

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

FILED
Superior Court of California
County of San Francisco

APR 13 2022

CLERK OF THE COURT

BY: *[Signature]*
Deputy Clerk

GLENN MAHLER, et al.,
Plaintiffs,

v.

JUDICIAL COUNCIL OF CALIFORNIA, et
al.,
Defendants.

Case No. CGC-19-575842

ORDERS ON PLEADING MOTIONS

Demurrer

Defendants' demurrer to the third amended complaint (TAC) is overruled.

This is a disparate impact age discrimination case under the Fair Employment and Housing Act. It seeks declaratory relief prohibiting enforcement of a 1,320-day service limit for retired judges in the Temporary Assigned Judges Program (TAJP). In such a disparate impact case, "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 v. Judicial Council of California* (2021) 67 Cal.App.5th 82, 114.)

Plaintiffs are seven retired judges over age 70 in the TAJP. They allege that judges in their subgroup are statistically more likely than judges under age 70 to be at or above the 1,320-

day cap. (TAC 13:18-14:22.) Plaintiffs also allege, as subgroup examples, that the number of judicial assignments they individually received in 2019-20 decreased markedly from assignments they received in 2018, before the service limit was promulgated. (Id. at 11:12-13:4; see also 4:27-5:9, 6:8-17.) These allegations thus address enforcement of the 1,320-day limit as well as its promulgation.

Plaintiffs further now allege that defendants refused them TAJP assignments because plaintiffs had reached or exceeded the 1,320-day limit. (TAC 11:12-15.) Plaintiffs explain this causal connection by referencing an exception to the 1,320-day service limit policy:

[S]ervice 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.”

(*Mahler*, 67 Cal.App.5th at 98.) Plaintiffs allege that under this provision presiding judges “may seek exceptions only where the calendar clerk of the requesting Court has determined that there are no non 1,320 Assigned Judges available for a specific appointment. Only in such cases may the Presiding Judge ask the Judicial Council to approve an exception. Since the implementation of the lifetime cap, Plaintiffs have received only an insignificant paucity of ‘exceptions.’” (TAC 2:20-24.)

Plaintiffs thus adequately allege that the significant decrease in their TAJP assignments was caused by defendants’ promulgation and enforcement of the 1,320-day service limit.

Defendants argue: “Unless and until an exception request is denied, a retired judge is not affected *at all*, let alone in a detrimental and substantial way, by the fact that a presiding judge must ask for an exception on their behalf.” (Rply. 9:5-9; emphasis in original.) Not so. Plaintiffs allege that the service-limit policy requires presiding judges to first assign retired

judges who have not reached the 1,320-day limit and only thereafter reach exceptions. This, plaintiffs allege, results in significantly fewer assignments for judges who have reached the 1,320-day limit even before the exception process comes into play.

Defendants also argue: “The critical point is that Plaintiffs cannot establish a prima facie case of disparate impact discrimination by proving that they – or even all retired judges over 70 who have served more than 1,320 days – have been disproportionately impacted.” (Rply. 7:12-14.) This puts cart before horse. We are at the pleading stage of this case; the time for establishing and proving follows discovery.

The parties’ requests for judicial notice are granted.

Motion to Strike

Defendants’ motion to strike is granted in part and denied in part.

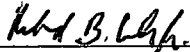
The motion is granted as to plaintiffs’ demand for damages. *Mahler v. Judicial Council of California* (2021) 67 Cal.App.5th 82, 107 makes clear that judicial immunity forecloses a damages award against the chief justice and the judicial council she heads. Judicial immunity “depends not on the status of the defendant, but rather, on the specific work or function being performed.” (*Greene v. Zank* (1984) 158 Cal.App.3d 497, 508.) *Mahler* held that judicial immunity applies to enforcement of the Temporary Assigned Judges Program (TAJP), because judicial assignments fall “within the Chief Justice’s unique constitutional and statutory authority to manage the judicial branch.” (67 Cal.App.5th at 108.) Thus, making assignments is, under the law of this case, a judge-like function as to which damages are unavailable.

The motion to strike is granted as to plaintiff’s demand for injunctive relief. Judicial immunity permits claims for prospective injunctive relief “[o]nly when a declaratory decree is

violated or declaratory relief is unavailable.” (*Mahler*, 67 Cal.App.5th at 109.) Here, no declaratory decree exists, and plaintiffs do not dispute that declaratory relief is available.

The motion is denied as to plaintiffs’ allegations challenging “promulgation” of the 1,320-day service limit. As plaintiffs point out: “In order to challenge enforcement [of the service limit], plaintiffs must describe what is being enforced. The language defendants want stricken is both relevant and proper.”

Dated: April 13, 2022



Richard B. Ulmer Jr.
Judge of the Superior Court

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 April 13, 2022 I electronically served the foregoing Order on Pleading Motions on the following counsel of record by causing a copy thereof to be sent by email to the email addresses indicated below.



Date: April 13, 2022

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