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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

GLENN MAHLER, JAMES H. POOLE, JULIE CONGER, EDWARD M. LACY JR., WILLIAM S. LEBOV, JOHN C. MINNEY, JOHN SAPUNOR, and F. CLARK SUEYRES,

Plaintiffs,

v.

JUDICIAL COUNCIL OF CALIFORNIA, CHIEF JUSTICE TANI G. CANTIL-SAKAUYE, and DOES ONE through TEN,

Defendants.

Case No.: CGC-19-575842

PLAINTIFFS' OPPOSITION TO DEFENDANTS' DEMURRER TO THE FIRST AMENDED COMPLAINT

Date:	August 8, 2019
Time:	9:30 a.m.
Courtroom:	302
Reservation No.:	07030808-14
Action Filed .	May 9, 2019
Trial Date:	None Set

I. DEFENDANTS ARE NOT IMMUNE FROM SUIT

Plaintiffs have already set forth their position regarding application of the doctrine of legislative immunity in their Memorandum of Points and Authorities in Support of their Motion for Preliminary Injunction dated June 10, 2019, in their Reply memorandum dated July 1, 2019 and at the hearing on their motion for injunction held on July 9, 2019. But plaintiffs also recognize that the Court concluded in its July 10, 2019 Order Denying Plaintiffs Motion for Preliminary Injunction that the defendants are clothed in legislative immunity. The Court ruled: "Defendants' challenged actions in modifying the rules governing the TAJP constitute an act of rulemaking expressly grounded in the Judicial Council's and the Chief Justice's constitutional authority which has all the hallmarks of a legislative action . . .. [and] constitute a bar to Plaintiffs' claims." Order Denying Plaintiffs' Motion for Preliminary Injunction, p. 7, ll. 5-11. Rather than repeat their position plaintiffs will refer the Court back to, and incorporate by reference, their previous submissions and arguments addressing this issue. Plaintiffs continue to assert that the defendants' conduct should not be protected by legislative immunity.

Should the Court adhere to its previous ruling on Defendants' demurrer, which may be the most expeditious way to proceed, it need not reach any other issue raised by defendants. But in the event the Court elects to address the other contentions made by defendants, plaintiffs will address them.

II. DAMAGE CLAIMS AGAINST THE CHIEF JUSTICE

Plaintiffs do not oppose the striking of the damages claims against the Chief Justice. However, the claims for equitable relief should stand.

III. PLAINTIFFS HAVE ALLEGED A PRIMA FACIE CASE OF AGE DISCRIMINATION

In their amended complaint ("FAC") Plaintiffs have plead a cause of action for disparate impact age discrimination. Amended Complaint at p. 8.

A *prima facie* case of disparate impact age discrimination consists of allegations that "a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class." *Guz v. Bechtel Nat.Inc.*, (2000) 24 Cal.4th 317, 354, fn. 20.

Plaintiffs have alleged that "[d]efendants policy of arbitrarily limiting assigned judges to 1,320 days of service ["1320 Policy"] amounts to illegal age discrimination against plaintiffs … and is an adverse employment action not based upon *bona fide* occupational qualifications [that] has a disparate impact on plaintiffs and other persons of their age in that it causes them to be demonstrably disadvantaged vis-à-vis younger participants in the [Assigned Judges Program]." FAC ¶ 24. Additionally, the FAC alleges that "[t]he policy requiring exceptions for participation in the AJP does not apply to younger, more recently retired judges . . .." FAC ¶ 26.

Defendants do not contend that the first two requirements ("employer policy" and "no manifest relationship to job requirements") have been inadequately plead in the FAC. Their sole argument is that plaintiffs have not adequately plead facts to support the allegation that the policy in question had "a disproportionate adverse effect" on assigned judges because of their age. Plaintiffs disagree.

The cases defendants cite in support of their argument are distinguishable. *Life Technologies Corp. v. Superior Court* (2011) 197 Cal.App.4th 640 was decided on an appeal of an order granting a motion to compel discovery and did not address pleading issues. *Id.* at 644.

Similarly, *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, (2015) 135 S.Ct. 2507 was a case based on the Fair Housing Act and was an appeal from a bench trial. Pleading requirements were not addressed, and the parties had already had an opportunity to conduct discovery to allow them to compile statistical evidence of disparate impact.

Defendants cite *Rea v. Martin Marietta Corp*,. (10th Cir. 1994) 29 F.3d 1450 for the proposition that "To create a permissible inference of discrimination, the complaint 'must

eliminate nondiscriminatory explanations for the disparity.'" However, *Rea* was a disparate *treatment* case that was decided on summary judgement and did not address pleading issues.

Rea is further distinguishable because in a disparate treatment case a plaintiff must allege intentional discrimination. "[I]n the context of disparate treatment cases, [plaintiff] . . . must account for and eliminate non-discriminatory – that is, non-intentional – explanations for the observed disparity. In disparate impact cases, however, the employer's intention is irrelevant and the sole question . . . is whether a statistical disparity between protected classes exists." *Kerner v. City and County of Denver* (D. Col. Sep. 29, 2015) 2015 WL5698663, at *8, distinguishing *Rea*, *supra*, on this ground. *Kerner* goes on to state "[T]he Court is aware of no authority that requires a plaintiff to affirmatively exclude the possibility of all alternative explanations for the disparity as part of the *prima facie* case in disparate impact claims." *Id.* at fn. 6.

Defendants arguments that age is not a proxy for experience are inapposite for several reasons. In *Jianqing Wu v. Special Counsel, Inc.*(year) 54 F.Supp.3d 48, plaintiff made no allegation of disproportionate impact. *Id.*, at 55. Further, *Jianqing Wu* interprets the Age Discrimination in Employment Act ("ADEA"), not the Fair Employment and Housing Act (FEHA). We note that defendants' quote from *Jianqing Wu* substitutes "[FEHA]" for "ADEA". Defendants' Memorandum of Points and Authorities, p. 15, l. 14. As set forth below there are significant differences between the two statutes.

For example, under the ADEA an act is not illegal age discrimination if it is based on "reasonable factors other than age." (*See* 29 U.S.C. § 623(f)((1).) There is no counterpart in the FEHA, where the only exceptions to the rule against age discrimination are if the act complained of was based on a bona fide occupational qualification or applicable security regulations of the United States or California. (Government Code § 12940) Further, in contrast to FEHA, disparate impact claims under the ADEA are not available to challenge hiring and firing actions. *Smith v. City of Jackson*, (2005) 544 U.S. 228, fn. 6) The federal statute (unlike FEHA) is further narrowed in that disparate impact claims are not available for job applicants or former employees

who have been terminated: "[T]he plain language of § 4(a)(2) leaves room for only one interpretation: Congress authorized only employees to bring disparate impact claims. (*Kleber v. CareFusion Corporation* (2019) 914 F.3d 480, 485) These significant differences between the two legislative schemes make it important to closely examine each when interpreting FEHA by looking to federal cases.

Defendants argue that age and experience are not equivalents for the purpose of the FEHA. (Defendants Memorandum, p. 15) Their argument is similar to that formerly used to contrast age and pay. *See Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30, which was legislatively overruled by Government Code section 12941: "There is nothing in the language of section 12942 which directly indicates that use of salary to differentiate between employees was intended by the Legislature to constitute age discrimination if by some chance it disproportionately affected older workers as a group." *Id.*, at 53.

The cases defendants cite interpreted ADEA, not FEHA. This is particularly perilous in light of the legislature's strong statement in Government Code section 12941:

> The Legislature hereby declares its rejection of the court of appeal opinion in Marks v. Loral Corp. 57 Cal.App.4th 30,The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employees may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination. The Legislature further reaffirms and declares its intent that the courts interpret the state's statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers.

Hazen Paper Co. v. Biggins (1993) 507 U.S. 604 cited by defendants, was an ADEA disparate *treatment* claim that was decided on an appeal from a jury verdict, and thus did not address pleading issues.

Garay v. Lowes Home Centers, LLC (D. Or. Nov. 14, 2017) 2017 WL 5473887, also cited by defendants, was not an FEHA case, and although the court dismissed the disparate impact claim, it stated: "Should Plaintiff learn of additional facts to support a claim for wage discrimination based on disparate impact, the Court will consider a properly supported motion to amend the complaint." *Id.* at *3.

Brady v. Livingood, (D.C.C.2004) 360 F.Supp.2d 94, also cited by defendants interpreted the Congressional Accountability Act, not the FEHA. In *Brady*, plaintiffs pleading did not identify the alleged policy that caused the alleged disparate treatment. While the court did dismiss the case, it stated: "[T]he D.C. Circuit has made it clear that the plaintiff need not even make out a prima facie case of discrimination in his complaint in order to survive a motion to dismiss, nor, for that matter, match facts to every element of a legal theory." *Id.*, at 100, citations and internal quotes omitted.

Hogan v. Metromail (2000) 107 F.Supp.2d 459 is similarly distinguishable. First, it interpreted the ADEA, not the FEHA. *Hogan* held "that an employment action grounded on its face in considerations other than age, can be permissible even if these considerations may also correlate with age." *Id.*, at 467. This is simply a restatement of the "reasonable factors other than age" exception that applies to ADEA, but is not relevant to FEHA. It should be noted that although the court in *Hogan* dismissed the disparate impact claim, it did so "with leave to replead factual allegations to support an inference of age-based disparate impact." *Id.* at 467.

As set forth above, plaintiffs have adequately plead a *prima facie* case for disparate impact age discrimination and defendants' demurrer to the first cause of action should be denied. If the Court is inclined to sustain the demurrer it should be without prejudice and with leave to amend. "[I]t is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff

shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. *Aubry v. Tri-City Hospital Dist.*, (1992) 2 Cal.4th 962. "Where the complaint is defective, in the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment." *Scott v. City of Indian Wells*, 6 Cal.3d 541, 549, internal quotes and citations omitted.

If the Court determines that the FAC does not contain sufficient statistical analysis to support a claim for disparate impact discrimination, plaintiffs will be able to amend their complaint to bolster their argument that the implementation of the 1,320-day limit to the AJP had a statistically significant disparate impact on older judges. [1]

IV. DEFENDANTS ARGUMENT REGARDING SUBGROUPING CANNOT PREVAIL

The weight of authority supports a finding that FEHA prohibits discrimination based on age, even where plaintiffs and others treated more favorably are both over the age of 40 years old. Defendants cite *Hall v. County of Los Angeles,* which was a class action on appeal from summary judgment. There plaintiffs attempted to compare employees of Auxiliary Legal Services, Inc. with employees of County Counsel. Here plaintiffs compare retired judges in the Assigned Judges Program with over 1,320 days of service with retired judges in the Assigned Judges Program with less than 1,320 days of service. All employees subject to the 1,320-day limit are in the same group: participants in the Assigned Judges Program.

[1] If necessary, Plaintiffs are prepared to submit additional fact allegations in an amended complaint, including 1) statistical evidence showing that the 1,320-day limit affects older retired judges significantly more often than younger retired judges; 2) evidence of statistically-significant age disparity between retired judges in the AJP who have reached the 1,320-day limit and retired judges in the AJP who have not reached that limit, and has not been caused by chance; 3) statistically significant evidence that retired judges in the AJP who have reached the 1,320-day limit are receiving fewer assignments than retired judges in the AJP who have not reached that limit.

Schechner and *Rudwall* were rulings on motions for summary judgment. *Schnechr v. KPIX-TV* (N.D. Cal., Jan 13, 2011) 2011 WL 109144 at *1; *Rudweall v. Blackrock, Inc.* (N.D. Cal., Feb.28, 2011) 2011 WL 767965, at *10. Further, the affected group in *Schechner* consisted of only five employees and that in *Rudwall* of only four employees. *See Schechner, supra,* at *1; *Rudwall, supra,* at *10. It is questionable whether such small samples are large enough to be statisticaly significant. *Id.* While the courts in *Schechner* and *Rudwall* (and defendants here) recognized that "older employees" are a protected group, they then proceed to argue that workers over 40 years of age are only protected against preferential treatment for workers under 40 years of age. This argument ignores the reasoning of the United States Supreme Court:

> The discrimination prohibited by the ADEA is discrimination "because of [an] individual's age," 29 U.S.C. § 623(a) (1), though the prohibition is "limited to individuals who are at least 40 years of age," § 631(a). This language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age. Or to put the point more concretely, there can be no greater inference of age discrimination (as opposed to "40 or over" discrimination) when a 40–year–old is replaced by a 39–year–old than when a 56– year–old is replaced by a 40–year–old. (O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996).[2]

Defendants attempt to distinguish *Karlo v. Pittsburgh Glass Works, LLC* (3d Cir. 2017) 849 F.3d 61 on the grounds that it is based on a Title VII case. They argue that the purpose of Title VII is to protect individuals, but that the policy behind the FEHA age discrimination

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[2] While it is true that *O'Connor* was a disparate treatment case, the Court's reasoning is equally applicable to a disparate impact case. As pointed out in *Karlo v. Pittsburgh Glass Works, LLC* (3d Cir. 2017) 849 F.3d 61, 71 "*O'Connor's* applicability is not diminished by the fact that it addressed a disparate-treatment claim. As demonstrated by the identical operative phrasing of § 623(a)(1) and § 623(a)(2), the two types of claims share the same 'ultimate legal issue.'" (*citations omitted*)

prohibition is to protect only workers over 40 years old as a group. *Plaintiffs Memorandum of Points and Authorities* at pp. 17-18. Defendants ignore the plain language of *Karlo:"*The ADEA's disparate-impact provision makes it unlawful for an employer 'to adversely affect [an employee's] status . . . because of an individual's age.' 29 U.S.C. § 623(a)(2). The plain text supports the viability of subgroup claims."

V. CONCLUSION

As noted above plaintiffs have acknowledged that this Court has concluded that defendants are entitled to legislative immunity. If the Court adheres to that ruling (which plaintiffs continue to believe is erroneous) on the demurrer plaintiffs believe that the most expeditious manner of addressing the issue of legislative immunity would be for the Court first to rule on that issue, and that it need not reach the other issues. However, if the Court decides to sustain the demurrer as to the pleading issues, it should do so only with leave to amend.

Dated July 26, 2019

FURTH SALEM MASON & LI LLP

/S/ Daniel S. Mason

Daniel S. Mason
Attorneys for Plaintiffs

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Case No. CGC-19-575842

PROOF OF SERVICE BY ELECTRONIC TRANSMISSION

I, Thomas W. Jackson, the undersigned, hereby declare as follows:

I am over the age of 18 years and am not a party to the within cause. I am employed by Furth Salem Mason & Li LLP in the County of Sonoma, State of California.

My email and business addresses are tjackson@fsmllaw.com; 640 Third Street, Second Floor, Santa Rosa, CA 95404-4418.

On July 26, 2019, I caused true and correct copies of the document(s) listed here:

- **DECLARATION OF DANIEL S. MASON IN SUPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

To be sent by e-filing via File & Serve Xpress and transmitting to the recipients designated on the Transaction Receipt located on the File & Serve Xpress website the document(s) listed above to the person(s) at the address(es) set forth below.

Robert A. Naeve (State Bar No. 106095) rnaeve@jonesday.com Cary D. Sullivan (State Bar No. 228527) carysullivan@jonesday.com JONES DAY 3161 Michelson Drive, Suite 800 Irvine, CA 92612 Telephone: +1.949.851.3939	Nathaniel P. Garrett (State Bar No. 248211) ngarrett@jonesday.com JONES DAY 555 California Street, Floor 26 San Francisco, CA 94101 Telephone: +1.415.875.5731

I declare under penalty of perjury that the foregoing is true and correct. Executed this 26th day of July, 2019, at Santa Rosa, California.

Thomas W. Jackson