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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 APUNOR, 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

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO FIRST AMENDED COMPLAINT

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

DATE: August 8, 2019
TIME: 9:30 a.m.
DEPT: 302
JUDGE: Hon. Ethan P. Schulman

Complaint Filed: May 9, 2019

Reservation No. 07030808-14

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Page

Constitutional Provisions

INTRODUCTION

Plaintiffs are eight retired superior court judges; they object to recent changes to the Temporary Assigned Judges Program ("TAJP"), a statewide program designed to provide courts with temporary assistance when unanticipated workload cannot be adequately addressed through other, available means.

In 2018, Defendants amended the TAJP so that, *inter alia*, retired judges generally would not sit on assignment for more than 1,320 days, which is the equivalent of a full judicial term of six years on a full-time basis. Plaintiffs, who have already sat on assignment for more than 1,320 days, claim the new policy discriminates on the basis of age in violation of the Fair Employment and Housing Act ("FEHA"), Government Code section 12940(a). Plaintiffs also allege that the 1,320-day service policy violates article VI, section 6 of the California Constitution.

On July 10, 2019, this Court denied Plaintiffs' motion for preliminary injunction, holding that Plaintiffs had failed to show some possibility of success on the merits. For the same reasons as set forth in this Court's order, Plaintiffs' complaint is deficient on its face, and Defendants' demurrer should be sustained.

First, Plaintiffs' claims are barred by the doctrine of legislative immunity because Defendants were acting in a legislative capacity when they made discretionary policy changes to the TAJP. Plaintiffs' claims, which challenge the policy itself, cannot support either monetary or injunctive relief. In addition, Plaintiffs' damages claims against Chief Justice Tani G. Cantil-Sakauye are barred by the California Tort Claims Act because she undertook a basic policy decision in amending the TAJP to include a 1,320-day service limit.

Second, Plaintiffs fail to allege a prima facie case for disparate impact discrimination under FEHA. The First Amended Complaint ("FAC") lacks any factual allegations or statistical evidence demonstrating a causal connection between the 1,320-day service limit and a disparate impact on retired judges of a particular age. In actuality, the FAC alleges that the 1,320-day service limit distinguishes between participants in the TAJP on the basis of their service in the program – not their age. The sparse and summary allegations in the FAC do not bridge the gap.

Moreover, Plaintiffs' disparate impact claim is predicated on an impermissible

subgrouping theory. Disparate impact claims are intended to protect employees over forty as a group; thus, a disparate impact claim requires allegations and proof that employees over forty years old were disproportionately affected as compared to employees under forty. Yet *all* participants in the TAJP are over forty. Accordingly, Plaintiffs can proceed, if at all, only by attempting to show that a particular subgroup of protected employees was impacted as compared to another subgroup of protected employees. Courts that have considered this theory of disparate impact discrimination under FEHA have rejected it, and this Court should as well.

Third, Plaintiffs fail to allege facts constituting a claim under article VI, section 6, of the California Constitution, which (as Plaintiffs previously conceded) is derivative of their FEHA claim. Plaintiffs have no private right of action—for damages or an injunction—under article VI. In any event, Plaintiffs do not allege Defendants violated the Constitution by amending the TAJP. The Constitution expressly grants the Chief Justice the discretion to administer the TAJP, which she did in adopting criteria that will promote good government and ensure that retired judges do not serve longer in the TAJP than active judges are permitted to serve before an election.

For these reasons, the demurrer should be sustained with prejudice.

BACKGROUND

A. Plaintiffs' Factual Allegations.

Plaintiffs challenge recent changes to the TAJP implemented by Defendants, the Judicial Council of California and Chief Justice Tani G. Cantil-Sakauye. FAC ¶ 1.

Article VI, section 6(e) of the California Constitution provides that the Chief Justice "shall seek to expedite judicial business and to equalize the work of judges," and "may provide for the assignment of any judge to another court … with the judge's consent." FAC ¶ 3 (quoting Cal. Const. art. VI, § 6(e)). Section 6(e) provides that "[a] retired judge who consents may be assigned to any court." *Id.*

According to the FAC, the TAJP establishes the structure by which the Chief Justice "temporarily assigns retired judges to fill judicial vacancies and to cover for vacations, illnesses, disqualification and other absences." FAC ¶ 2. To be eligible to participate in the TAJP, a retired judge must not have been defeated in an election for office, must not have been removed from

office by the Commission on Judicial Performance, and must have met minimum age and years-of-service requirements. *Id.* ¶ 4 (citing Gov't Code § 75025). To remain in the program, a retired judge must, at a minimum, "serve at least 25 days each fiscal year." *Id.* ¶ 5. Plaintiffs allege that until May 21, 2018, there was no maximum limit on the number of days a retired judge could participate in the TAJP. *Id.* ¶ 7.

On May 21, 2018, Defendants limited the number of days a retired judge can participate in the TAJP to 1,320-service days. FAC ¶ 7. The FAC alleges that all plaintiffs have already accumulated over 1,320-service days in the program. *Id.* ¶¶ 8-16.

According to Plaintiffs, the 1,320-day service limit prevents them from participating in the TAJP under the same terms and conditions "as are applicable to younger judges." FAC ¶ 16. They allege that the 1,320-day service limit "has a disparate impact on plaintiffs and other persons of their age" because they "will no longer be given assignments unless they receive an 'exception' to the policy." *Id.* ¶ 24. Plaintiffs summarily allege the 1,320-day service limit "does not apply to younger, more recently retired judges." *Id.* ¶ 26.

The FAC states two causes of action. Count One alleges unlawful disparate impact age discrimination in violation of the FEHA. FAC ¶ 30. Count Two alleges "Violation of the California Constitution," claiming that the 1,320-day service limit violates sections 6(d) and 6(e) of article VI of the California Constitution. *Id.* ¶¶ 33-34. Plaintiffs seek "back pay, front pay, and other monetary relief," as well as declaratory and injunctive relief. *See* FAC at Prayer for Relief.

B. The Court Denied Plaintiffs' Motion for Preliminary Injunction Because They Failed to Show Some Possibility of Success on the Merits.

Shortly after filing the FAC, Plaintiffs moved for a preliminary injunction, seeking to enjoin Defendants from retroactively enforcing against them the 1,320-day service limit. *See* Order Denying Pls.' Mot. for Prelim. Inj. ("Order") at 2:10-13. The Court denied Plaintiffs' motion on July 10, 2019, finding that "Plaintiffs have failed to show a reasonable probability, or at least 'some possibility,' of prevailing on the merits of their claims…." *Id.* at 3:12-14.

The Court found, at the threshold, that the doctrine of legislative immunity barred all of

Plaintiffs' claims because "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…." *Id.* at 7:5-7. The Court further held that, contrary to Plaintiffs' position, this immunity "'extends beyond the adoption of the enactment to its implementation.'" *Id.* at 7:9-10 (quoting *Esparza v. County of Los Angeles* (2014) 224 Cal.App.4th 452, 462) (*Esparza*).

The Court further held that, even assuming immunity does not apply, Plaintiffs offered no evidence that the 1,320-day service limit has a disparate impact on Plaintiffs because of their age. *Id.* at 8:1-9:12. Observing that "experience may but does not necessarily correlate with age, because age and work experience are analytically different," the Court found that 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 [TAJP]." *Id.* at 9:3-4, 10:14-16.

Based on Plaintiffs' concession that their constitutional claim "has no independent vitality, but depends entirely on their statutory age discrimination claim," the Court also held that Plaintiffs failed to show some possibility of success on their second cause of action. *Id.* at 8 n.4.

ARGUMENT

I. DEFENDANTS ARE IMMUNE FROM SUIT.

A. Plaintiffs' Claims Are Barred by the Legislative Immunity Doctrine.

The Court should grant Defendants' demurrer because Plaintiffs' claims are barred by the doctrine of legislative immunity.

"[T]he doctrine of legislative immunity bars actions against judicial officers when they act in a legislative capacity." Order at 5:9-10 (citing *Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771, 1784) (*Steiner*); *see also Howard v. Drapkin* (1990) 222 Cal.App.3d 843, 852 n.3 (citing *Supreme Court of Va. v. Consumers Union* (1980) 446 U.S. 719 (*Consumers Union*)); *Greene v. Zank* (1984) 158 Cal.App.3d 497, 506 n.9.

As explained by the California Supreme Court, "both constitutional and institutional understandings require that legislative acts, even if improper, find their judicial remedy in the

undoing of the wrongful legislation, not in money damages awarded against the state." *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 519. Accordingly, "absolute immunity" bars suits based on legislative acts, and this immunity applies both to damage suits and to suits for declaratory and injunctive relief.[1] *People ex rel Harris v. Rizzo* (2013) 214 Cal.App.4th 921, 939-40 (citing *Steiner*, 50 Cal.App.4th at 1784); *see also Schmidt v. Contra Costa Cty.* (9th Cir. 2012) 693 F.3d 1122, 1132 (*Schmidt*) ("Legislative immunity applies to actions for damages and for injunctive relief.").

The Ninth Circuit's opinion in *Schmidt* "is closely analogous" to this case. Order at 5:14-15. There, a temporary commissioner sued the Judicial Council, the Contra Costa Superior Court, and several superior court judges under 42 U.S.C. § 1983 for adopting a policy that rendered her ineligible to continue serving as a temporary commissioner. *Schmidt*, 693 F.3d at 1126-27. The Ninth Circuit held that "the Judge Defendants enjoy absolute immunity for the adoption and application of its policy." *Id.* at 1132. The court reasoned that the superior court had the authority to regulate the minimum qualifications of subordinate judicial officers and that legislative immunity applied because the defendants "act[ed] within their defined or delegated legislative powers." *Id.*

"Precisely the same conclusion follows here: the Judicial Council and the Chief Justice, as its chair, enjoy legislative immunity from Plaintiffs' statutory and constitutional claims, including their requests for injunctive and declaratory relief." Order at 7:1-3.

First, Plaintiffs concede, as they must, that the Constitution grants Defendants the authority to regulate the qualifications for participants in the TAJP. *Schmidt*, 693 F.3d at 1132. In particular, the FAC confirms that the California Constitution expressly authorizes the Chief Justice, as Chair of the Judicial Council, to "provide for the assignment of any judge to another court." Cal. Const. art. VI, § 6(e); FAC ¶ 3; *see also id.* ¶¶ 2, 4, 17.

Second, the standards and conditions imposed by the TAJP are not "ad hoc decisions," but instead create binding state-wide rules for administration of the TAJP. *See Schmidt*, 693 F.3d at

[1] Contrary to Plaintiffs' contention (Reply in Supp. of Mot. for Prelim. Inj. at 7 n.9), legislative immunity applies to both individuals and governmental entities. *See Steiner*, 50 Cal.App.4th at 1785.

1136. The FAC acknowledges that the Judicial Council is the policymaking body of the California courts and, at the direction of the Chief Justice establishes budget priorities and rules for court administration. FAC ¶¶ 17, 18. The FAC does not suggest that the 1,320-day service limitation applies to only some TAJP participants. Instead, the FAC confirms that this service limitation "changed the terms and conditions of employment of [all] retired judges participating in the [T]AJP." *Id.* ¶ 7.

Third, while the FAC does not allege that the TAJP changes were subject of a vote, *Schmidt* itself confirms that "the fact that a decision was made by voting or through an equivalent legislative procedure—weighs in favor of legislative immunity, but *it does not itself decide the issue*." *Schmidt*, 693 F.3d at 1137 (emphasis added; internal quotations omitted). In this case, the FAC and venerable caselaw confirm that the "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…." Order at 7:5-7; *see also id.* 4:1-19 (citing cases).

Fourth and finally, the FAC confirms that the TAJP amendments have "all the hallmarks of a legislative action." Order at 7:7. In particular, ¶ 3 of the FAC confirms that the TAJP "is authorized by Article VI, section 6(e) of the California Constitution," a provision which, as noted above, grants discretion to enact policy changes to the program. *See Schmidt*, 693 F.3d at 1137. The TAJP also "implicates the provision of services to litigants and the public," *id.*, inasmuch as program participants sit as Assigned Judges in California's superior courts. *E.g.*, FAC ¶¶ 8-16. And, as explained above, the policy has prospective implications because it applies to all current and future TAJP participants. *Id.* ¶ 7 (noting that the 1,320 day service limitation affects the "employment of [all] retired judges participating in the [T]AJP").

Relying on *Consumers Union*, Plaintiffs previously argued that even if Defendants are immune from adopting changes to the TAJP, Defendants may be sued for equitable relief for enforcing the 1,320-service day limit policy. Reply in Supp. of Mot. for Prelim. Inj. at 7:6-8 (citing 446 U.S. at 736-37). But as this Court previously recognized, "Plaintiffs' reliance upon" *Consumers Union* "is misplaced." Order at 7 n.3.

"[L]egislative immunity extends beyond the adoption of the enactment to its implementation." *Esparza*, 224 Cal.App.4th at 462 (citing *Nunn v. State of California* (1984) 35 Cal.3d 616, 622); *see also Schmidt*, 693 F.3d at 1132 (holding that the defendants enjoyed "absolute legislative immunity for the adoption *and application* of the Policy") (emphasis added). Plaintiffs' argument that Defendants are immune from adopting the 1,320-day service limit, but cannot implement the policy, "is merely an attempt to circumvent the legislative immunity" granted by the common law. *Esparza*, 224 Cal.App.4th at 462.

Consumers Union is not to the contrary. In that case, the Supreme Court held that legislative immunity barred claims against the Supreme Court of Virginia for its adoption of professional responsibility rules. 446 U.S. at 734. The Virginia Supreme Court also had "independent authority … to initiate proceedings against attorneys" for unprofessional conduct and, as to that power, the Supreme Court allowed that putative plaintiffs could bring a declaratory relief action against the Virginia Supreme Court in its "enforcement capacit[y]." *Id.* at 736.

Unlike in *Consumers Union*, "[t]he instant case involves the Judicial Council's exercise of rulemaking authority governing the TAJP, not its exercise of enforcement authority against individuals…." Order at 7 n.3; *see* FAC Prayer for Relief. Because Plaintiffs' suit is directed at a quasi-legislative policy, and implementation of that policy, the legislative immunity doctrine bars the entire complaint.

B. Plaintiffs Cannot Recover Damages for Chief Justice Cantil-Sakauye's Discretionary Acts.

Plaintiffs' claim for damages against the Chief Justice, whom Plaintiffs sue in her official capacity as Chair of the Judicial Council (FAC ¶ 18), is likewise barred by discretionary act immunity.

Government Code section 820.2 provides that "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."[2] This "absolute immunity" accomplishes the duel goals of freeing public officials to exercise their judgment and

[2] Judges are "public employee[s]" for purposes of discretionary act immunity. *See* Gov't Code § 811.9.

circumscribing judicial second-guessing of the decisions of public officials. *See Freeny v. City of San Buenaventura* (2013) 216 Cal.App.4th 1333, 1343-44; *Johnson v. State* (1968) 69 Cal.2d 782, 793.

In *Caldwell v. Montoya* (1995) 10 Cal.4th 972 (*Caldwell*), the Supreme Court held that discretionary act immunity bars FEHA claims asserted against a public employee who made "deliberate and considered policy decisions, in which a [conscious] balancing of risks and advantages … took place." *Id.* at 981 (quotation marks and citation omitted; brackets in original). In that case, school board members exercised their discretion to remove a district superintendent from employment. *Id.* at 982-83. The Court held that discretionary act immunity applied because the board's action carried "fundamental policy implications" as to the representation, guidance, and administration of the school district. *Id.* at 982-83.

Likewise here, the Chief Justice is entitled to discretionary act immunity because she undertook a "basic policy decision" in amending the TAJP to include a 1,320-day service limit. *Caldwell*, 10 Cal.4th at 981. As Plaintiffs admit, the Chief Justice's duties include "establishing budget policies and promulgating rules for court administration." FAC ¶ 18. Moreover, it is well understood that the manner, method, and criteria for selecting assigned judges is "within the ***discretion*** of the Chief Justice in the exercise of her constitutional authority." *Mosk v. Superior Court* (1979) 25 Cal.3d 474, 483 (emphasis added); *see also People v. Superior Court (Mudge*) (1997) 54 Cal.App.4th 407, 412 (Chief Justice has "discretion of the broadest character" in the assignment of judges). It may be that Plaintiffs do not believe the Chief Justice reached the correct result; but "claims of *improper* evaluation cannot divest a discretionary policy decision of its immunity." *Caldwell*, 10 Cal.4th at 984 (emphasis in original).

II. THE FAC FAILS TO ALLEGE A PRIMA FACIE CASE OF AGE DISCRIMINATION.

A. Plaintiffs Fail to State a Prima Facie Claim of Disparate Impact Age Discrimination.

Defendants' demurrer to Plaintiffs' FEHA claim should be sustained also because Plaintiffs fail to plausibly allege, as they must, that the 1,320-day service limit "has caused the exclusion of applicants for jobs or promotions *because of* their membership in a protected group," *i.e.*, the element of causation. *Life Technologies Corp. v. Superior Court* (2011) 197 Cal.App.4th

640, 650 (emphasis added; internal quotations omitted).

To state a prima facie case of disparate impact age discrimination, a plaintiff must "allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection" between the defendants' challenged policy and a disparate impact on a protected group of employees. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507, 2523.[3] To create a permissible inference of discrimination, the complaint "must eliminate nondiscriminatory explanations for the disparity." *Rea v. Martin Marietta Corp.* (10th Cir. 1994) 29 F.3d 1450, 1456.

The FAC challenges a policy that, on its face, distinguishes between employees based on *experience*—the number of days for which a court has requested a judge and the judge has accepted the assignment—rather than *age*. FAC ¶ 24. Plaintiffs' summary allegation that this policy disadvantages Plaintiffs "vis-à-vis younger participants in the AJP" is not sufficient to establish the causation required to sustain a FEHA claim. *See id.*

Age and experience "are not logical equivalents for the purpose of [FEHA]." *Jianqing Wu v. Special Counsel, Inc.* (D.D.C. 2014) 54 F. Supp. 3d 48, 55, *aff'd* 2015 WL 10761295 (D.C. Cir. Dec. 22, 2015). As the Supreme Court explained in *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, an employee's age is "analytically distinct from his years of service" in a job or employment program. *Id.* at 611. After all, "a younger employee might easily have more" experience in an employment program "than a newly-hired older employee and so a policy involving long-term employees does not automatically implicate a disparate impact on employees over forty." *Garay v. Lowes Home Centers, LLC* (D. Or. Nov. 14, 2017) 2017 WL 5473887, at *3 (*Garay*).

At the pleading stage, therefore, "age discrimination cannot be inferred from differential treatment based on length of service." *Hogan v. Metromail* (S.D.N.Y. 2000) 107 F. Supp. 2d 459, 467 (*Hogan*). Instead, the complaint must proffer some form of statistical or other evidence showing that older candidates are systematically disadvantaged compared to unprotected

[3] It is the established practice of California courts to look to federal decisions for assistance in state age discrimination cases. *See, e.g.*, *Janken v. GM Hughes Elec.* (1996) 46 Cal.App.4th 55, 66.

employees. *See Wu*, 54 F. Supp. 3d at 55; *see also Brady v. Livingood* (D.D.C. 2004) 360 F. Supp. 2d 94, 100 ("Common sense and fairness … dictate that a plaintiff, at a minimum, allege some statistical disparity, however elementary, in order for the defense to have any sense of the nature and scope of the allegation the plaintiff is seeking to prove."); *Garay*, 2017 WL 5473887, at *3 (while "detailed statistical evidence" is not required at pleading stage, a plaintiff "must still provide *some* well-pleaded facts" establishing a causal connection between a policy and discrimination against employees of a certain age).

The FAC is bereft of any statistical evidence or other allegations of fact that would allow the Court to infer that the 1,320-day service limit causes discrimination on the basis of age. Indeed, other than stating that they are over the age of 40, the FAC does not identify the age of any of the Plaintiffs. By failing to state their ages or compare those ages to any statistical evidence relevant to age discrimination, Plaintiffs' claims only speculate that the service limit imposes a disparate impact on the basis of age. In effect, what the FAC actually alleges is "that Defendants' … policies have a disparate impact on people with too much *experience*, rather than old people." *Wu*, 54 F. Supp. 3d at 54. Because "[f]acially-neutral discrimination based on length of service is not by itself age-based discrimination, and thus does not suffice to sustain a [FEHA] claim under disparate impact theory," the FAC should be dismissed. *Hogan*, 107 F. Supp. 2d at 467.

B. Plaintiffs' Claim is Based on Legally-Impermissible Subgrouping.

Plaintiffs' FEHA claim should be dismissed also because it can only be brought on behalf of a *subgroup* of the protected class.

It is an unlawful employment practice under FEHA to discriminate on the basis of "age," which is defined to mean over 40-years old. *See* Gov't Code §§ 12926(b), 12940(a). FEHA permits age discrimination claims on a theory of disparate impact (*id.* § 12941), but such a claim requires pleading and proving that facially neutral employment practices "had a disproportionate adverse impact on members of the *protected class*." *Hall v. Los Angeles* (2007) 148 Cal.App.4th 318, 326 (emphasis added).

Plaintiffs allege that *every* participant in the TAJP—whether they have served 1,320 days

or not—must meet the age and service requirements set forth in Government Code section 75025, which requires judges to be at least 60-years old to retire. FAC ¶ 5. Because every retired judge who participates in the TAJP is at least 60-years old, and thus a member of the protected class, Plaintiffs can proceed only by comparing the effect of the 1,320-day service limit on one subgroup of the protected class to another (*e.g.*, by comparing the effect of the TAJP amendments on judges over 80 to judges under 80). This, however, is precisely what courts interpreting FEHA have held a plaintiff may not do.

As explained in *Schechner v. KPIX-TV* (N.D. Cal., Jan. 13, 2011) 2011 WL 109144, the "focus" of a disparate impact claim under FEHA "is on whether older employees, as a protected *group*, are disproportionately affected by a facially neutral employment practice." *Id.* at *4 (emphasis in original). Accordingly, "the only relevant question is whether" an employment practice "had a disproportionate impact on employees aged 40 or over compared with employees under 40." *Id.* Noting that its decision was consistent with several federal appellate decisions interpreting the ADEA, the court held that a plaintiff suing under FEHA cannot "distinguish between subgroups of employees over the age of 40." *Id.* (citing *EEOC v. McDonnell Douglas Corp.* (8th Cir. 1999) 191 F.3d 948, 950–51; *Lowe v. Commack Union Free School Dist.* (2d Cir. 1989) 886 F.2d 1364, 1373; *Smith v. Tenn. Valley Auth.* (6th Cir. 1991) 924 F.2d 1059 (unpublished)).

Likewise, in *Rudwall v. Blackrock, Inc.* (N.D. Cal., Feb. 28, 2011) 2011 WL 767965, all of the employees affected by a reduction-in-force were over 40 years old. *Id.* at 10. The district court rejected the plaintiff's disparate impact claim under FEHA, holding that distinguishing between subgroups of employees over the age of 40 is inappropriate because, otherwise, employers would be required to do the impossible: "'achieve statistical parity among the virtually infinite number of age subgroups in its work force.'" *Id.* at *10 (quoting *McDonnell Douglas*, 191 F.3d at 951).

Recently, the Third Circuit expressed doubt that recognizing subgroups would "proliferate liability for reasonable employment practices." *Karlo v. Pittsburgh Glass Works, LLC* (3d Cir. 2017) 849 F.3d 61, 75 (*Karlo*). But *Karlo*'s holding was premised on a Title VII case, which held

that the statute's purpose is to protect individual employees, rather than a protected group as a whole. 849 F.3d at 72 (citing *Conn. v. Teal* (1982) 457 U.S. 440). Unlike Title VII, the California Legislature's stated policy behind disparate impact claims is to protect workers over 40 "as a *group.*" Gov't Code § 12941 (emphasis added). Since disparate impact claims are designed to protect employees 40 and over as a group, it is only sensible to use the entire group as the basis of any disparate impact analysis. *See* CACI No. 2502 (instructing that an element of a disparate impact claim is that a policy had a disproportionate adverse impact on a "protected group—for example, persons over the age of 40").

Plaintiffs also previously argued that subgrouping is permissible under *O'Connor v. Consolidated Coin Caterers Corp.* (1996) 517 U.S. 308 (*O'Connor*), which held that a plaintiff may sue for age discrimination even if replaced with another worker in the protected class. Reply in Supp. of Mot. for Prelim. Inj. at 5:8-16. But *O'Connor* was a disparate *treatment* (not disparate *impact*) case. Where there is evidence of intentional age discrimination, there is no reason why a 40-year old who is replaced by a 39-year old should have a more valid case than a 56-year old replaced by a 40-year old. *See id.* at 312. That reasoning, however, "makes little sense in a disparate impact case, where no evidence of discriminatory intent is required. There is simply no reason to force an employer who has no discriminatory animus to achieve statistical parity for each and every conceivable age subgroup throughout its work force." *E.E.O.C. v. McDonnell Douglas Corp.* (E.D. Mo. 1997) 969 F. Supp. 1221, 1224.

Because Plaintiffs cannot show that the 1,320-day service limit disproportionately impacted judges over the age of 40 compared to judges under the age of 40, their age discrimination claim fails as a matter of law.

III. THE FAC FAILS TO ALLEGE FACTS CONSTITUTING A CLAIM UNDER THE CALIFORNIA CONSTITUTION.

Plaintiffs' second cause of action, under the California Constitution, also fails, for at least three independently-sufficient reasons.

A. Plaintiffs' Second Cause of Action is Derivative of Their FEHA Claim.

First, Plaintiffs' claim under the California Constitution falls with their claim under

FEHA. As Plaintiffs conceded at the preliminary injunction hearing, "their constitutional claim in the second cause of action has no independent vitality, but depends entirely on their statutory age discrimination claim." Order at 8 n.4. Given that this Court adopted and relied on Plaintiffs' representation, Plaintiffs cannot now claim their second cause of action has any independent vitality. *See Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-87.

B. There is No Private Right of Action to Sue Under Section 6.

Plaintiffs' claim under the California Constitution also fails because Plaintiffs have no private right of action. *See* FAC ¶¶ 32-34.

To assess whether a governmental violation of a state constitutional provision gives rise to an action for damages, the Court first inquires whether there is an affirmative intent either to authorize or to withhold a damages remedy. *Katzberg v. Regents of Univ. of California* (2002) 29 Cal.4th 300, 317 (*Katzberg*). Here, neither of the provisions in article VI, section 6 upon which Plaintiffs rely disclose an intent to authorize damages.

Accordingly, the Court next undertakes a "constitutional tort" analysis, considering whether an adequate remedy exists, the extent to which a constitutional tort action would change established tort law, and the nature and significance of the constitutional provision. *Katzberg*, 29 Cal.4th at 317. All three factors weigh against recognizing a constitutional tort under article VI.

First, an adequate alternative remedy exists in mandamus, which "is the traditional remedy for the failure of a public official to perform a legal duty." *Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 442. Mandamus is an adequate alternative remedy to a constitutional tort suit for damages. *Carlsbad Aquafarm, Inc. v. State Dept. of Health Services* (2000) 83 Cal.App.4th 809, 821.

Second, recognizing a constitutional tort action would change tort law because no existing law permits an action for damages arising from the violation of article VI, section 6. *See MHC Financing Limited P'ship Two v. City of Santee* (2010) 182 Cal.App.4th 1169, 1187 (refusing to recognize a tort remedy for violation of the constitutional right to petition).

Third, while article VI, section 6 is certainly significant to the Judicial Council and its Chairperson, that alone can hardly justify a claim for damages when courts have refused to

recognize a damages claim for violations of the hoary rights of free speech (*Degrassi v. Cook* (2002) 29 Cal.4th 333, 343), and due process (*Katzberg*, 29 Cal.4th at 328).

Nor do Plaintiffs have a private right of action to obtain an employment-related injunction under article VI. *See McAllister v. Los Angeles Unified School Dist.* (2013) 216 Cal.App.4th 1198, 1217 (*McAllister*). In *McAllister*, the plaintiff sought an injunction under the free speech clause, compelling the defendant to rehire her. Finding no precedent showing that injunctive relief has even been granted under the free speech clause, the Court of Appeal declined to make new law when the clause "makes no mention of employment or an individual's right to employment or rehiring." *Id.* at 1217.

Plaintiffs' request to enjoin application of the 1,320-day service limit is, effectively, a demand to be retained under the TAJP. Defendants are unaware of any court ever awarding injunctive relief under article VI, section 6, let alone the employment-related relief sought by Plaintiffs. And while section 6(e) states that the Chief Justice "may provide for the assignment" of judges, it makes no mention of an individual's *right* to assignment. As in *McAllister*, the Court should decline to make new law in recognizing a right to sue under article VI, section 6.

C. The FAC Does Not Allege a Violation of Section 6.

Even if Plaintiffs had the right to sue under article VI, section 6, the FAC does not allege a constitutional violation. Plaintiffs invoke section 6(e), which states that the Chief Justice "shall seek … to equalize the work of judges," and "may provide for the assignment of any judge to another court."

Plaintiffs acknowledge that, before the imposition of the 1,320-day service limit, the TAJP required a judge to serve at least 25 days each fiscal year to remain in the program. FAC ¶ 5. Imposing a service limit equalizes the work of retired judges within the TAJP by helping ensure that each judge can meet the 25-day minimum and that no particular judge disproportionately consumes assignment opportunities. The service limit 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.

Plaintiffs fail to show how the 1,320-day service limit exceeds the Chief Justice's

discretion under article VI, which "is not limited … but rather is broad: the Chief Justice '*may provide for*' the assignment of any judge to another court." *People v. Swain* (1995) 33 Cal.App.4th 499, 503. There is no statute, constitutional provision, or court rule that prescribes the manner in which judges are to be selected; the "criteria for selection of duly qualified assigned judges is … within the discretion of the Chief Justice." *Mosk*, 25 Cal.3d at 483; *see also People v. Ferguson* (1932) 124 Cal.App. 221, 231 (Chief Justice has "discretion of the broadest character" in the assignment of judges and her determination is conclusive "in the absence of clear and unequivocal showing of abuse of discretion"). This authority contravenes Plaintiffs' claim that section 6(e) *compels* the Chief Justice to assign retired judges with more than 1,320 days of service. Nothing in the text of section 6(e), or in the caselaw interpreting it, requires the Chief Justice to assign any particular retired judge to any court.

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." But this claim 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: July 15, 2019.

JONES DAY

By: _____
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