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CHIEF JUSTICE TANI G. CANTIL-SAKAUYE

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, and JOHN SAPUNOR,

Plaintiffs,

v.

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

Defendants.

CASE NO. CGC-19-575842

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRERS TO SECOND AMENDED COMPLAINT

[Notice of Demurrers, Statement of Demurrers, and Declaration of Nathaniel P. Garrett Filed Concurrently Herewith]

DATE: December 27, 2021
TIME: 9:30 a.m.
DEPT: 302
JUDGE: Hon. Ethan P. Schulman

Complaint Filed: May 9, 2019
First Amd. Compl. Filed: May 28, 2019
Second Amd. Compl. Filed: Oct. 19, 2021

TABLE OF CONTENTS

Page

INTRODUCTION 5

BACKGROUND 5

A. The Temporary Assigned Judges Program ("TAJP"), and Promulgation of the 1,320-Day Service Limit and its Exceptions 5

B. Challenges to Plaintiffs' First Amended Complaint 7

1. The Superior Court Denied Plaintiffs' Request for a Preliminary Injunction 7

2. The Superior Court Sustained Defendants' Demurrer Without Leave to Amend 8

C. The Court of Appeal Issues a Qualified Reversal, Remanding One Limited Claim 8

D. Plaintiffs Amend Their Complaint – But Not in the Way the Court of Appeal Intended 10

ARGUMENT 11

I. THE FIRST CAUSE OF ACTION FOR DISPARATE IMPACT DISCRIMINATION IN VIOLATION OF FEHA SHOULD BE DISMISSED 11

A. Plaintiffs' FEHA Claim Should be Dismissed Because the SAC Fails to Identify an Actionable Employment Practice 12

B. Plaintiffs' FEHA Claim Should be Dismissed Because the SAC Fails to Allege an Adverse Employment Action 13

C. Plaintiffs' FEHA Claim Should be Dismissed Because the SAC Fails to Allege an Impact of Statistical Significance 14

II. THE SECOND CAUSE OF ACTION FOR VIOLATION OF THE CALIFORNIA CONSTITUTION SHOULD BE DISMISSED 17

A. Plaintiffs Did Not Appeal the Dismissal of Their Claim Under the California Constitution and Cannot Revive it Now 17

B. This Court Correctly Held that Plaintiffs Failed to State a Claim 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Akers v. County of San Diego
(2002) 95 Cal.App.4th 1441 14

Bach v. County of Butte
(1989) 215 Cal.App.3d 294 17

France v. Johnson
(9th Cir. 2015) 795 F.3d 1170 16

Hanna v. City of Los Angeles
(1989) 212 Cal.App.3d 363 17

Jumaane v. City of Los Angeles
(2015) 241 Cal.App.4th 1390 ..... 12, 15

K.H. v. Secretary of the Department of Homeland Security
(N.D. Cal. 2017) 263 F.Supp.3d 788 16

Katz v. Regents of the University of California
(9th Cir. 2000) 229 F.3d 831 16

Mahler v. Jud. Council of California
(2021) 67 Cal.App.5th 82 ..... passim

McRae v. Department of Corrections & Rehabilitation
(2006) 142 Cal.App.4th 377 13

Meacham v. Knolls Atomic Power Laboratory
(2008) 554 U.S. 84 12

Mosk v. Superior Court
(1979) 25 Cal.3d 474 18

People v. Ferguson
(1932) 124 Cal.App. 221 18

Rose v. Wells Fargo & Co.
(9th Cir. 1990) 902 F.2d 1417 15

Stockwell v. City and County of San Francisco
(9th Cir. 2014) 749 F.3d 1107 12

TABLE OF AUTHORITIES

Page

Stout v. Potter
(9th Cir. 2002) 276 F.3d 1118 12

Watson v. Fort Worth Bank and Trust
(1988) 487 U.S. 977 ..... 12, 15

Yanowitz v. L'Oreal USA, Inc.
(2005) 36 Cal.4th 1028 13

Constitutional Provisions

Cal. Const., art. VI, § 6 ..... passim

Statutes

Gov't Code § 75025 11

Other Authorities

96 Ops. Cal. Atty. Gen. 36 (2013) 6, 18

INTRODUCTION

This action challenges changes to California's Temporary Assigned Judges Program ("TAJP"), that, among other things, limit retired judges from sitting on assignment for more than 1,320 days unless they are granted an exception. Plaintiffs alleged in their First Amended Complaint ("FAC") that this 1,320-day service limit discriminates against older retired judges on the basis of age in violation of the Fair Employment and Housing Act ("FEHA"), and violates article VI, section 6 of the California Constitution. This Court sustained Defendants' demurrer to the FAC. Plaintiffs appealed as to their FEHA claim (but expressly abandoned their claim under the California Constitution).

On appeal, the Court of Appeal held that legislative immunity completely shields Defendants from *any* claim based on the *promulgation* of policy changes to the TAJP. The Court further held that Defendants' *implementation* of those policy changes—*i.e.*, the particular assignments and exceptions issued by the Chief Justice—are protected by judicial immunity, but that judicial immunity only forecloses monetary and injunctive relief, not declaratory relief. The Court of Appeal therefore reversed and remanded to give Plaintiffs a chance to amend their complaint to state one, limited claim for declaratory relief: that Defendants' implementation of the TAJP disparately impacts older judges in violation of the FEHA.

Plaintiffs have now filed a Second Amended Complaint ("SAC"), but it wholly disregards the narrow grounds on which the Court of Appeal allowed a remand. Hence, and for the reasons more fully explained below, Defendants hereby demur to the SAC for failure to allege facts sufficient to constitute a cause of action for disparate impact discrimination, and request that their demurrers be sustained with prejudice.

BACKGROUND

A. The Temporary Assigned Judges Program ("TAJP"), and Promulgation of the 1,320-Day Service Limit and its Exceptions.

Since 1951, the Chair of the Judicial Council—*i.e.*, the Chief Justice—has been authorized to assign retired judges, with their consent, "to sit in a court of like jurisdiction as, or higher jurisdiction than, that court from which he was retired." *Mahler v. Jud. Council of*

California (2021) 67 Cal.App.5th 82, 94. The Chief Justice's appointment authority is set forth in article VI, section 6, subdivision (e) of the California Constitution, which provides that "[t]he Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court."

The Judicial Council adopted the TAJP in 1996 "to provide administrative support to the Chief Justice in the exercise of her constitutional authority to assign and reassign judges, including retired judges." *Mahler*, 67 Cal.App.5th at 96. Assisted by Judicial Council staff, and pursuant to her constitutional mandate, the Chief Justice "'issues temporary judicial assignment orders to active or retired judges and justices in response to a variety of circumstances, including vacancies, illnesses, disqualifications, and calendar congestion in the courts.'" *Id.* at 97 (quoting 96 Ops. Cal. Atty. Gen. 36, 37 (2013).) It is well-recognized that the Chief Justice is "invested with 'discretion of the broadest character' in the assignment of judges," that her discretion "encompasses both the non-renewal and the termination of such assignments," and that the "manner, method, or criteria for selection of duly qualified assigned judges is within" the Chief Justice's discretionary powers. *Ibid.* (quotation marks and citation omitted).

In 2017, concerns about the TAJP were brought to the attention of the Chief Justice, who directed Judicial Council staff to conduct an internal review. *Mahler*, 67 Cal.App.5th at 97. At the same time, the State Auditor initiated a review of the TAJP in response to concerns that retired judges were being assigned to courts with judicial "surpluses." *Ibid.* As the result of this internal review, the Chief Justice made a number of changes to the TAJP, including limiting participation to 1,320 days (the equivalent of a single, six-year term of a full-time elected superior court judge), with exceptions. *Id.* at 98. In particular, the 1,320-day service limit:

> can be adjusted if a superior court seeking TAJP assistance shows, among other things, the absence of other available retired judges or if there is a strong need for a specific retired judge. Accordingly, retired judges who reach the 1,320-day service limit can continue to enroll in TAJP and may be assigned to a superior court submitting an exception report that demonstrates "why it is both prudent and necessary to reappoint the judge specifically requested by the court."

Ibid. (citation omitted).

The Chief Justice's changes to the TAJP were announced in May 2018, and became effective on July 1, 2018, after having been reviewed by the Judicial Council's Trial Court Presiding Judges Committee, the Court Executives Advisory Committee, and the Administrative Presiding Justices Advisory Committee. *Mahler*, 67 Cal.App.5th at 98. Before adoption, Judicial Council staff, on behalf of the Chief Justice, conducted more than 50 transition meetings and conference calls with individual presiding judges and court executive officers. *Ibid.*

B. Challenges to Plaintiffs' First Amended Complaint.

Plaintiffs are seven retired superior court judges, each over 70 years old, who have participated in the TAJP for more than 1,320 days. SAC ¶ 2. They filed their original complaint on May 9, 2019, and their FAC on May 28, 2019, each naming the Chief Justice in her official capacity as Chair of the Judicial Council, and the Judicial Council. *Mahler*, 67 Cal.App.5th at 99.

In general, the FAC challenged "recent changes to the [TAJP] program made by the Chief Justice," including the imposition of a 1,320-day service limit. *Mahler*, 67 Cal.App.5th at 99. Plaintiffs did "not claim that they have been denied any appointments," but nonetheless alleged that "the changes, and the 1,320-day service limit, in particular, subjects them to 'different' conditions than 'younger judges.'" *Id.* at 98-99. Plaintiffs alleged two causes of action—disparate impact age discrimination in violation of FEHA and violation of Article VI, section 6(e) of the California Constitution—and sought monetary relief, as well as declaratory and injunctive relief. *Id.* at 99.

1. The Superior Court Denied Plaintiffs' Request for a Preliminary Injunction.

Shortly after filing suit, Plaintiffs moved for a preliminary injunction to enjoin enforcement of the 1,320-day service limit. The superior court denied Plaintiffs' motion in a July 10, 2019 order, holding that Plaintiffs were unlikely to prevail on the merits because the suit was barred by legislative immunity and because Plaintiffs could not state a viable claim for disparate impact age discrimination under FEHA. *Mahler*, 67 Cal.App.5th at 99. On legislative immunity, the court explained that changes to the TAJP were "'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: detailed policy analysis, use of discretion, implication of budgetary priorities, and prospective application.'" *Ibid.* As to the sufficiency of Plaintiffs' allegations, the Court ruled that "experience may but does not necessarily correlate with age, because age and work experience are analytically different" and Defendants' evidence "convincingly show[ed]" that "whether a given retired judge has already reached the 1,320 limit does not correlate to his or her age or even to the number of years he or she has served" in the program. *See ibid.*

2. The Superior Court Sustained Defendants' Demurrer Without Leave to Amend.

Defendants then demurred on the same grounds. The Court sustained Defendants' demurrer on the basis of legislative immunity, referring back to its prior ruling denying injunctive relief. *Mahler*, 67 Cal.App.5th at 100. The Court also provided additional grounds for dismissing Plaintiffs' constitutional claim: that Plaintiffs did not oppose Defendants' demurrer as to that claim, that there is no private right of action to enforce the relevant constitutional provision, and that the complaint failed to adequately allege a violation of that provision.

Plaintiffs appealed, but they limited their challenge to the trial court's ruling on their FEHA claim. Plaintiffs expressly did "not challenge in this appeal the trial court's ruling that there is no cause of action under Cal. Const., art. VI, § 6, (e)." *Mahler v. Judicial Council of Cal.*, Opening Brief, 2020 WL 1290458, at *17 n.8.

C. The Court of Appeal Issues a Qualified Reversal, Remanding One Limited Claim.

The Court of Appeal reversed and remanded for further proceedings, but it strictly limited the claims that Plaintiffs could pursue on remand.

The Court of Appeal began by affirming the superior court's holding that the Chief Justice's promulgation of changes to the TAJP was "legislative in character," and fell within the doctrine of legislative immunity. *Mahler*, 67 Cal.App.4th at 108. The Court thus held that legislative immunity "shield[s] the Chief Justice and the Judicial Council from suit, regardless of the nature of the relief sought, to the extent plaintiffs' discrimination claim is based on the Chief Justice's *promulgation* of changes to the TAJP." *Id.* at 91 (emphasis added). Any claim based upon a change in TAJP policy therefore is completely barred. *Id.* at 108.

The Court observed that in addition to promulgating changes to the TAJP, the Chief

Justice also "makes individual assignments pursuant to that policy." *Mahler*, 67 Cal.App.4th at 108. This function is "different in character" and not protected by legislative immunity. *Ibid.* However, the Chief Justice's "enforcement of the challenged provisions of the TAJP through individual judicial assignments" does "come within the bounds of judicial immunity (and also discretionary immunity)." *Id.* at 92, 108. And judicial immunity "foreclose[s] a damages award" (*id.* at 110 n.15), as well as injunctive relief where declaratory relief is available (*id.* at 110): the *only* form of relief unaffected by judicial immunity is "prospective declaratory relief." *Id.* at 92.

In short, immunity doctrines permit Plaintiffs to pursue only the following: a cause of action under FEHA "for prospective declaratory relief against the Chief Justice and Judicial Council based on 'enforcement' of the new TAJP requirements." *Mahler*, 67 Cal.App.4th at 107. Plaintiffs cannot seek monetary damages. And they cannot predicate a claim on the Chief Justice's promulgation of amendments to the TAJP – only her enforcement of them through individual judicial assignments.

With respect to this limited claim, the Court of Appeal was careful to emphasize that Plaintiffs had not yet stated a valid cause of action. It noted, for example, that although Plaintiffs alleged they would be adversely impacted by the 1,320-day service limit, they "have not, at this point, alleged they have received no assignments." *Mahler*, 67 Cal.App.5th at 107. This defect was not "fatal" yet, however, because Plaintiffs "filed their lawsuit only six months after the new provisions went into effect." *Ibid.* Thus, the Court ruled, Plaintiffs should be given one more opportunity to "allege with respect to implementation and/or enforcement of the new TAJP provisions … that he or she applied for and was accepted into the program but then, in contrast to his or her prior service, received no appointments." *Ibid.*

Finally, the Court provided guidance for remand regarding what Plaintiffs must allege to state a valid disparate impact claim under FEHA. The Court explained that, in a disparate impact case, a plaintiff must allege and prove, "usually through statistical disparities," that facially neutral employment practices have such significant adverse effects on protected groups that they are "in operation ... functionally equivalent to intentional discrimination." *Mahler*, 67 Cal.App.5th at 113. The Court agreed with Plaintiffs that a disparate impact claim theoretically

can "be based on impact on a 'subgroup' of the class protected by the FEHA (persons 40 years of age and over)." *Id.* at 116. But it warned that any disparity must be "significant" to make out a prima facie case. *Id.* at 127. And while "express[ing] no opinion as to whether plaintiffs will be able to sufficiently plead such a claim," the Court remanded to give them an opportunity to try. *Id.* at 128.

D. Plaintiffs Amend Their Complaint – But Not in the Way the Court of Appeal Intended.

Plaintiffs filed their SAC on October 19, 2021. However, they did not attempt to allege that Defendants refused to approve particular TAJP assignments because of the 1,320-day service limit. Instead, the SAC reads as if the Court of Appeal rendered an unqualified reversal and sent this case back to the beginning.

Plaintiffs' SAC continues to assert two causes of action—a disparate impact claim under FEHA and a claim for violation of the California Constitution—even though Plaintiffs expressly declined to appeal the dismissal of their constitutional claim. SAC ¶¶ 53–55. And the SAC continues to seek "back pay, front pay, and other monetary relief" from the Judicial Council as to the FEHA cause of action (*id.* at 13–14), even though the Court of Appeal limited Plaintiffs to prospective declaratory relief.

Even more glaring, Plaintiffs continue to predicate their claims on the Chief Justice's *promulgation* of amendments to the TAJP (adopted of the 1,320-day service limit), rather than on her *enforcement* of the 1,320-day service limit (*i.e.*, the making of individual assignments pursuant to that policy). Thus, Plaintiffs allege that Defendants unlawfully "changed the terms, conditions, and privileges of employment of retired judges participating in the [T]AJP by limiting to 1,320 the number of days a retired judge may participate in the [T]AJP." SAC ¶ 10. And Plaintiffs allege that "Defendants' *policy*" amounts to illegal age discrimination because it has a disparate impact on "participants in the [T]AJP who are over the age of 70." *Id.* ¶ 34, 35 (emphasis added).

What Plaintiffs do not allege is a single instance in which Defendants refused a TAJP assignment because a particular judge had reached or exceeded the 1,320-day service limit. To

the contrary, the SAC concedes that retired judges who have served more than 1,320 days in the TAJP may be granted exceptions allowing them to receive additional assignments. SAC ¶¶ 41-44. The SAC generally alleges that "[m]ost assignments under the exceptions are either to Family Law Departments or to courts located in communities far from the home counties of Plaintiffs." *Id*. ¶ 42. But Plaintiffs do not allege that any of them actually have been limited to assignments within a Family Law Department, or at a distant courthouse.

Plaintiffs double down on their error when they attempt to allege a significant statistical disparity between retired judges over the age of 70, and retired judges under the age of 70. Thus, Plaintiffs allege, and illustrate with a bar chart, that 7% of TAJP judges under the age of 70 have served for 1,320 days, while 23% of the TAJP judges age 70 and older have served for 1,320 days. SAC ¶ 32. Plaintiffs further allege, and provide another bar chart, that the average age of a retired judge who has served more than 1,320 days in the TAJP is 76, whereas the average age of a retired judge who has served less than 1,320 days is 72. *Id.* ¶ 30.

Again, however, the only statistical disparity Plaintiffs have attempted to measure is a difference between how judges of a certain age are affected by the *promulgation* of the 1,320-day service limit. The SAC never attempts to compare how judges over 70 and judges under 70 are affected by the Chief Justice's *enforcement* of the 1,320-day service limit and its exceptions, *i.e.*, whether there is a statistically significant disparity in the way that members of each subgroup are actually assigned pursuant to that policy.

ARGUMENT

I. THE FIRST CAUSE OF ACTION FOR DISPARATE IMPACT DISCRIMINATION IN VIOLATION OF FEHA SHOULD BE DISMISSED.

Plaintiffs have not alleged, and cannot truthfully allege, that Defendants adopted the 1,320-day service limit and its exceptions in order to discriminate on the basis of age. After all, *all* TAJP participants are retired judges over the age of 60. *See* Gov't Code § 75025. Their claim, rather, is limited to one for disparate impact.

Pursuant to the Court of Appeal's limited remand, Plaintiffs can only attempt to establish a viable FEHA claim by alleging (and ultimately proving) that Defendants' *application* of the

1,320-day service limit *and its exceptions* resulted in the *actual denial* of TAJP assignments to a group of retired judges over 70 years old – and that the rate of denials is so significant, as compared to judges under 70, that Defendants' conduct is functionally equivalent to intentional discrimination.

This is, admittedly, a demanding burden. And Plaintiffs do not even attempt to carry it. Rather than focusing on actual harm resulting from Defendants' enforcement of the 1,320-day service limit, and its exceptions, Plaintiffs allege merely that more TAJP judges over the age of 70 have worked 1,320 days in the TAJP. That claim is both unremarkable (inasmuch as judges necessarily work a greater number of days the longer they are in the TAJP) and insufficient as a matter of law since Defendants' *promulgation* of the 1,320-day limit, and the effects of that promulgation, are protected by legislative immunity.

A. Plaintiffs' FEHA Claim Should be Dismissed Because the SAC Fails to Identify an Actionable Employment Practice.

The first element of a disparate impact claim is a requirement that the plaintiff identify the *employment practice* that caused their harm. *See* CACI 2502; *Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1405 (first step is identifying "the employment practice at issue").

"Identifying a specific practice is not a trivial burden" in age discrimination cases alleging disparate impact. *Meacham v. Knolls Atomic Power Laboratory* (2008) 554 U.S. 84, 101. "Requiring plaintiffs to name a specific employment practice 'has bite,' both on the merits and for purposes of determining whether there is a common question in a disparate impact case." *Stockwell v. City and County of San Francisco* (9th Cir. 2014) 749 F.3d 1107, 1114 (citation omitted). At the threshold, Plaintiffs must identify and isolate "the specific employment practices that are allegedly responsible for any observed statistical disparities." *Watson v. Fort Worth Bank and Trust* (1988) 487 U.S. 977, 994; *see also Stout v. Potter* (9th Cir. 2002) 276 F.3d 1118, 1124 ("Plaintiffs generally cannot attack an overall decisionmaking process in the disparate impact context, but must instead identify the particular element or practice within the process that causes an adverse impact.").

Here, Plaintiffs allege that they "challenge disabling eligibility criteria changes to [the

TAJP] program made by defendants." SAC ¶ 3. Plaintiffs expressly allege that "[t]hese changes"—*i.e.*, the adoption of a 1,320-day service limit—"constitute [the] unlawful employment practice." *Id.* ¶ 5. Plaintiffs allege that Defendants have "implemented, and are enforcing, this new eligibility policy," but the SAC is clear that the policy itself—*i.e.*, the "impos[ition of] disqualifying eligibility criteria on plaintiffs"—is the challenged practice. *Id.* ¶ 36.

Plaintiffs' allegations fall short because the Court of Appeal made clear that the doctrine of legislative immunity precludes Plaintiffs from challenging Defendants "promulgation of the revised TAJP." *Mahler*, 67 Cal.App.5th at 106. As the court put it, "[l]egislative immunity does, indeed, shield the Chief Justice and the Judicial Council from suit, regardless of the nature of the relief sought, to the extent plaintiffs' discrimination claim is based on the Chief Justice's promulgation of changes to the TAJP." *Id.* at 92.

Plaintiffs' SAC defies this unambiguous ruling. The actionable employment practice cannot be Defendants' adoption of a 1,320-day service limit. And because the SAC fails to isolate and identify any other employment practice, Plaintiffs' FEHA claim fails at the first step.

B. Plaintiffs' FEHA Claim Should be Dismissed Because the SAC Fails to Allege an Adverse Employment Action.

For similar reasons, Plaintiffs' FEHA claim fails also because the SAC does not allege an *adverse* employment action.

To state a valid claim, a FEHA plaintiff must not only identify an employment practice, but an employment practice "that had a disproportionate *adverse effect* on" a protected class. CACI 2502 (emphasis added). The term "adverse employment action" "does not appear in the language of the FEHA or in title VII, but has become a familiar shorthand expression referring to the kind, nature, or degree of adverse action against an employee that will support a cause of action under a relevant provision of an employment discrimination statute." *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1049. The relevant concept is that not every type of employment practice can form the basis of a FEHA claim: to be actionable, the practice must "materially affect the terms and conditions of employment." *Id.* at 1036; *see also McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 386–387 ("The

plaintiff must show the employer's retaliatory actions had a detrimental and substantial effect on the plaintiff's employment.").

Here, however, Plaintiffs do not identify any actionable conduct that had a material impact on the terms and conditions of their employment. The Court of Appeal's opinion in this matter is crystal clear that the *only* conduct not absolutely immune from suit is *implementation* of the TAJP "through individual judicial assignments." *Mahler*, 67 Cal.App.5th at 92. Yet Plaintiffs do not allege that Defendants have implemented individual judicial assignments in such a way as to have a detrimental and substantial effect on their employment. Indeed, Plaintiffs do not identify a *single* instance in which they have been prevented from serving under the TAJP. *See id*. at 107 (Plaintiffs must allege that they "applied for and [were] accepted into the program but then, in contrast to [their] prior service, received no appointments.").

On the contrary, Plaintiffs acknowledge that judges who have served more than 1,320 days in the TAJP may be granted exceptions allowing them to receive additional assignments. SAC ¶¶ 41–43. Tellingly, Plaintiffs do not allege that they have been denied such exceptions.

To be sure, the SAC alleges that "[m]ost assignments under the exceptions are either to Family Law Departments or to courts located in communities far from the home counties of Plaintiffs." SAC ¶ 43. The SAC further alleges that "acceptance of any such assignments requires considerable travel and long absences from [Plaintiffs'] homes" working "in unfamiliar courts with unfamiliar practices." *Ibid.* But the SAC does not explain how these supposed burdens are the result of Defendants' individual judicial assignments – as opposed to the result of presiding judges requiring greater temporary assistance in these departments and locations. Nor does the SAC identify how, if at all, these general issues have actually affected Plaintiffs. Regardless, if the only harm Plaintiffs can identify is being assigned to a less desirable division or courthouse, that hardly would be sufficient to constitute an adverse employment action. *See Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455 ("A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient.").

C. Plaintiffs' FEHA Claim Should be Dismissed Because the SAC Fails to Allege an Impact of Statistical Significance.

Plaintiffs' FEHA cause of action also fails to allege that Defendants' enforcement of the TAJP program—the only conduct not immune from suit—had a *statistically significant* adverse impact on a protected group, as is required to establish disparate impact discrimination.

As the Court of Appeal explained, "'in a disparate impact case, a plaintiff must allege and prove, usually through statistical disparities, that facially neutral employment practices without a deliberately discriminatory motive nevertheless have such significant adverse effects on protected groups that they are in operation functionally equivalent to intentional discrimination.'" *Mahler*, 67 Cal.App.5th at 113 (quoting *Jumaane*, 241 Cal.App.4th at 1405) (simplified)). Thus here, Plaintiffs were required to allege statistical disparities demonstrating that the Chief Justice's enforcement of the TAJP has had such significant adverse effects on a protected group that her enforcement has, in operation, "caused the exclusion of applicants for jobs or promotions *because of* their membership in a protected group." *Watson*, 487 U.S. at 994 (emphasis added). "The statistical disparities 'must be sufficiently substantial that they raise such an inference of causation.'" *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1424 (citation omitted).

Plaintiffs' statistics and bar charts fail to raise an inference of causation twice over. *First*, Plaintiffs fail to allege that Defendants' *implementation* of the TAJP had any statistically disparate impact on retired judges of a certain age. To be sure, the SAC alleges that 23% of TAJP judges over the age of 70 have served 1,320 days, and that there is a four-year gap in the average ages of TAJP judges who have and have not reached that service limit. SAC ¶¶ 30, 32. But those statistics measure the wrong metric: the average age of judges affected by the *promulgation* of the 1,320-day service limit, rather than the average age of judges affected by the *implementation* of that policy through individual judicial assignments.

The distinction is critical. The SAC and the Court of Appeal's decision both recognize that the TAJP provides for exceptions to the 1,320-day service limit. *Mahler*, 67 Cal.App.5th at 98; SAC ¶ 42. Hence, judges who have worked in the TAJP for more than 1,320 days can still sit, and in fact *are sitting* on assignment. Plaintiffs' focus on the TAJP policy itself disregards the

Court of Appeal's clear dictate that the *only* conduct not absolutely immune from suit here is the implementation of the TAJP through individual judicial assignments. *Mahler,* 67 Cal.App.5th at 92. Plaintiffs failed to allege *any* disparity in the ages of those who did and did not receive such assignments, let alone a statistically significant one.

Second, and even assuming that Plaintiffs' statistics measure the correct disparity, the disparity identified in the SAC is not *statistically significant*. In the context of age discrimination, "an average age difference of ten years or more between the plaintiff and the replacements [is] presumptively substantial, whereas *an age difference of less than ten years [is] presumptively insubstantial*." *France v. Johnson* (9th Cir. 2015) 795 F.3d 1170, 1174 (emphasis added). Thus, courts have held that a five-year age difference, *see Katz v. Regents of the University of California* (9th Cir. 2000) 229 F.3d 831, 836, and a three-year age difference, *see K.H. v. Secretary of the Department of Homeland Security* (N.D. Cal. 2017) 263 F.Supp.3d 788, 796, are insufficient to support disparate impact claims.

Here, SAC paragraph 30 and its bar chart allege that the average age of TAJP judges who have served for 1,320 days is 72, whereas that the average age of TAJP judges who have not served for 1,320 days is 76. SAC ¶ 30. In other words, Plaintiffs allege only a *four-year* age difference between those judges "affected" and "unaffected" by the 1,320-day service limit. SAC ¶ 30. Under *K.H.* and *Katz*, this age gap is insubstantial as a matter of law, and is simply too small to permit an inference that Plaintiffs are affected by the 1,320-day service limit because of their age (rather than because of their length of service in the program).

SAC paragraph 32 and its additional bar chart, regarding the percentage of judges over the age of 70 who have reached the 1,320-day service limit, fares no better. In *Katz*, plaintiffs presented evidence that their employer's decision adversely impacted 27% of employees over the age of 60. 229 F.3d at 836. The court held this statistic was "insufficient to raise an inference that the disparate impact fell upon employees by virtue of their membership in a protected age group." *Ibid*. Plaintiffs here allege an even smaller impact: that 23% of TAJP judges over the age of 70 have served 1,320 days in the program. As in *Katz*, the fact that less than one-quarter of

retired judges over the age of 70 purportedly are affected by the 1,320-day service limit suggests that Plaintiffs are affected by the rule not because of their age, but because of their length of service in the program.

II. THE SECOND CAUSE OF ACTION FOR VIOLATION OF THE CALIFORNIA CONSTITUTION SHOULD BE DISMISSED.

Plaintiffs' SAC continues to assert a cause of action under article VI, section 6 of the California constitution. But Plaintiffs did not oppose Defendants' first demurrer to this cause of action, and expressly did not challenge its dismissal on appeal. Plaintiffs cannot revive this long-dead claim now, which fails in any event on the merits.

A. Plaintiffs Did Not Appeal the Dismissal of Their Claim Under the California Constitution and Cannot Revive it Now.

Defendants demurred to the constitutional claim in the FAC on the ground that nothing in the constitution compels the Chief Justice to assign a particular retired judge. Plaintiffs did not oppose.

This Court sustained the demurrer, reasoning that:

> [P]laintiffs do not contest defendants' showing that their second cause of action, which is brought under article VI, section 6 of the California Constitution, fails to state a claim. That is so both (i) because there is no private right of action to enforce that provision and (ii) because the first amended complaint does not allege any facts constituting a violation of article VI, section 6.

Order Sustaining Demurrer to First Am. Compl. at pp. 1-2 (Aug. 8, 2019). Plaintiffs then expressly forfeited the claim on appeal. *See Mahler v. Judicial Council of Cal.*, Opening Brief, 2020 WL 1290458, at *17 n.8 ("Appellants do not challenge in this appeal the trial court's ruling that there is no cause of action under Cal. Const., art. VI, § 6, (e).")

"Where there has been an appellate decision in a case, the trial court is reinvested with jurisdiction of the cause, but only such jurisdiction as is defined by the terms of the remittitur." *Hanna v. City of Los Angeles* (1989) 212 Cal.App.3d 363, 376. "The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case," if that is beyond the scope of the remittitur, "and, if it should do so, the judgment rendered therein

would be void." *Bach v. County of Butte* (1989) 215 Cal.App.3d 294, 301.

Plaintiffs here waived any challenge to this Court's dismissal of the constitutional claim by failing to challenge the Court's reasoning on appeal. *See, e.g.*, *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-85; *1119 Delaware v. Continental Land Title Co.* (1993) 16 Cal.App.4th 992, 1004. The Court of Appeal's qualified reversal does not undo resolution of every claim; rather, because Plaintiffs' FEHA claim was the only claim that was appealed, that was the only claim the Court of Appeal remanded. Remand is therefore limited to Plaintiffs' FEHA claim.

B. This Court Correctly Held that Plaintiffs Failed to State a Claim.

Plaintiffs' claim under the California Constitution fails in any event; as this Court previously held, Plaintiffs do not allege any facts constituting a violation of article VI, section 6. (*See* SAC ¶¶ 53–55.)

Section 6(e) of article VI provides that the Chief Justice "shall seek ... to equalize the work of judges," and "may provide for the assignment of any judge to another court." "'The Constitution gives the Chief Justice broad authority to expedite the work of the courts [citation], and implicit in that authority is the Chief Justice's power to assign judges to assist the Supreme Court when regular Supreme Court justices are disqualified. Such assignments have become commonplace.'" *Mahler*, 67 Cal.App.5th at 95 (quoting *Mosk v. Superior Court* (1979) 25 Cal.3d 474, 481-82). It is further implicit, since "[t]here is no constitutional provision, statute, or court rule which prescribes the manner in which assigned judges are to be selected," that the "manner, method, or criteria for selection of duly qualified assigned judges is within the inherent power of the Supreme Court and within the discretion of the Chief Justice in the exercise of her constitutional authority to make the assignments." *Mosk*, 25 Cal.3d at 482-83. In short, the Chief Justice has "discretion of the broadest character" in the assignment of judges. *People v. Ferguson* (1932) 124 Cal.App. 221, 231. And this discretion "in the making of judicial assignments generally encompasses both the non-renewal and the termination of such assignments." 96 Ops. Cal. Atty. Gen. 36, *5 (July 25, 2013).

To that end, the promulgation of a 1,320-day service limit equalizes the work of retired judges by ensuring that each judge can participate in the program and that no particular judge disproportionately consumes assignment opportunities. It also equalizes the work of judges by ensuring that a retired judge, who is otherwise not subject to voter approval, serves no longer than the equivalent of an elected judicial term of six years for an active judge. As the Court of Appeal noted, the State Auditor reviewed "these changes to the TAJP, and ultimately reported that '[b]y modifying the process to establish metrics for judicial participation and changing how it allocates service days and funds in the AJP, the Judicial Council has taken steps to administer the AJP in a more efficient manner.'" *Mahler*, 67 Cal.App.5th at 97.

Regardless, legislative immunity bars any claim based on *promulgation* of the 1,320-day service limit. And the SAC does not identify anything about any individual assignment that might run afoul of the Chief Justice's broad discretionary powers. That is, Plaintiffs do not even attempt to explain how the Chief Justice has *enforced* the TAJP rules in a manner that defies her constitutional power to provide for the assignment of a retired judge.

In passing, Plaintiffs also invoke section 6(d), which authorizes the Judicial Council to adopt "rules for court administration, practice and procedure," so long as such rules are "not inconsistent with statute." (*See* SAC ¶ 55.) But this claim, which Plaintiffs also failed to raise on appeal, rests entirely on proving that the TAJP amendments violate FEHA, which, as explained above, they do not.

CONCLUSION

For these reasons, Defendants' demurrer should be sustained with prejudice.

Dated: November 22, 2021.

JONES DAY

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