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<p>Anthony Alleyne, individually and on behalf of all others similarly situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>New Jersey Transit Corporation,</p> <p style="text-align: center;">Defendant.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY</p> <p>CIVIL ACTION</p> <p>DOCKET NO. _____</p> <p style="text-align: center;"><u>CLASS ACTION COMPLAINT AND JURY DEMAND</u></p>
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Plaintiff Anthony Alleyne, by his attorneys, brings this action on behalf of himself and all other persons similarly situated, and hereby alleges as follows:

1. Plaintiff brings this class action on behalf himself and on behalf of all engineers and conductors of New Jersey Transit Corporation (“NJ Transit”) against NJ Transit for disability discrimination in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12 (“NJ LAD”) for practices in connection with NJ Transit’s sleep apnea policy.

2. NJ Transit is a state-owned public transportation system that operates within the State of New Jersey, as well as in parts of Pennsylvania and New York. NJ Transit operates one of the largest regional public transportation networks in the United States.

3. On September 29, 2016, a NJ Transit commuter train crashed at Hoboken Terminal in Hoboken, New Jersey. One individual died as a result of the crash. At the time of the crash, it was suspected that the locomotive engineer controlling the train suffered from severe sleep apnea.

4. In the immediate aftermath, NJ Transit began discriminatorily enforcing its sleep apnea testing policy, basing their testing metrics solely on weight, neck circumference, and Body Mass Index (BMI). As a result, as many as 100 engineers and conductors were pulled out of service after their routine certification physical examinations and were subjected to required sleep studies and costly treatment at their own expense.

JURISDICTION AND VENUE

5. This Court has original jurisdiction to hear this Complaint and to adjudicate the claims stated herein under the NJ LAD, NJ Rev. Stat. § 10:5-12, and Rule 4:32-1 *et seq.* of the New Jersey Rules of Civil Procedure.

6. NJ Transit is owned and operated by the State of New Jersey and is headquartered within the State.

7. The unlawful practices described herein have been committed in the County of Essex, State of New Jersey.

PARTIES

8. Anthony Alleyne is a resident of the State of New Jersey and is currently employed by Defendant NJ Transit, working as a locomotive engineer during the applicable statute of limitations. Plaintiff Alleyne has claims and losses common to members of the putative class.

9. Defendant NJ Transit is a state-owned public transportation system. NJ Transit is headquartered in the City of Newark, County of Essex, State of New Jersey.

10. Defendant NJ Transit was an “employer” within the meaning of the New Jersey Law Against Discrimination, NJ Rev. Stat. § 10:5-5.

FACTUAL ALLEGATIONS

11. On September 29, 2016, a NJ Transit train crashed into the platform at Hoboken Station in Hoboken, New Jersey, killing a woman standing on the platform and injuring more than 100 passengers and crew.

12. At the time, it was suspected that the locomotive engineer controlling the train, Thomas Gallagher, had undiagnosed sleep apnea. This was later confirmed.

13. NJ Transit immediately began screening locomotive engineers and conductors for sleep apnea during the employees’ regularly-scheduled physical examinations by measuring each employee’s neck size, weight, and BMI.

14. NJ Transit’s locomotive engineers and conductors were immediately taken out of service if they met certain criteria, such as a large neck circumference, or high weight or Body Mass Index (“BMI”).

15. Upon information and belief, NJ Transit only removed from service those locomotive engineers or conductors who met the criteria referenced in the preceding paragraphs.

16. According to the National Heart, Lung, and Blood Institute, part of the National Institutes of Health and the U.S. Department of Health and Human Services, only about half of all individuals with sleep apnea are overweight.¹

17. Locomotive engineers and conductors were not paid for the time spent out of service for the required sleep apnea testing, nor were they compensated for travel time to and from the required testing, or the cost of the mandatory testing and treatment.

18. Upon information and belief, once an obese NJ Transit employee is diagnosed with sleep apnea, no matter how mild, he or she must demonstrate compliance with wearing the CPAP machine each night or risk being removed from service for noncompliance.

19. On or about October 5, 2016, Anthony Alleyne was scheduled for his yearly required physical examination. Alleyne was informed by NJ Transit's doctors that his BMI was over 35 and that, as a result, he would be taken out of service without pay until an overnight sleep study could be completed.

20. Alleyne completed an overnight sleep study on October 11, 2016, and was diagnosed with "mild sleep apnea" on October 14, 2016.

¹ See "Who Is at Risk for Sleep Apnea?" National Heart, Lung, and Blood Institute, National Institutes for Health, United States Department of Health & Human Services, <https://www.nhlbi.nih.gov/health/health-topics/topics/sleepapnea/atrisk> (2012).

21. Alleyne was forced to pay a \$250 deductible out of pocket, and was not reimbursed for travel to and from the sleep study on October 11, 2016, despite the study being mandatory for his reinstatement.

22. Alleyne was required by NJ Transit's doctors to begin using a Continuous Positive Airway Pressure ("CPAP") machine, and was also required to participate in another sleep study while wearing the CPAP machine. He did not receive compensation for expenses related to the CPAP machine, travel to and from the second sleep study, or for time spent at the study.

23. Alleyne sought a second opinion from doctors unaffiliated with NJ Transit, and was told that wearing a CPAP was not necessary given his mild sleep apnea. Alleyne was told by NJ Transit that, despite this second opinion, Alleyne must wear the CPAP nightly or risk being pulled out of service for noncompliance.

24. Alleyne was reinstated on November 9, 2016. To date, Alleyne has not received payment for wages he lost while out of service or costs associated with the mandatory sleep apnea testing and treatment.

STATE LAW CLASS ACTION AVERMENTS

25. Plaintiff Anthony Alleyne brings this claim pursuant to Rule 4:32 *et seq.* of the New Jersey Rules of Civil Procedure seeking monetary relief, other compensatory relief and injunctive and declaratory relief 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 29, 2016 to the present.

These individuals are referred to as “the NJ Class” or the “NJ Class Members.” Plaintiff reserves the right to revise this class definition based on discovery or other legal developments.

26. The class action model is superior to any other available method for the fair and efficient adjudication of the claims outlined herein.

27. The NJ Class Members, to wit, the past and present members of the NJ Transit workforce affected by the contested application of the sleep apnea testing policy, are so numerous that joinder of all members of the class would be impractical.

28. The questions of law and fact pertinent to the NJ Class Members are common to the entirety of the class, and include but are not limited to:

- a. 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;
- b. Whether the sleep apnea policy as described herein was directed at all NJ Class Members;
- c. 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.

29. Further, the questions of factual loss are common to all NJ Class Members because each class member would have lost by virtue of the same route to liability. Although each class member’s individual loss calculation may be different, the nature of the damages would be identical for all. Specifically,

- a. Whether monetary damages, injunctive relief, and other equitable remedies for the class are warranted; and
- b. Whether punitive damages may be awarded.

30. The claims asserted here, and possible defenses against them, are typical for the claims of the NJ Class Members and the defenses asserted against all class members.

31. The representative plaintiff, Anthony Alleyne, will fairly and adequately protect the interest of the class to the best of their ability, as will counsel.

32. The litigation of separate or individual class members' claims would create a risk of inconsistent or varying adjudications which would, in turn, establish incompatible standards of conduct for NJ Transit.

33. Individual litigation of claims would also represent a risk of adjudications as to the individual's matters which would in turn potentially be dispositive of, and/or substantially impair or impede, the ability of other putative class members to protect their own interests.

34. Upon information and belief, NJ Transit has acted in a uniform way against the representative plaintiff and against all putative class members, thereby making appropriate final injunctive and legal relief with respect to the class as a whole.

35. The interests of the class members in individually controlling the adjudication of separate actions is inferior to the preferred method of adjudicating all claims at once because it conserves state and judicial resources, and represents an efficient and fair method by which all class members could obtain proper relief.

36. To the extent that individual actions are currently pending or have been commenced, this class action is still preferable to the resolution of individual actions for the reasons set forth above.

37. The NJ Class will not be unduly burdensome or difficult to manage.

CLAIMS FOR RELIEF

COUNT 1

Disability Discrimination in Violation of NJ Rev. Stat. § 10:5-12

38. Plaintiff incorporates all other allegations in this Complaint as if set forth herein in full.

39. By and through the conduct described above, NJ Transit violated the New Jersey Law Against Discrimination, NJ Rev. Stat. § 10:5-2 *et seq.* by discriminating against Plaintiff and the NJ Class Members on the basis of their disability and/or the perception that they had disabilities.

40. NJ Transit has engaged in a pattern and practice of disability discrimination by taking out of service any employee who works as a locomotive engineer or conductor and is designated “obese,” and by forcing such employees to sleep apnea testing and treatment, including the acquisition of CPAP machines, at the cost and expense of the employee.

41. As a result of NJ Transit’s unlawful conduct, Plaintiff and the NJ Class Members have suffered and continue to suffer economic losses, emotional distress, harm to career, harm to reputation, and other such damages compensable under the New Jersey Law Against Discrimination.

WHEREFORE, Plaintiff Anthony Alleyne demands judgment against Defendant NJ Transit as follows:

- (a) 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.*
- (b) Enjoining, preliminary and permanently, NJ Transit's imposition of costs upon the Class associated with mandatory sleep apnea-related procedures and treatments;
- (c) Directing that NJ Transit accounts for, Plaintiff and the NJ Class Members all damages caused by NJ Transit;
- (d) Awarding to Plaintiff and the NJ Class Members all damages caused by NJ Transit;
- (e) Declaring this action to be a class action and certifying Plaintiff Alleyne as the Class representative of the NJ Class and his counsel as Class counsel;
- (f) Awarding Plaintiff the costs of this action, including a reasonable allowance for the fees and expenses of Plaintiff's attorneys and experts; and
- (g) For such other and further relief available by statute;
- (h) For such other and further relief as the Court deems just and equitable; and
- (i) For leave to amend the complaint to add additional named Plaintiffs.

Schall and Barasch, LLC

Dated: January 3, 2018

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