she is qualified to perform the essential functions of the job, or was performing those essential functions, either with or without a reasonable accommodation"); Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 399 (2005) (describing the second element as requiring plaintiff to show that he or she "applied for or held a position for which he or she was objectively qualified"). An "employee's proof that he or she was performing the job at a level that met the employer's legitimate expectations … proves that the handicap did not unreasonably hinder his or her job performance." Jansen, at 382.

Third, the plaintiff must show that he or she was subject to discrimination "in compensation or in terms, conditions or privileges of employment." N.J.S.A. § 10:5-12; see also Victor v.

State, 203 N.J. 383, 410 (2010) (noting that traditionally, employment discrimination cases require a plaintiff to show that he or she "endure[d] an adverse employment consequence as a result of the discriminatory act"). In other words, plaintiff must show a "discriminatory act" of the defendant. In determining whether an employee has "been subjected to unlawful discrimination in an employment setting" our courts look to "'the substantive and procedural standards established under federal law' for general guidance." Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 398 (2005) (quoting Viscik v. Fowler Equipment Co., Inc., 173 N.J. 1, 13 (2002)).

In this case the plaintiff alleges the defendant engaged in a "pattern or practice" of discriminating against employees with sleep apnea. "Pattern or practice" claims have been recognized under LAD and under the Title VII of the Civil Rights Act of 1964 ("Title VII"). See e.g., Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Erickson v. Marsh & McLennan Co., 117 N.J. 539 (1990). A "pattern or practice" claim brought under Title VII requires the plaintiff to show that "discrimination was the [defendant] company's standard operating procedure – the regular rather than the unusual practice." Int'l Bhd. of Teamsters, 431 U.S. at 336. A "'pattern or practice' of discrimination could be either a pattern of disparate treatment of a number of individuals, or the wide-scale application of tests or other neutral factors having disparate impact, or both." 1 Larson on Employment Discrimination § 8.01. In the case where neutral factors are alleged, "the proof pattern would be similar to that of a 'disparate impact' case." Id.

In this case, the defendant argues that predominance is not satisfied since there are questions of law as to each individual member which predominate over questions shared by all members. The first such individual question that defendant argues predominates is whether each class

member will be able to prove he or she was disabled, as that term is defined in the LAD. defendant argues that since obesity alone is not considered a disability under the LAD, the issue of "disability" would need to be established as to each plaintiff individually.

The defendant furthermore provides a list of individual questions that the defendant argues would predominate over common questions. The list of questions includes:

1. What was the impetus for the screening, as employees can be screened for sleep apnea during an annual physical exam, book of rules examination or a fatigued operator examination?
2. Which doctor conducted the particular examination? More than one physician conducts the examinations.
3. Did the examiner follow the sleep apnea policy exclusively or make her/his own recommendation based on other data or medical sources?
4. What role is any the head nurse played in facilitating the employee's prompt return to duty where possible, as the head nurse was responsible for monitoring the employee's progress in completing a sleep study?
5. Was the employee a member of the union?
6. What doctor completed the employee's sleep study?
7. Whether an employee intentionally delayed the process such that they could have returned to work sooner, if they had been more diligent.

The court finds the defendants arguments do not have merit. The issue of "disability" is unlikely to vary from person to person among the members of the proposed class since all members of the class were designated by NJ Transit as suspected for having sleep apnea. It is plaintiff's theory that NJ Transit's policy discriminated against the plaintiffs based on their "disability." As already discussed, whether sleep apnea falls within the definition of "disability" goes to the merits of the case and cannot be decided on a motion to certify class. NJ Transit established a policy under which, once an employee was suspected of sleep apnea, that employee was required to be removed from service and undergo further testing. In this case, all class

members, by definition, are employees who were removed from service and required to submit to further medical exams.

The central question at issue is whether defendant's treatment of employees it believes might have sleep apnea, or were confirmed to have sleep apnea, was discriminatory. This may require, among other things, a determination of whether NJ Transit's policy to remove from service employees suspected of sleep apnea, require those employee to take further medical tests, even if the same were not medically required, and to fail to compensate the out-of-pocket costs incurred by those employees for the mandatory testing, deprived those employee's to "the equal access to employment," or, in other words, was "discriminatory" conduct. Several of NJ Transit's acts that plaintiff alleges were discriminatory were consistent from person-to-person among the members of the proposed class. This includes NJ Transit's failure to compensate the plaintiff and class members for their out-of-pocket costs, which they did as a matter of policy.

Although the litigation may raise some individual questions, such as how much out-of-pocket expenses each plaintiff incurred, for how long each plaintiff was removed from service, or the number of medical exams or testing each plaintiff was required to undergo, these questions are not dominant over the questions raised by the sleep apnea policy. Regarding the NJ Transit's list of questions which NJ Transit argues are individual questions that predominate over shared questions, the court first notes that NJ Transit provided no further reasoning or explanation as to why these questions predominate. Nonetheless, considering the merit of its argument, the court finds these questions do not predominate. Several of the questions, such as which doctor conducting the exam, the role of NJ Transit's nurses, the "impetus" for conducting the sleep apnea screening, while relevant, are not essential in addressing the issue of discrimination. The

remaining questions, while relevant, do not predominate over common questions of whether the sleep apnea policy was discriminatory.

In this case, NJ Transit detailed a policy that included several testing requirements, and requirements regarding compensation, which allegedly was applied uniformly to its covered employees, and most importantly to the members of the proposed class. NJ Transit's acts raise question of whether NJ Transit's policy had a disparate impact on employees who had or were perceived to have sleep apnea. This question predominates over any individual questions. Therefore, the court finds that predominance is satisfied.

Failure to Compensate Pursuant to N.J.S.A. § 34:11-24.1

N.J.S.A. § 34:11-24.1 provides that "[n]o employer … shall … in any manner require payment of any sum from [an] employee … to defray the cost of any medical examination of such employee … when such examination is made at the request or direction of the employer, by a physician designated by said employer, as a condition of entering or continuing employment. A claim under § 34:11-24.1 would require plaintiff to show: (1) employer defrayed the cost of (2) medical examination made at the request or direction of the employer, (3) by a physician designated by the employer, (4) as a condition of entering or continuing employment. .." Furthermore, if an employee "pays for any such medical examination," the employee is required to reimburse the employee for "any such payment."

Plaintiff alleges NJ Transit violated § 34:11-24.1 "by requiring plaintiff and the NJ Class members to pay to defray the cost of medical examinations as required by NJ Transit's sleep apnea testing policy."

Defendant argues that the plaintiff fails to establish a prima facie case under § 34:11-24.1. According to the defendant, § 34:11-24.1 requires the plaintiff to show as part of his prima facie case that the examination was made "by a physician designated" by the employer. In this case, the record does not show that the plaintiff or class members were examined by a physician designed by the employer.

The court finds predominance exists as to plaintiff's § 34:11-24.1 claim. The class members share several significant facts and legal questions, including whether the medical examinations and treatments they took were required as a condition of returning to work, whether they were compensated, and whether they were examined by a physician designated by the employer. Since plaintiff contends that NJ Transit required its employees, as a matter of policy, to submit to medical examinations (including the overnight sleep study) and treatment (such as use of CPAP machine) as a condition to returning or continuing work, there is unlikely to be significant issues raised by individual claims as to the fourth element of a § 34:11-24.1 claim.

Similarly, the issue of NJ Transit's failure to compensate is unlikely to raise individual issues since NJ Transit refused to compensate as a matter of policy. Finally, with regards to whether the examinations were conducted by a "physician designated by the employer," the court will first note that that language has not been interpreted by any court in NJ. How that term should be interpreted is not before the court today since that question would go to the merits of the case and was not argued by the parties. For purposes of a motion to certify, whether the examination of the employee was conducted by a "physician designated by the employer" may be resolved by a review of the medical records of the employees, and is unlikely to require a significant examination into each individual claim. For these reasons, the court finds the predominance requirement is satisfied as to plaintiff's § 34:11-24.1 claim.

b. Superiority Requirement

In addition to showing predominance, a plaintiff seeking class certification under R. 4:32-1(b)(3) must also show that "class action is superior to other available methods for the fair and efficient adjudication of the controversy." R. 4:32-1(b)(3). The factors pertinent to determining whether this requirement is satisfied are:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> (C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and
>
> (D) the difficulties likely to be encountered in the management of a class action.
>
> [R. 4:32-1(b)(3)(A)-(D).]

The Court in Lee v. Carter-Reed Co., LLC, 203 N.J. 496 (2010), noted that the class action device "allows 'an otherwise vulnerable class' of diverse individuals with small claims access to the courthouse." It also furthers "judicial economy" by allowing for "consistent treatment of class members and protection of defendants from inconsistent results." Id.

The defendant argues that class action is not the superior form of action for this case because the defendants are not "diverse," the damages sought are "not the type of small damages appropriate for class actions," and administrative remedy under the parties' Collective Bargaining Agreement ("CBA") is the superior method instead. Regarding the first two arguments, defendant provides little detail for its position. defendant leaves it unclear in its opposing papers in what respects the proposed class lacks diversity and why such lack of diversity makes class action in this case inappropriate.

As to defendant's argument that there are no "small claims" in this case that would make this case suitable for adjudication by class action, the defendant states that class action in this case would potentially require this court "to conduct over a hundred mini-trials to determine the eligibility of each class member to pursue their claims." However, the defendant does not explain why such mini-trials would be necessary. As already discussed, there are significant questions regarding NJ Transit's conduct that would address many of the claims of the individual class members. These questions predominate over any individual questions. Furthermore, for a plaintiff to proceed in a class action, an absence of individual questions is not required.

Regarding defendant's argument that the plaintiff's claims are covered by the parties' CBA and therefore should be pursued in arbitration, the court finds it is unfounded.

In New Jersey, "arbitration … is a favored means of dispute resolution." Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006). Ambiguities in an arbitration agreement are generally "resolved in favor of arbitration." Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006).

However, our courts have recognized that the right to arbitration is waivable. See Cole v. Jersey City Medical Center, 215 N.J. 265, 276 (2013). "Waiver is the voluntary and intentional relinquishment of a known right." Id. (quoting Knorr v. Smeal, 178 N.J. 169, 177 (2003)). However, "[w]aiver is never presumed." Cole, 215 N.J. at 276. The determination of whether a party waived its right to arbitrate requires a "fact sensitive analysis." Id. at 278. NJ common law recognizes both explicit and implicit waiver of a right to arbitrate. See Id. at 280.

In determining whether a party implicitly waived its right to arbitrate, the court conducts a "totality of the circumstances" analysis. Id. The court "concentrate[s] on the party's litigation

conduct to determine if it is consistent with its reserved right to arbitrate and dispute." Id. The court also evaluates the following factors:

> (1) the delay in making the arbitration request;
>
> (2) the filing of any motions, particularly dispositive motions, and their outcomes;
>
> (3) whether the delay in seeking arbitration was part of the party's litigation strategy;
>
> (4) the extent of discovery conducted;
>
> (5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration;
>
> (6) the proximity of the date on which the party sought arbitration to the date of trial; and
>
> (7) the resulting prejudice suffered by the other party, if any.
>
> [Id. at 280-81.]

In this case, several of the Cole factors support plaintiff's argument that NJ Transit waived its right to arbitrate. In NJ Transit's answer, NJ Transit provided the following affirmative defense: "The court should not exercise jurisdiction over the plaintiff's claims because the plaintiff has failed to exhaust State and/or administrative remedies." (NJ Transit's Ans. 14) ("Thirty-second Affirmative Defense"). However, when NJ Transit's answer is viewed in its entirety, notably, NJ Transit makes no mention of the parties' CBA.

Just before filing its answer, NJ Transit filed a motion to dismiss complaint on March 15, 2018. In this motion, NJ Transit only argued that the plaintiff's complaint should be dismissed because the plaintiff's complaint failed to comply with R. 1:2-1 and 1:4-1, which govern the

information a plaintiff is required to provide in a complaint. Again, there was no mention of the parties' CBA or of a right to arbitrate.[2]

After the plaintiff filed an amended complaint, the defendant filed an answer to plaintiff's second amended complaint on November 9, 2018. Like defendant's answer filed May 7, 2018, the November 9 answer made no mention of the CBA.

It also appears that the parties were actively participating in discovery. During 2018, depositions were conducted, including the depositions of Dr. Homer Nelson (conducted October 24, 2018), Stephen Michael Drayzen (conducted September 12, 2018), discovery documents were exchanged, and interrogatories were served and answered.

Based on the record before the court, NJ Transit only sought arbitration on August 23, 2019, in its opposition to plaintiff's motion to certify class, and not earlier. This is over a year after plaintiff filed its first complaint and after discovery was well underway. The court finds that under the totality of the circumstances just discussed, NJ Transit waived its right to arbitrate.

2. Injunctive Claims – (b)(2)

Class certification under R. 4:32-1(b)(2) would be appropriate where "one injunction can remedy the harmful conduct." Cameron v. South Jersey Pubs, Inc., 460 N.J. Super. 156. Accordingly, it would be inappropriate if each "individual class member would be entitled to a different injunction or declaratory judgment against the defendant." Id. at 181 (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011)). "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such

[2] The motion was ultimately withdrawn after plaintiff amended his complaint to satisfy the requirements of R. 1:2-1 and 1:4-1.

that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Cameron, 460 N.J. Super. at 181 (quoting Shelton v. Bledsoe, 775 F.3d 554, 561 (3d Cir. 2015) (quoting Wal-Mart Stores, Inc., 564 U.S. at 360)) (internal quotation marks omitted).

The plaintiff's second amended complaint seeks the following injunctive relief: "[e]njoining, preliminary [sic] and permanently, NJ Transit's imposition of costs upon the Class associated with mandatory sleep apnea-related procedures and treatments." defendant argues that the class should not be certified under R. 4:32-1(b)(2) since plaintiff fails to make out a prima facie case of discrimination.

The court finds that the relief sought by plaintiff satisfies the requirements of R. 4:32-1(b)(2). As noted earlier, "an order enjoining the defendants from following [allegedly unlawful] policies and practices is particularly well-suited for certification" under R. 4:32-1(b)(2). See Wilson, 256 F.R.D. at 491. Such is the case here. In this case, the allegedly harmful conduct is NJ Transit's policy to require mandatory testing and thereafter not compensate employees for the testing. By adjoining NJ Transit from imposing this policy would provide a remedy for plaintiff and class members, without requiring the court to make inquiry into individual cases.

III. CONCLUSION

For the foregoing reasons, the plaintiff's motion is GRANTED. Class certification is granted as to plaintiff proposed class:

> Individuals who were removed from service with NJ Transit and required to submit to sleep apnea testing, while employed by NJ Transit at any time from September 19, 2016 to present.

Class is certified as to both count 1 and count 2 of plaintiff's second amended complaint. These are: (1) plaintiff's claim under the LAD for injunctive and declaratory relief, as well as monetary damages, and (2) plaintiff's claim for monetary damages under N.J.S.A. § 34:11-24.1. Furthermore, the court approves plaintiff Anthony Alleyne as Class representative and Nichols Kaster, PLLP as class counsel. plaintiff's proposed notice to class is approved as well, and plaintiff is directed to provide notice to the members of the class pursuant to R. 4:32-2(b)(2).