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-SAKAYUE; and DOES ONE through TEN,** Defendants.	Case No. CGC-19-575842 **ORDER ON DEFENDANTS' DEMURRER TO SECOND AMENDED COMPLAINT**

The demurrer of Defendants Judicial Council of California and Chief Justice Tani Cantil-Sakauye to Plaintiffs' Second Amended Complaint ("SAC") came on regularly for hearing before the court on January 19, 2022. All parties appeared through their counsel of record. Having reviewed the pleadings and papers on file, and the argument of counsel presented at the hearing, the Court rules as follows:

Defendants' demurrer is sustained without leave to amend as to Plaintiffs' second cause of action for violation of Article VI of the California Constitution, as unopposed. The demurrer is sustained in part with 20 days leave to amend as to Plaintiffs' first cause of action for employment discrimination based on age under the Fair Employment and Housing Act ("FEHA"). The Court declines to consider the discovery requests and responses attached to Plaintiffs' opposition, which are not properly before the Court on demurrer.

DISCUSSION

Effective on July 1, 2018, Defendants announced changes to California's Temporary Assigned Judges Program ("TAJP") that, among other things, limit retired judges to sitting on assignment for no more than 1,320 days unless they are granted an exception. Plaintiffs are eight retired judges who have served in the TAJP and object to those changes. On July 10, 2019, this Court denied Plaintiffs' motion for a preliminary injunction to enjoin enforcement of the 1,320-day service limit. On August 8, 2019, this Court sustained Defendants' demurrer to Plaintiffs' First Amended Complaint ("FAC") without leave to amend. Plaintiffs appealed.

In *Mahler v. Judicial Council of California* (2021) 67 Cal.App.5th 82, the Court of Appeal reversed and remanded. The Court of Appeal held that nearly all of Plaintiffs' claims as pled were foreclosed by legislative or judicial immunity:

> Legislative 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. Legislative immunity does not, however, foreclose suit to the extent plaintiffs' claim is based on defendants' enforcement of the challenged provisions of the TAJP through individual judicial assignments. Rather, judicial immunity applies to the Chief Justice's assignment of

> individual judges in accordance with the new TAJP provisions, and while judicial immunity forecloses monetary relief, it does not foreclose prospective declaratory relief.

(*Id.* at 92.) The court held that Plaintiffs' allegations in the then operative First Amended Complaint did not support a disparate impact age discrimination claim under FEHA, agreeing with Defendant that those allegations were "conclusory and particularly bereft when it comes to causation." (*Id.* at 113.) However, it found that Plaintiffs should be granted leave to amend to attempt to plead such a claim. The Court of Appeal "express[ed] no opinion as to whether plaintiffs will be able to sufficiently plead such a claim, let alone raise a triable issue of age discrimination or prove such a claim." (*Id.* at 128; see also *id.* at 93 [same].)

Thus, the issue on the instant demurrer is whether Plaintiffs have stated a claim for disparate impact age discrimination based on Defendants' enforcement or implementation of the challenged provisions of the TAJP that could support a request for prospective declaratory relief. (See *id.* at 107 ["A more difficult issue is 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"].)[1] The Court concludes that Plaintiffs' allegations in the SAC remain inadequate to state such a cause of action, but that Plaintiffs should be given one final opportunity to amend in an attempt to satisfy the governing standard.

Plaintiffs' claim in the first cause of action is that the TJAP, and specifically the 1,320-day service cap, has a disparate impact on the basis of age, in violation of the FEHA. A disparate impact claim is distinct from a disparate treatment claim:

> In "disparate treatment" cases, the plaintiff alleges that an employer has treated *him or her* less favorably than others due to race, color, religion, sex or national origin [or age], and the plaintiff must prove a discriminatory intent or motive. . . . In "disparate impact" cases, by contrast, the plaintiff alleges and proves, usually 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.

[1] Plaintiffs' contention that they may seek damages from the Judicial Council is mistaken.

(*Juumane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1404-1405, quoting *Harris v. Civil Service Com.* (1998) 65 Cal.App.4th 1356, 1365.) Statistical evidence is essential to showing such a disproportionate effect on a protected group:

> It is well settled that valid statistical evidence is required to prove disparate impact discrimination, that is, that a facially neutral policy has caused a protected group to suffer adverse effects. Once the employment practice at issue has been identified, causation must be proved; that is, 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.... [S]tatistical disparities must be sufficiently substantial that they raise such an inference of causation.

(*Id.* at 1405.) This requirement applies at the pleading stage. Thus, in a disparate impact case, to survive a demurrer "the 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.) Where a complaint fails to allege a disparate impact on a protected group of individuals and cannot be amended to do so, a demurrer will be sustained without leave to amend. (*Villafana v. County of San Diego* (2020) 57 Cal.App.5th 1012, 1017-1020.)

Here, Plaintiffs focus their claim on Defendants' adoption of the 1,320-day cap, and specifically on its "retroactive" application to them and other retired judges over 70 years of age who have already reached or exceeded the requisite number of days of service. However, Plaintiffs fail adequately to allege that the service cap has had a disparate impact on the basis of age.

At the outset, Plaintiffs improperly continue to focus many of their allegations in the SAC on the Chief Justice's promulgation of the 1,320-day service limit and on the wisdom of that change, rather than on her enforcement of that limit through individual assignments. For example, Plaintiffs allege that "Defendants arbitrarily and without lawful basis changed the terms, conditions, and privileges of employment of retired judges participating in the AJP by limiting to 1,320 the number of days a retired judge may participate in the AJP," and that such changes are inconsistent with Government Code section 7522.56(i). (SAC ¶ 10.) Similarly, Plaintiffs allege

that Defendants adopted the changes to the TAJP "notwithstanding their failure to undertake a reasoned decision-making process reflecting deliberate and considered policy decisions, and their further failure to engage in conscious balancing of risks and advantages of implementation and enforcement of the new eligibility policy." (*Id.* ¶ 36.) And Plaintiffs challenge the necessity of the changes in the TAJP procedures, asserting that the exceptions procedure "imposes excessive additional work on local courts," and that the new eligibility requirements will result in "lost efficiencies due to assigned judges unfamiliar with court procedures and added expenses," and will deprive the courts of the expertise of experienced judges. (*Id.* ¶¶ 44-48; see also, e.g., *id.* ¶¶ 3-5, 34, 37-39.)

As the Court of Appeal explicitly held, however, Plaintiffs' challenges to the promulgation of the changes to the TAJP are barred as a matter of law. Plaintiffs may only state a claim "to the extent plaintiffs' claim is based on defendants' enforcement of the challenged provisions of the TAJP *through individual judicial assignments*." (*Id.* at 92 (emphasis added); see also *id.* at 108 fn. 14 [legislative immunity does not extend to "allegations of individualized appointment decisions impacting specific, individual TAJP applicants"].) Plaintiffs' allegations challenging the Chief Justice's authority to promulgate changes to the TAJP, the process by which those changes were adopted, and the wisdom or necessity of those decisions, are foreclosed by the Court of Appeal's decision, which is law of the case. (See, e.g., *Clemente v. State of California* (1985) 40 Cal.3d 202, 211; *Nelson v. Tucker Ellis, LLP* (2020) 48 Cal.App.5th 827, 837-838.)

The central flaw in the SAC is that it contains literally *no* factual allegations regarding Defendants' enforcement of the challenged provisions of the TAJP through individual judicial assignments to the eight Plaintiffs, or to other similarly situated retired judges, that would be sufficient to show a significant disparate impact that results in such judges being systematically excluded from receiving assignments. The Court of Appeal observed,

> [G]iven the way in which temporary appointments are made—a retired judge does not apply to fill a particular position but rather applies to be a participant in the TAJP and awaits call by the Chief Justice—generally the most a plaintiff can allege with respect to implementation and/or enforcement of the new TAJP provisions is 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.

(*Id.* at 107.) But Plaintiffs do not allege that they have received no appointments since the adoption of the changes to the TAJP, which became effective on July 1, 2018. Nor do Plaintiffs even allege that they have been denied exceptions to the 1,320-day service cap. As the Court of Appeal explained,

> The 90-, 120-, and 1,320-day service limitations 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."

(*Id.* at 98.) Instead, the only allegation in the SAC that addresses Plaintiffs' individual assignments is the vague allegation that "Plaintiffs failed to receive assignments of the same nature and substance they had received in their prior service in the AJP." (SAC ¶ 20.) In particular, Plaintiffs complain that they have received assignments "either to Family Law Departments or to courts located in communities far from the home counties of Plaintiffs." (*Id.* ¶ 43.) Plaintiffs do not make any more specific factual allegations than that. Even more significantly, the general allegations Plaintiffs do make are substantially identical to those in their first amended complaint, which the Court of Appeal has already found to be inadequate to state a prima facie case of disparate impact discrimination. (See *Mahler*, 67 Cal.App.5th at 114 [quoting same allegations].)

The Court of Appeal identified several infirmities in Plaintiffs' pleading of disparate impact in the FAC:

> There are, for example, no specifics as to the total number of participants in the TAJP, or the number of participants allegedly adversely impacted by the challenged changes to the program, or even the age "group" allegedly adversely impacted. Nor are there any "basic allegations" of statistical methods and comparison, or even any anecdotal information of a significant age-based disparity.

(*Mahler*, 67 Cal.App.5th at 115.) The SAC now supplies some allegations responsive to the Court of Appeal's concerns. Plaintiffs allege that as of May 2019, there were 349 participants in

the TAJP, that 59 participants (out of 65 who had reached the 1,320-day limit) are adversely impacted by Defendants' enforcement of changes to the TAJP, and that the age group adversely affected is retired judges over 70 years of age. (SAC, ¶¶ 19, 20, 32.) Plaintiffs allege that, as of July 2019, "of the [349] AJP participants who were 70 years old or older, 23% were affected by the lifetime limit, whereas only 7% of participants not yet 70 years old were affected." (SAC, ¶ 32.) Plaintiffs provide other statistical comparisons, including age distributions for judges who have and haven't reached the 1,320-day limit and the odds of being at the lifetime limit for judges 70 years of age or older versus younger judges. (SAC, ¶¶ 29-33.) However, *none* of these allegations addresses the narrowly limited topic left open by the Court of Appeal's opinion: "defendants' enforcement of the challenged provisions of the TAJP *through individual judicial assignments*." Indeed, as Defendants point out, Plaintiffs do not allege a single instance in which Defendants refused a TAJP assignment because a particular judge had reached or exceeded the 1,320-day limit.

Plaintiffs' allegations are inadequate to establish an essential element of a FEHA discrimination claim: an adverse employment action that substantially and detrimentally affects the terms and conditions of a plaintiff's employment. (See, e.g., *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1036 [defining "adverse employment action" as one that "materially affect[s] the terms and conditions of employment"]; *McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 386-387 ["In California, an employee seeking recovery on a theory of unlawful discrimination . . . must demonstrate that he or she has been subject to an adverse employment action that materially affects the terms, conditions, or privileges of employment . . . The plaintiff must show the employer's . . . actions had a detrimental and substantial effect on the plaintiff's employment"].)[2] The mere fact that a retired

[2] As Defendants point out, it is open to serious doubt whether an assignment that is undesirable to a particular retired (or sitting) judge, whether for subject matter or geographic reasons, would constitute an adverse employment action within the meaning of FEHA. "A change that is merely contrary to the employee's interests or not the employee's liking is insufficient." (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455; accord, *Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511 ["the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially advedrse employment action"].)

judge who is over the age of 70 has reached the 1,320-day service cap (a so-called "1320 judge") does not mean that he or she has suffered an adverse employment action, as at least two examples proffered by Defendants make clear: (1) a 1320 judge who decides not to apply for a temporary position; and (2) a 1320 judge who applies for such a position, but does not receive one because none are available (rather than because of his or her age). Neither has suffered an adverse employment action.[3]

Plaintiffs attempt to justify their failure to plead sufficient facts to satisfy the prima facie standard on two grounds, neither of which is persuasive. First, Plaintiffs point out that the case is currently at the pleading stage, and that a number of the cases Defendants rely upon were decided on a full record on summary judgment or after trial. However, while Plaintiffs are correct that, as the *Mahler* court expressly recognized, "disparate impact allegations need not be as specific as the evidentiary showing required to overcome a defense motion for summary judgment," the Court of Appeal also squarely held that Plaintiffs' allegations in the first amended complaint failed to state a claim. Moreover, that court emphasized that evidentiary issues concerning proffered statistical evidence must be examined with some "rigor" in determining "whether a plaintiff makes even a prima facie showing of disparate impact age discrimination." (*Mahler*, 67 Cal.App.5th at 114, 127.)] Here, Plaintiffs' allegations in the SAC still fall well short of satisfying the governing standard.

Second, Plaintiffs attempt to justify their pleading deficiencies on the basis of Defendants' purported failure to provide discovery. As Defendants correctly point out, however, Plaintiffs' argument puts the cart before the horse. The issue before the Court is whether Plaintiffs have a good faith factual basis for pleading that the changes in the TAJP have had a disparate impact on the basis of age. Speculation that Plaintiffs may be able through future discovery to uncover evidence to support such a claim is not a proper basis for opposing a demurrer. (See *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 81 [plaintiffs may not sue on speculation that

[3] Defendants make the further argument that Plaintiffs' allegations challenging the retroactive application of the 1,320-day cap are insufficient to show a statistically significant effect. The Court need not address that issue in order to resolve the instant demurrer.

defendants' conduct caused harm and "thereafter try to learn through discovery whether their speculation was well-founded"].)[4]

At the hearing on Defendants' demurrer, Plaintiffs' counsel represented that Plaintiffs can amend to make more specific allegations regarding their individual assignments. While the Court shares Defendants' frustration that Plaintiffs have disregarded the Court of Appeal's explicit guidance regarding what is required to plead a prima facie case of age discrimination on a disparate impact theory, it will grant them one final opportunity to amend to attempt to plead a cognizable claim.

CONCLUSION

For the foregoing reasons, Defendants' demurrer to the first cause of action of the Second Amended Complaint is sustained with 20 days leave to amend, and their demurrer to the second cause of action is sustained without leave to amend.

IT IS SO ORDERED.

Dated: January 26 2022

HON. ETHAN P. SCHULMAN
JUDGE OF THE SUPERIOR COURT

[4] Plaintiffs' reliance on *Alch v. Superior Court* (2004) 122 Cal.App.4th 339 is misplaced. That case involved 23 separate class action lawsuits filed by hundreds of television writers against 12 different groups of related television networks, studios and production companies and 11 talent agencies. The court held, among other things, that plaintiffs had properly alleged classwide claims of a pattern or practice of age discrimination in violation of FEHA, and therefore were not required to plead detailed evidentiary facts supporting individual prima facie cases of discriminatory refusal to hire as a predicate for their classwide claims. (*Id.* at 377-383.) The instant case does not involve any classwide claims, but rather is brought by eight individual retired judges. In *Alch*, plaintiffs alleged "each employer has adopted or maintained a companywide policy of age discrimination in employment by refusing to hire plaintiffs on the basis of age, and by adopting ageist hiring policies that have deterred plaintiffs from seeking employment opportunities. They also allege they have applied for and have been rejected and/or have been deterred from seeking television writing employment as a result of the emloyers' practices. They further allege the employers have hired statistically significant lower numbers of older writers than would be expected given the relevant qualified applicant pool, and these disparities increase in direct relationship to age. They also describe anecdotal evidence of intentional discrimination." (*Id.* at 382-383.) Plaintiffs' conclusory allegations here are not remotely comparable.

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I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on January 26, 2022 I served the foregoing **order on Defendants' demurrer to second amended complaint** on each counsel of record or party appearing in propria persona by causing a copy thereof to be served electronically by email sent to the email addresses indicated below.

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