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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' REPLY IN SUPPORT OF DEMURRERS TO SECOND AMENDED COMPLAINT

DATE: December 29, 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

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INTRODUCTION

Plaintiffs' over-length opposition brief concedes they should not have reasserted a cause of action under the California Constitution (Opp'n at 25), so that claim must be dismissed.[1] Plaintiffs' disparate impact claim under FEHA should be dismissed as well. It is now clear that the Second Amended Complaint suffers from two overarching and fatal deficiencies.

First, the SAC does *not* allege that *any* of the Plaintiffs "applied for and was accepted into the program but then, in contrast to his or her prior service, received no appointments," as the Court of Appeal's decision requires. *Mahler v. Judicial Council of California* (2021) 67 Cal.App.5th 82, 107. The Court of Appeal's opinion precludes Plaintiffs from challenging the wisdom of *promulgating* the 1,320-day service limitation, and granted leave to amend to determine if Plaintiffs could truthfully allege that *enforcement* of the service limit violates the FEHA. At best, the Second Amended Complaint ("SAC") and Plaintiffs' Opposition harp on the idea that "retroactive application" of the 1,320-day service limit itself qualifies as "illegal age discrimination" and as "an adverse employment action." (SAC ¶ 24) But this argument fails for the simple reason that the 1,320-day service limit is subject to exceptions, and the SAC does not even try to allege whether any Plaintiff lost even one assignment, let alone a statistically significant number of them, because of the service limitation.

Second, the SAC fails to plausibly allege, "through statistical disparities, that facially neutral employment practices adopted without a deliberately discriminatory motive nevertheless have such significant adverse effects on" judges of a certain age "that they are … 'functionally equivalent to intentional discrimination.'" *Mahler*, 67 Cal.App.5th at 113 (citation omitted). Indeed, the SAC offers *no* statistical evidence to show the service limitation, in light of exceptions to that limit, resulted in more retired judges over the age of 70 being excluded from assignments, as compared to retired judges between 60 to 70 years of age. Plaintiffs allege only that judges over the age of 70 are four times more likely to have served 1,320 days in the TAJP. Plaintiffs' charts and graphs measure only the extent to which judges of a certain age have served

[1] Plaintiffs' 20-page opposition exceeds the applicable 15-page limit. Cal. R. Ct. 3.113(d).

more than 1,320 days – and thus are impacted by Defendants' *promulgation* of the service limit. This is patently insufficient.

Perhaps recognizing the SAC's inherent weaknesses, Plaintiffs claim they need discovery to find out if judges over 70 have been denied individual assignments. But a plaintiff cannot file an unsupported claim and then demand a fishing expedition to prove it up after-the-fact. And Plaintiffs already know, or ought to know, if *they* have been denied individual assignments, yet Plaintiffs make no such allegation – and do not suggest they could with leave to amend.

For just that reason, the demurrers should be sustained without leave to amend. Plaintiffs have had three opportunities to plead a valid claim, and this last time, they had the benefit of a roadmap from the Court of Appeal. Plaintiffs either are unable or unwilling to allege what the Court of Appeal said they must – that Defendants' making of individual assignments has had a disproportionate and significant adverse impact on judges of a certain age.

ARGUMENT

I. PLAINTIFFS' DISPARATE IMPACT DISCRIMINATION CLAIM SHOULD BE DISMISSED.

A. The SAC Fails To Identify A Specific, Adverse Employment Action.

Parts I(A) and (B) of Defendants' opening memorandum explained that the SAC failed to identify a specific employment practice that had an adverse effect on Plaintiffs. We explained that, because the Court of Appeal's opinion permits only a narrow claim "based on 'enforcement' of the new TAJP requirements," Plaintiffs must allege that they "applied for and [were] accepted into the program but then, in contrast to [their] prior service, received no appointments." *Mahler*, 67 Cal. App. 5th 82, 107.

Plaintiffs oppose, claiming: (1) the SAC alleges that Defendants "enforced" the 1,320-day service rule by "retroactively applying" it; (2) the SAC alleges that the TAJP's "exceptions procedure" is "onerous"; and (3) the SAC summarily alleges that "plaintiffs failed to receive assignments of the same nature and substance they had received in their prior service in the TAJP." (SAC ¶ 20). These arguments all fail.

1. "Retroactive Application" Is Not An "Adverse Employment Action."

It is true that the SAC repeatedly alleges that Defendants' decision to apply the 1,320-day service limit retroactively "amounts to illegal age discrimination against Plaintiffs in the terms, conditions, and privileges of their employment under the AJP, and is an adverse employment action." (*E.g.*, SAC ¶ 34.) As the Opposition puts it, Plaintiffs "would not be here" but for the retroactive application of the 1,320-day service limit. (Opp'n at 7:3-4.)

However, complaining that it is a really bad idea to "retroactively apply" the 1,320-day service limit, and that doing so surely will result in the "inefficiencies" identified in Judge Nadler's letter (SAC ¶¶ 45-49), relates only to the wisdom of *promulgating* the policy retroactively. These claims related to promulgation are barred in their entirety by legislative immunity. *Mahler*, 67 Cal.App.5th at 101-106.

More importantly, the SAC does *not* allege that the 1,320-day service limit by itself has prevented, or will in the future prevent, the Chief Justice from making individual assignments to retired judges who have exceeded the 1,320-day service limit. Indeed, it contains no allegations relating to actual *enforcement* of the policy with respect to any of the named plaintiffs – that is, the SAC does *not* allege that, "in contrast to [their] prior service, [Plaintiffs] received no appointments." *Mahler*, 67 Cal. App. 5th at 107. Thus, when Plaintiffs complain about the "retroactive application" of the 1,320-day service limit, they are both complaining about conduct that is protected by legislative immunity and challenging an "intermediate action" that, by itself, has no "substantial and material adverse effect on the terms and conditions of the plaintiff's employment." *Pinero v. Specialty Restaurants Corp*. (2005) 130 Cal.App.4th 635, 641.

2. An "Onerous" Exception Process Is Not An "Adverse Employment Action."

Along the same lines, Plaintiffs don't advance the ball by suggesting that something about the exception process is "onerous," absent an allegation that they lost, or received less attractive, TAJP assignments as a result. To be sure, Plaintiffs allege that they failed to receive TAJP assignments "under the same terms and conditions as in their prior service." (Opp'n at 11:14-14.) Yet this is nothing more than a *legal* conclusion, devoid of any supporting *facts*. *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 551.

What's more, Plaintiffs implicitly acknowledge that they continued to receive TAJP

assignments, but that they did so only after satisfying the new TAJP exception requirement. (SAC ¶ 44.) Just as employment discrimination plaintiffs cannot predicate a FEHA violation upon a mere transfer from one job to another with equivalent responsibility and pay, Plaintiffs here cannot establish that the 1,320-day service limitation and its exceptions violate the FEHA when Plaintiffs have not, in fact, been denied a TAJP assignment. See *McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 393 (noting that a job transfer "is not an adverse employment action when it is into a comparable position that does not result in substantial and tangible harm").

3. Plaintiffs Allege No Facts Showing They "Received No Assignments."

Plaintiffs' final argument, that the SAC summarily alleges Plaintiffs "failed to receive assignments of the same nature and substance" comes a bit closer, but also falls short of the mark. (SAC ¶ 20.) Plaintiffs' Opposition ultimately acknowledges that they must allege *how* Defendants enforced the service limit "through the making of individual assignments." (Opp'n at 24:7-9). However, the Court will search the SAC in vain for a single allegation about any individual assignment that Plaintiffs have, or have not received. Certainly, the SAC does *not* allege that *any* of the Plaintiffs "applied for and [were] accepted into the program," let alone that, "in contrast to [their] prior service, [they] received no appointments," as the Court of Appeal's decision requires. *Mahler*, 67 Cal.App.5th at 107.

This omission is absolutely fatal to the SAC. "The requirements of a prima facie disparate impact case . . . are in some respects more exacting than those of a disparate treatment case." *Garcia v. Spun Steak Co*. (9th Cir. 1993) 998 F.2d 1480, 1486; *see also Ledbetter v. Goodyear Tire & Rubber Co., Inc.* (2007) 550 U.S. 618, 624 ("we have stressed the need to identify with care the specific employment practice that is at issue"). Hence, it is *not* sufficient for Plaintiffs to generically allege that they have been harmed by a policy, as Plaintiffs have here. Instead, Plaintiffs must allege "the existence of adverse effects of the policy"; "the impact of the policy is on terms, conditions, or privileges of employment"; "the adverse effects are significant"; and "the employee population in general is not affected by the policy to the same degree." *Garcia*, 998 F.2d at 1486. The SAC fails to satisfy these exacting requirements, and the demurrers should be

sustained without leave to amend accordingly.

B. The SAC Fails To Allege An Impact Of Statistical Significance.

Plaintiffs also must "allege[]," and ultimately prove, "through statistical disparities, that facially neutral employment practices adopted 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 v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1404-1405). These "'statistical disparities must be sufficiently substantial that they raise such an inference of causation.'" *Ibid.* (citation omitted). Put otherwise, "'the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions *because of* their membership in a protected group.'" *Alch v. Superior Court* (2008) 165 Cal.App.4th 1412, 1428 (emphasis added; citation omitted). Here, Plaintiff's allegations of a statistical impact fail for two independent reasons.

1. Plaintiffs' Statistical Allegations Measure The Wrong Metric.

Plaintiffs' statistical allegations all measure the wrong metric. Pointing to paragraph 32 of the SAC, Plaintiffs argue they have identified the number of participants "allegedly adversely impacted by the challenged change" to the TAJP. (Opp'n at 16:20-22.) Paragraph 32, however, alleges only that 19% of participants in the TAJP have served more than 1,320 days. (SAC ¶ 32.) Plaintiffs' statistics highlight nothing more than the number of retired judges affected by the *promulgation* of the 1,320-day service limit. Plaintiffs do not even attempt to measure whether, and how many, retired judges "received no appointment[s]" because of the 1,320-day service limit. *Mahler*, 67 Cal.App.5th at 107. Plaintiffs' 19% statistic thus fails to show how Defendants actually implemented the 1,320-day service limit, and is fails to support their disparate treatment claim accordingly.

Indeed, Plaintiffs forthrightly admit that they "do not precisely know" whether any retired judge lost a TAJP assignments through operation of the 1,320-day service limitation, although "they would like to." (Opp'n at 22:1-3.) Plaintiffs appear to believe this concession helps them, because such evidence might be obtained through discovery and the SAC's allegations "should be

permitted to stand" until then. (Opp'n at 14:5-8.) Plaintiffs have it backwards. Demurrers are designed to screen out legally meritless lawsuits and thereby prevent the parties from wasting time and money conducting discovery on claims that should not have been pled in the first place. *See Terminals Equip. Co. v. City & County of San Francisco* (1990) 221 Cal.App.3d 234, 247 (noting that, discovery is an "unnecessary and burdensome additional expense" that should avoided "[u]nless and until [Plaintiffs] file[] a viable complaint stating at least one triable cause of action"); *Arei II Cases* (2013) 216 Cal.App.4th 1004, 1020 ("a vague suggestion that additional facts might be uncovered through discovery" fails justify granting further leave to amend).

2. Plaintiffs' Statistics Fail To Demonstrate A Significant Effect On Retired Judges Because Of Their Age.

Plaintiffs' statistical allegations fail also because they do not sufficiently show that operation of the 1,320-day service limit somehow excludes retired judges from TAJP assignments because of their *age*, as opposed to their length of service in the program.

The Court of Appeal held that Plaintiffs' "complaint must allege facts or statistical evidence demonstrating a causal connection between the challenged policy and a significant disparate impact on the allegedly protected group." *Mahler*, 67 Cal.App.5th at 114. This means, at a minimum, that the SAC must "move the disparate-impact claim over the plausibility threshold" by including statistics that show "older candidates were being excluded systematically." *Id.* at 115 (quotation marks and citations omitted).

The SAC attempts to do this in several ways, but none plausibly suggests Plaintiffs are affected by the 1,320-day service limit because of their *age*. First, Plaintiffs allege 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. (SAC ¶ 30.) Commensurate with common sense, courts have held that an age gap of this size is not significant enough to permit an inference of discrimination. *See France v. Johnson* (9th Cir. 2015) 795 F.3d 1170, 1174; *Katz v. Regents of the Univ. of California* (9th Cir. 2000) 229 F.3d 831, 836; *K.H. v. Secretary of the Department of Homeland Security* (N.D. Cal. 2017) 263 F. Supp. 3d 788, 796. In favorably citing this precedent, the Court of Appeal noted that its reasoning ought to apply with

particular "rigor" in cases, like this one, where Plaintiffs seek to gerrymander a subgroup of judges over 70 years old. *Mahler*, 67 Cal.App.5th at 127.

Plaintiffs complain these cases were decided on summary judgment, but that procedural distinction matters not. In federal court, summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment *as a matter of law*. *Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 322. Thus, Defendants' cited cases stand for the proposition that a four-year age gap is insufficient to prove discrimination as a matter of law. Plaintiffs do not explain why this legal principle finds any less purchase on a demurrer, which tests "the sufficiency of the complaint as a matter of law." *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316.

Plaintiffs also argue that the Court should ignore their own allegations about the scope of the age gap because the 1,320-day service limit is akin to a "reduction in force" ("RIF"), in which case it is sufficient for Plaintiffs to show they were terminated despite a "continuing need for their skills and services." (Opp'n at 19:10-15 [quoting *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1281].) Of course, this *isn't* a RIF case, and Plaintiffs *haven't* been terminated from employment. Hence, the RIF cases Plaintiffs cite simply are inapposite because Plaintiffs do not, and cannot, "allege their positions were abolished for discriminatory reasons." *Guerrero v. Beverly Hills Hotel* (C.D. Cal., Feb. 10, 1994) 1994 WL 383228, at *2. What's more, even in RIF cases, a plaintiff still has to show that his discharge "occurred under circumstances giving rise to an inference of [ ] discrimination." *Nesbit v. Pepsico, Inc.* (9th Cir. 1993) 994 F.2d 703, 705. Plaintiffs argue that Defendants' changes to the TAJP were unwise as a matter of policy (Opp'n at 19:10-15), but they point to no allegation suggesting these changes "were motivated by age discrimination." *Nesbit*, 994 F.2d at 705.

That leaves Plaintiffs with the singular statistical allegation that the odds of a judge over 70 being over the 1,320-day service limit is four times greater than the odds of a judge under 70 being over the limit. (SAC ¶ 33.) Plaintiffs' specific allegation is wrong as a matter of simple math. Plaintiffs allege that 23% of judges over 70 are affected by the 1,320-service limit, whereas 7% of judges under 70 are similarly affected (*ibid.*); 23% divided by 7% is 3.3.

Whether calculated properly or not, however, the outcome is the same—this alleged fact is neither statistically nor practically significant. Most fundamentally, Plaintiffs' statistic "does not take into account any variables other than age." *Coleman*, 232 F.3d at 1281. It is Plaintiffs' burden to show "stark pattern of discrimination unexplainable on grounds other than age." *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1423. If a plaintiff doesn't account for factors other than age, and Plaintiffs don't here, the mere fact that older employees are three times more likely to be terminated is insufficient, on its own, to give rise to an inference of age discrimination. *Ibid.* (while 73.5% of employees over age 50 were terminated, compared to 28.2% of those under 40, the plaintiffs failed to account for the fact that defendant was terminating management positions more likely to be held by "older persons").

Here, 77% of retired judges over the age of 70 were *not* impacted by the adoption of the 1,320-day service limit. (SAC ¶ 32.) That fact, in and of itself, dooms Plaintiffs' suggestion that the 1,320-day service limit is, in operation, functionally equivalent to intentional discrimination. *See Katz*, 229 F.3d at 836 (fact that 73% of employees over the age of 60 were not affected demonstrated that disparate impact did not fall on employees "by virtue" of their age).

Moreover, Plaintiffs' statistical allegation entirely fails to account for the fact that the 1,320-day service limit is tied to length of service—how many days a retired judge has participated in the TAJP—not age. If a retired judge has served more than 1,320 days in the TAJP, the policy applies, regardless of the judge's age. Yet, "in a disparate impact claim, 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. Thus, even if Plaintiffs' statistical allegation measured the right metric—and it doesn't—the fact that retired judges over the age of 70 are three times more likely to have serviced 1,320 days in the TAJP does not, alone, give rise to an inference of age discrimination.

II. MONETARY DAMAGES ARE UNAVAILABLE.

For the reasons just explained, Plaintiffs' FEHA claim should be dismissed entirely. But Plaintiffs are also misguided in arguing that, if their claim survives, the Judicial Council may be held liable for monetary damages.

According to Plaintiffs, the Court of Appeal said nothing about whether money damages may be recovered against the Judicial Council. (Opp'n at 14:18-21.) To the contrary, the Court of Appeal was clear about what question it was answering: "whether plaintiffs can pursue a lawsuit for prospective declaratory relief against the Chief Justice and Judicial Council based on 'enforcement' of the new TAJP requirements under the reasoning of *Consumers Union*." *Mahler*, 67 Cal.App.5th at 107. In remanding, the Court held that judicial immunity does not "bar[] plaintiffs' suit for prospective declaratory relief." *Id.* at 112. But the Court of Appeal was clear that, in this case, "[j]udicial immunity does foreclose a damages award." *Id.* at 110 n.15.

Plaintiffs say the Court of Appeal must have intended otherwise, for the Judicial Council "is neither a jurist nor a judicial officer." (Opp'n at 15:6-8.) But judicial immunity "depends not on the status of the defendant, but rather, on the specific work or function being performed." *Greene v. Zank* (1984) 158 Cal.App.3d 497, 508. So one does not have to be a judge to deserve judicial immunity; one need only perform "judge-like" functions. *Id.*

The Court of Appeal held that judicial immunity applies to the enforcement of the TAJP because the making of individual assignments falls "within the Chief Justice's unique constitutional and statutory authority to manage the judicial branch." *Mahler*, 67 Cal.App.4th at 108. Logically, then, the act of making individual assignments is, under the law of the case, a judge-like function. If Plaintiffs are challenging, as to the Judicial Council, something other than the making of individual assignments, the SAC is silent as to what that "something else" is.

Certainly, *Huminski v. Corsones* (2d Cir. 2004) 396 F.3d 53, does not compel a different outcome. (Opp'n at 14-15.) In fact, *Huminski* didn't concern application of judicial immunity to a quasi-judicial entity at all. Cases that do involve that fact pattern confirm that if the Chief Justice (the agent) is entitled to judicial immunity, so too is the Judicial Council (the principal). *See Hiramanek v. Clark* (N.D. Cal. Jan. 10, 2014) 2014 WL 107634, at *6 (holding that if the judge, the agent, was immune from damages then so too was the Superior Court, the principal, otherwise the objectives sought by immunity would be seriously compromised). After all, the purpose of judicial immunity—to ensure independent and disinterested judicial decisionmaking—would be seriously impaired or destroyed if Plaintiffs could shift the threat of liability from the

agent to the principal. *Ibid.*

III. LEAVE TO AMEND SHOULD BE DENIED.

Enough is enough. Plaintiffs have now filed three iterations of the complaint, the last of which was filed *after* the Court of Appeal instructed Plaintiffs to limit their claim to "defendants' enforcement of the challenged provisions of the TAJP through individual judicial assignments." *Mahler*, 67 Cal.App.5th at 92, 107. Rather than allege that they "received no appointments" because of the 1,320-day service limitation, *ibid.*, Plaintiffs elected to complain about the wisdom of *promulgating* the service limit and applying it retroactively. Plaintiffs are not entitled to *another* bite of the apple merely because they now pledge to take the Court of Appeal seriously.

In addition, Plaintiffs have not explained *how* further amendment might cure the defects inherent in the SAC, as is their burden. *Genis v. Schainbaum* (2021) 66 Cal.App.5th 1007, 1015. Plaintiffs do not suggest they can that *enforcement* of the 1,320-day service rule through individual assignments disproportionately impacts judges over 70. Plaintiffs contend they need discovery, but it is entirely within Plaintiffs' control to allege that they have not received appointments since the TAJP was amended. Tellingly, not one of them is willing to represent they can. In short, Plaintiffs have "had three opportunities to plead [their] claims" under FEHA, and while they contend they "should be given leave to amend, [they] do [] not meet [their] burden of demonstrating how [they] can amend [their] complaint or how it would change the legal effect." *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618–619. If Plaintiffs were capable of stating a valid claim, they would and could have done so by now.

CONCLUSION

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

Dated: December 21, 2021.

Jones Day

By: _____
Robert A. Naeve

Attorneys for Defendants
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CHIEF JUSTICE TANI G. CANTIL-SAKAUYE

PROOF OF SERVICE

I, Frances Pham, declare:

I am a citizen of the United States and employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 3161 Michelson Drive, Suite 800, Irvine, California 92612. On December 21, 2021, I served a copy of the within document(s):

DEFENDANTS' REPLY IN SUPPORT OF DEMURRERS TO SECOND AMENDED COMPLAINT

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 21, 2021, at Irvine, California.

Frances Pham