

1 Quentin L. Kopp (SBN 25070)

2 qkopp@fsmllaw.com

3 (415) 681-5555

4 Daniel S. Mason (SBN 54065)

5 dmason@fsmllaw.com

6 (415) 407-7796

7 Furth Salem Mason & Li LLP

8 101 California Street, Suite 2710

9 San Francisco, California 94111

10 Thomas W. Jackson (SBN 107608)

11 tjackson@fsmllaw.com

12 (707) 244-9422

13 Furth Salem Mason & Li LLP

14 640 Third Street, Second Floor

15 Santa Rosa, CA 95404

16 Attorneys for Plaintiffs

17 SUPERIOR COURT OF THE STATE OF CALIFORNIA

18 COUNTY OF SAN FRANCISCO

19 GLENN MAHLER, JAMES H. POOLE, and,
20 JULIE CONGER

21 Plaintiffs,

22 vs.

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

26 Defendants.

Case No.: 000 - 19 - 575842

COMPLAINT FOR DAMAGES FOR
EMPLOYMENT DISCRIMINATION

(Government Code section 12940(a))

27 Plaintiffs allege:

28 INTRODUCTION AND BACKGROUND

1. Plaintiffs, retired superior court judges, challenge the recent changes to the Assigned Judges Program ("AJP") implemented by defendants Chief Justice of California and the Judicial Council of California ("Judicial Council") that limit participation by individual retired judge in that program to a total of 1,320 days. These changes constitute an

1 unlawful employment practice in violation of Government Code sec. 12940(a) as it
2 discriminates against plaintiffs because of their age, in the terms, conditions, and privileges
3 of their employment, as more fully set forth below.

4 2. The AJP sets forth the structure by which the Chief Justice of California
5 temporarily assigns retired judges to fill judicial vacancies and to cover for vacations,
6 illnesses, and disqualifications.

7 3. The AJP is authorized by Article VI, section 6(e) of the California
8 Constitution which requires the Chief Justice to "seek to expedite judicial business and to
9 equalize the work of judges." In order to fulfill this mandate, "[t]he Chief Justice may
10 provide for the assignment of any judge to another court but only with the judge's consent if
11 the court is of lower jurisdiction. A retired judge who consents may be assigned to any
12 court."

13 4. To be eligible to participate in the AJP a retired judge must not have been
14 defeated in an election for his or her office (Gov. Code §68549); must not have been
15 removed from office by the Commission on Judicial Performance (Cal. Const. Article VI, §
16 18; must have met minimum age and years-of-service requirements and filed a notice of
17 retirement (Gov. Code §75025); must have made certain payments to the Judges' Retirement
18 Fund (Gov. Code §75026); and must comply with the Code of Judicial Ethics (Code of
19 Judicial Ethics, Canon 6).

20 5. A retired judge must apply to participate in the AJP within two years of
21 retirement or within two years of previous service in the program; renew that application
22 annually; provide a declaration that he or she does not intend to become an active member of
23 the State Bar; certify that the retired judge will not participate in privately compensated
24 dispute resolution activities; submit to a reference check, serve at least 25 days each fiscal
25 year; participate in continuing education; and take an oath of office.

26 6. Retired judges participating in the AJP are evaluated each year by the
27 presiding judges in the courts in which they sit.
28

1 7. Until May 21, 2018 there was no limit on the number of days a retired judge
2 could participate in the AJP. However, on that date, defendant Chief Justice Cantil-Sakuye
3 through defendant Judicial Council arbitrarily and without lawful reason changed the terms,
4 conditions, and privileges of employment of retired judges participating in the AJP by
5 limiting the number of days a retired judge could participate in the AJP to 1,320 days. Said
6 change was made retroactive, thus directly impacting plaintiffs. The stated effective date of
7 the change was July 1, 2018, although implementation of the change was delayed until
8 January 1, 2019.

9 PARTIES

10 8. Plaintiff Glenn Mahler is an adult person over 40 years of age and resident of
11 the County of Orange, State of California. Judge Mahler began his judicial career as a
12 Subordinate Judicial Officer in 1977. Judge Mahler was appointed as an Orange County
13 Municipal Court judge in 1986 and elevated to the Superior Court in 1998. Judge Mahler
14 retired in 2008 and at that time his application for participation in the AJP was accepted.
15 Judge Mahler worked nearly full-time in the AJP, accumulating over 2,000 days of service
16 through December 31, 2018.

17 9. Plaintiff James H. Poole is an adult person over 40 years of age, and resident
18 of the County of Los Angeles, State of California. Judge Poole was first appointed to the
19 Orange County Municipal Court in 1989 and ran unopposed in the next general election.
20 Judge Poole was later elected presiding judge of the West Orange County Municipal Court.
21 In 1992 Judge Poole was elevated to the Superior Court. Judge Poole retired in June 2009
22 and at that time his application for participation in the AJP was accepted. Judge Poole
23 worked in the AJP nearly full-time through December 2018, accumulating approximately
24 1,800 days of service.

25 10. Plaintiff Julie Conger is an adult person over 40 years of age, and a resident of
26 the County of Sonoma, State of California. Judge Conger was elected as Municipal Court
27 judge in Berkeley-Albany in 1982 and served on that court until 1998 when Judge Conger
28

1 was elevated to the Superior Court. Judge Conger retired in April 2008. Shortly thereafter
2 Judge Conger's application for participation in the AJP was accepted. Judge Conger
3 commenced participation in the AJP on July 1, 2008. Since that time Judge Conger has
4 regularly worked approximately nine full months per year in the AJP, accumulating over
5 1,500 days of service.

6 11. At all times mentioned herein Plaintiffs were qualified for the position of
7 Assigned Judge. Plaintiffs are participants in the AJP who as of May 21, 2018 had already
8 worked on assignments for more than 1,320 days. Plaintiffs have applied, and been accepted
9 in, the Assigned Judges Program for 2019, but they have been adversely affected by the new
10 rules in that they will not be able to participate in the AJP under the same terms, conditions,
11 and privileges of employment as existed prior to the change, and as are applicable to
12 younger judges.

13 12. Defendant Judicial Council of California ("Judicial Council") is established
14 under authority of the Constitution of the State of California, Article VI, section 6 and
15 California Rules of Court Rule 10.1. It is the policymaking body of the California courts and
16 is chaired by the Chief Justice. According to its governance policies, "Under the leadership
17 of the Chief Justice and in accordance with the California Constitution, the council is
18 responsible for ensuring the consistent, independent, impartial, and accessible administration
19 of justice." The Judicial Council is subject to suit under the California Fair Employment Act,
20 Government Code Section 12900 et seq. (FEHA), in that it is an employer of five or more
21 persons.

22 13. Defendant Tani G. Cantil-Sakauye is the Chief Justice of California, a
23 position she has held since January 3, 2011. As chair of the Judicial Council Chief Justice
24 Cantil-Sakauye directs the Council's work, including establishing budget policies and
25 promulgating rules for court administration. Chief Justice Cantil-Sakauye appoints 14 of the
26 Judicial Council's 20 other voting members. Defendant Chief Justice Cantil-Sakauye is sued
27 in her official capacity as Chair of the Judicial Council.
28

1 14. Plaintiffs are ignorant of the true names and capacities of defendants sued
2 herein as DOES ONE through TEN, inclusive, and therefore sue these defendants by such
3 fictitious names. Plaintiffs will amend this complaint to allege their true names and
4 capacities when ascertained. Plaintiffs are informed and believes that each of these
5 fictitiously-named defendants is responsible in some manner for the occurrences herein
6 alleged, and that plaintiffs' injuries as herein alleged were proximately caused by the
7 aforementioned defendants.

8 15. Plaintiffs are informed and believe and thereon allege that at all times herein
9 mentioned each of the defendants was the agent and employee of each of the remaining
10 defendants and, in doing the things hereinafter alleged, was acting within the course and
11 scope of such agency and employment.

12 RIGHT TO SUE LETTERS

13 16. On March 8, 2019, and within one year of the date of the discrimination
14 committed by defendants, plaintiffs filed charges of discrimination with the California
15 Department of Fair Employment and Housing (DFEH). Copies of these charges are
16 appended hereto, marked "Exhibits A, B, and C," and are incorporated by this reference as
17 though fully set forth.

18 17. On March 8, 2019 the DFEH issued to plaintiffs notices of right to bring a
19 civil action based on the charges that are "Exhibits A, B, and C" to this complaint. Copies of
20 these notices of right of action are appended hereto, marked "Exhibit D, E, and F," and are
21 incorporated by this reference as though fully set forth.

22 VENUE

23 18. Venue is proper in this court because the unlawful employment practices
24 complained of herein occurred in San Francisco County and records relevant to the unlawful
25 employment practices are maintained in San Francisco County
26
27
28

1 ADVERSE EMPLOYMENT ACTION

2 19. Defendants' policy of arbitrarily limiting assigned judges to 1,320 days of
3 service amounts to illegal age discrimination against plaintiffs in the terms, conditions, and
4 privileges of their employment under the AJP, and is an adverse employment action not
5 based upon bona fide occupational qualifications nor upon any applicable security
6 regulations established by the United States or the State of California. This policy has a
7 disparate impact on plaintiffs and other persons of their age in that it causes them to be
8 demonstrably disadvantaged vis-à-vis younger participants in the AJP in the following
9 manner: plaintiffs, who have 1,320 or more days' experience in the Assigned Judges
10 Program, will no longer be given assignments unless they receive an "exception" to the
11 policy.

12 20. Defendants have purported to establish an "exception" to the newly
13 implemented AJP changes, but the "exception" does not cure the discriminatory purpose and
14 effect of the AJP changes.

15 21. The policy requiring exceptions for participation in the AJP does not apply to
16 younger, more recently retired judges, whose terms, conditions, and privileges of
17 employment have not been changed. It applies only to judges with more than 1320 days'
18 service in the AJP, such as plaintiffs herein

19 22. Most assignments under the exceptions are either to Family Law Departments
20 or to courts located in communities far from the home counties of plaintiffs and most 1320
21 Judges. As a result, acceptance of any such exceptions require considerable travel and long
22 absences from their homes. In addition, "exception" assignments are in unfamiliar courts
23 with unfamiliar practices. And confirmation of "exception" assignments are made in many
24 instances only shortly before the assignment is to commence, providing inadequate time for
25 Judges to prepare and travel to the assigned court and requiring that dates be held open
26 almost up to the proposed date of commencement of the assignment.

1 23. Judges who have reached 1320 days, in order to continue to work, are
2 required to accept assignments under these discriminatory terms and conditions. Moreover,
3 the "exception" procedure otherwise imposes excessive additional work on local courts,
4 resulting in uncertainty as to whether a needed Judge will in fact be available for assignment.
5 These problems will continue to occur due to the policy requiring "exceptions" for 1320
6 judges.

7 24. Defendants' discriminatory actions against plaintiffs, constitute unlawful
8 discrimination in employment on account of age, in violation of Government Code Section
9 12940(a). As such they violate California Constitution Article VI, Section 6(d), which states
10 that the functions performed by defendants must "not be inconsistent with statute." Further,
11 they are not based on any bona fide job qualifications in that limiting an Assigned Judge to
12 1,320 days of service is not necessary to the AJP, is inefficient and wasteful, and is contrary
13 to law and public policy.

14 25. As a proximate result of defendants' discriminatory actions against plaintiffs,
15 as alleged above, plaintiffs have been harmed in that plaintiffs have suffered the loss of
16 wages, salary, benefits, and additional amounts of money plaintiffs would have received if
17 they had been able to continue actively serving in the Assigned Judges Program. As a result
18 of such discrimination and consequent harm, plaintiffs have suffered such damages in an
19 amount according to proof.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 PRAYER FOR RELIEF

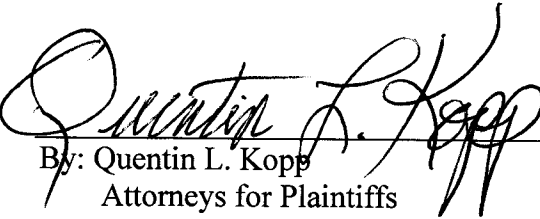
2 WHEREFORE, plaintiffs pray for judgment as follows:

- 3 1. For back pay, front pay, and other monetary relief according to proof;
- 4 2. For interest on the sum of damages awarded, calculated from January 1, 2019 to the
- 5 date of judgment;
- 6 3. For reasonable attorney's fees pursuant to Government Code Section 12965(b);
- 7 4. For costs of suit herein incurred; and
- 8 5. For such other and further relief as the court deems proper.
- 9

10 Dated this 9th day of May, 2019.

11

12 Furth Salem Mason & Li LLP

13 

14 By: Quentin L. Kopp

15 Attorneys for Plaintiffs

16

17

18

19

20

21

22

23

24

25

26

27

28