UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GARY ERNST, Plaintiff, vs. BANK OF AMERICA CORPORATION, Defendant.	CASE NO. 12cv1255 JM(BGS) ORDER DENYING MOTION TO DISMISS; DECLINING TO STRIKE CLASS ACTION ALLEGATIONS; SCHEDULING ORDER ON MOTION FOR CLASS CERTIFICATION

Defendant Bank of America Corporation ("BAC") moves to dismiss, pursuant to Fed.R.Civ.P. 12(b)(6), or alternatively to strike, pursuant to Fed.R.Civ.P. 12(f), Plaintiff Gary Ernst's disparate impact age discrimination claims and the class action allegations. Plaintiff opposes the motion. Pursuant to Local Rule 7.1(d)(1), the court finds the matters presented appropriate for resolution without oral argument. For the reasons set forth below, the court denies the motion to dismiss the disparate impact age discrimination claims, and declines to reach the motion to strike or dismiss the class action allegations at this stage of the proceedings. The court also instructs Plaintiff to move for class certification as soon as practicable, see Fed.R.Civ.P. 23(c)(1)(A), but no later than 90 days from the date of entry of this order.

I. BACKGROUND

On May 23, 2012, Plaintiff commenced this federal question action alleging two claims for relief: violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621, et seq.,

and violation of the California Fair Employment and Housing Act ("CFEHA"), Cal.Gov't. Code §12940 et seq. The complaint alleges that Plaintiff is a former Merrill Lynch Wealth Management Advisor who holds a degree in business administration from UCLA. Compl. ¶¶ 14, 15.

In August of 2010, Plaintiff was contacted by a BAC representative, Ms. Park, stating that BAC was interested in interviewing Plaintiff for the position of financial advisor. ¶ 17. During this conversation, Ms. Park stated that Plaintiff's qualifications as a fully licensed advisor were so strong that she asked Plaintiff his preference of the top five offices that he would prefer to work at. ¶18. Shortly thereafter Plaintiff received an email instructing him to fully complete an employment application prior to his interview. ¶ 21. The application asked for Plaintiff's date of birth. Plaintiff was 57 years old at the time he completed the form. ¶ 22. The application also failed to include a disclaimer concerning the requirements of the ADEA. ¶¶ 23, 24.

Plaintiff's interview with BAC regional manager Debbie West (who "appeared significantly younger than Plaintiff") began poorly: "Plaintiff sensed an immediate negative reaction from Ms. West who Plaintiff felt acted oddly reserved during the interview." ¶ 28 Though Plaintiff "put his best foot forward," Plaintiff was informed that Ms. West had chosen other candidates who were "a better fit," but provided no further explanation. ¶ 30. Despite Plaintiff's request, BAC refused to provide a letter stating the reason he was not hired. ¶ 31. The complaint alleges that BAC "hired significantly younger workers with inferior qualifications for the position Plaintiff applied for." ¶ 32.

The complaint also makes class action allegations, seeking recovery for four different classes. Each class covers a time period of 455 days prior to the complaint's filing "or any longer period authorized by law." ¶¶ 33-36.

The "ADEA Class" includes all BAC applicants in the United States who were over the age of 40, provided their birth dates on BAC pre-hiring documentation, and were not selected for the position they applied for. ¶ 33.

The "ADEA Financial Advisor Subclass" is the same as the ADEA class, but is limited to those who applied for the position of Merrill Edge Financial Solution Advisor. ¶ 34.

The "FEHA Class" contains the same parameters of the ADEA class, but is limited to those who applied in California. ¶ 35.

The "FEHA Financial Advisor Subclass" is limited to those who applied in California for the position of Merrill Edge Financial Solution Advisor. ¶ 36.

The complaint states that Plaintiff believes the number of class members is "in the thousands, if not substantially higher," ¶ 38, and meets the commonality, typicality, and adequacy requirements of Fed. R. Civ. P. 23.

The complaint then states two claims for relief. It alleges age discrimination (both for disparate treatment and disparate impact) in violation of 29 U.S.C. § 621, et seq. and of Cal. Govt. Code §12940, et seq.

II. LEGAL STANDARDS

A. Pleading Standards

To defeat a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). However, the court is required to construe plaintiff's allegations in the light most favorable to the non-moving party, accepting as true all material allegations in the complaint and any reasonable inferences drawn therefrom. See, e.g., Broam v. Bogan, 320 F.3d 1023, 1028 (9th Cir. 2003). The court should grant the motion if the complaint does not contain either a "cognizable legal theory" or facts sufficient to support a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

A motion to strike should be granted if the complaint includes redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f).

BAC also moves to dismiss for lack of subject matter jurisdiction under 12(b)(1), which should be granted unless the plaintiff can show "affirmatively and distinctly" the existence of federal jurisdiction in the complaint. Tosco Corp. v. Communities for a Better Environment, 236 F.3d 495, 500 (9th Cir. 2001).

B. The ADEA and FEHA

The ADEA prevents employers from refusing to hire individuals at least forty years old because of their age. 29 U.S.C. §623(a)(1). Employers may be held liable under either a disparate treatment theory or a disparate impact theory. Enlow v. Salem-Keizer Yellow Cab Co., Inc., 389 F.3d 802, 811

(9th Cir. 2004). Disparate impact claims allege that an employer's policy or practice is facially neutral, but has a disparate impact on certain employees because of their membership in a protected group. Katz v. Regents of the University of California, 229 F.3d 831, 835 (9th Cir. 2000) ("To state a prima facie case under a disparate impact theory, a plaintiff must demonstrate "(1) the occurrence of certain outwardly neutral employment practices, and (2) a significantly adverse or disproportionate impact on persons of a particular [age] produced by the employer's facially neutral acts or practices.") (internal quotation marks omitted).

The State of California similarly outlaws discrimination based on age in the Fair Employment and Housing Act. Cal. Govt. Code §12940(a).

III. DISPARATE IMPACT CLAIMS

A. Failure to Exhaust Administrative Remedies on Disparate Impact Claims

BAC argues that the disparate impact claims must be dismissed because Plaintiff failed to administratively exhaust such claims as required by 29 U.S.C. §626(d). Plaintiff filed his charge with the EEOC and with the California Department of Fair Employment and Housing ("DFEH"). (BAC's mtn, Exh. B). The charge states that Plaintiff was "subjected to an impermissible non-job related inquiry," and denied a position "because of my age (57 years)." It also states that "age was a factor in the denial of the position," and briefly states the facts alleged in the complaint, including the fact that he was required to inform BAC of his date of birth, and that fourteen other candidates were hired despite Plaintiff being told that sixteen positions were open.

BAC explains that exhaustion of administrative remedies with the EEOC is a prerequisite to federal subject matter jurisdiction and that allegations of disparate treatment in an EEOC claim are not sufficient to exhaust administrative remedies on a disparate impact claim. Plaintiff argues that disparate impact claims are sufficiently related to the allegations in the complaint to provide this court with jurisdiction.

There appears to be little Ninth Circuit law addressing this issue exactly, but courts examining ADEA issues have often used the same standards as employed for other discrimination laws. 45C Am. Jur. 2d Job Discrimination § 2439 ("Thus, legislative history indicates that disparate impact claims brought under the ADEA should be treated in the same manner as under Title VII as amended."). In

assessing an administrative charge, the court should keep in mind the "paucity of legal training among" those filing with the EEOC, and therefore construe the filings liberally. Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472, 1476 (9th Cir. 1989). Further, jurisdiction extends to allegations that fall within the scope of the EEOC's investigation or which would be reasonably expected to grow out of the discrimination charge. Paige v. California, 102 F.3d 1035, 1041 (9th Cir. 1996).

BAC's argument on this issue relies principally on a 2010 district court case dealing with Title VII racial discrimination claim. De Los Santos v. Panda Express, Inc., 2010 U.S. Dist. LEXIS 127788 (N.D. Cal. 2010). That case addressed whether an EEOC filing alleging disparate treatment encompassed a disparate impact claim. Several plaintiffs alleged that Panda Express refused to promote them because it favored Asians for promotions over other races. The court began by explaining that it obtains jurisdiction over both conduct alleged in the EEOC charge and conduct "which is 'likely or reasonably related to the allegations made in the EEOC charge.'" Id. at *11(quoting B.K.B. v. Maui Police Dept., 276 F.3d 1091, 1099 (9th Cir. 2002)).

In discussing the differences between disparate treatment and disparate impact, the court noted that "federal courts in general have concluded that an administrative charge that only alleges a discrimination claim based on disparate treatment is insufficient to exhaust a claim for disparate impact—and vice-versa." Id. (citing Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726, 730 (9th Cir. 1984)). The court also found that the allegations sent to the EEOC were not sufficient to afford the court with jurisdiction. The EEOC charge stated that an Asian person with much less experience was promoted instead of the plaintiff, and that the plaintiff's manager told her that she needed more "GM points" (part of Panda Express' method of evaluating employees) in order to get a promotion. The court concluded that the reference to GM points was "intended to convey that Defendants were relying on that point system as a pretext," id. at *15, and pointed out that the complaint did not list GM points as one of the policies and practices employed by Panda Express that created a disparate impact.

Here, just as in De Los Santos, Plaintiff made a charge that seems based, at least, primarily on

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intentional discrimination. The charge states that he was denied a position "because of" his age.[1] However, De Los Santos is distinguishable because in that case, there was no neutral policy alleged in the EEOC charge that adversely affected the plaintiffs—the GM points system was interpreted as a pretext specifically intended to allow discrimination. Here, the date of birth requirement cannot be interpreted as a pretext for allowing discriminatory practices, because its existence alone creates at least some suspicion of age discrimination. It seems more likely that an administrative agency receiving Plaintiff's charge would naturally interpret it as a disparate impact claim as well, given the factual circumstances.

Further, allowing Plaintiff's suit to proceed here would not violate Brown, the Ninth Circuit authority cited in De Los Santos, because De Los Santos extends Brown's principle further than necessary. Brown reiterated the principle that a federal court examining incidents not specifically listed in an EEOC charge "may assume jurisdiction over the new claims if they are like or reasonably related to the allegations of the EEOC charge," and noted that requiring a second filing would simply create an unnecessary procedural technicality. 732 F.3d at 729-30 (internal quotation marks omitted). In Brown, the plaintiff first filed an administrative disparate impact claim that dealt with an age requirement for an application to an apprenticeship program and alleged that the requirement disparately impacted women. The plaintiff later alleged intentional discrimination, and the court examined the issue of whether the two were closely enough related such that the disparate impact claim exhausted administrative remedies for the disparate treatment claim. The court found that the two incidents were not closely enough related because the initial disparate impact claim would not have encompassed a claim of intentional discrimination since the agency would not naturally have investigated intentional discrimination based on the disparate impact charge. Id. at 730.

Here, unlike Brown, it would not have been outside the natural scope of the agency's investigation to examine the disparate impact claim here—the disparate impact claim is reasonably expected to flow from the charge concerning the date of birth requirement. Though the fact that the same incident is the basis for both of Plaintiff's claims is not dispositive, it is helpful in demonstrating that the disparate impact claim is a natural extension from the charge.

[1] However, the seemingly redundant statement that "age was a factor in the denial of the position" could be construed as the basis for a separate disparate impact allegation.

In sum, the court denies the motion to dismiss the disparate impact claim for failure to exhaust administrative remedies.

B. Failure to State a Claim of Disparate Impact

BAC also argues that Plaintiff has failed to state a claim of disparate impact because he has not pointed to a specific practice causing the impact. BAC acknowledges that Plaintiff has specifically pointed to the requirement that applicants state their age, but "has not pleaded facts to support" the theory that use of the form caused the disparate impact, especially because BAC interviewed Plaintiff after he revealed his age.

BAC's case law in support of its motion explains that plaintiffs cannot succeed by generally attacking an overall decision-making process, "but must instead identify the particular element or practice within the process that causes an adverse impact." Stout v. Potter, 276 F.3d 1118, 1124 (9th Cir. 2002). However, Stout rejected the claim of discrimination because plaintiffs simply claimed that the screening process for promotions had a disparate impact, and there was no evidence that the protected group (females) performed more poorly in evaluations or evaluated competencies in the application process. Id. at 1125. Here, by contrast, Plaintiff has made a very specific claim: that the facially neutral requirement of providing the birth date leads to discrimination against older applicants. BAC maintains that Plaintiff only "ostensibly *suggests* that use of the form itself caused the alleged disparate impact," Motion at p. 10, but has not pleaded facts in support. BAC points out that there are no allegations that the form was used as a part of the decision-making process or that the decision-maker based their decision on the form. Viewing the complaint's allegations in the best light to Plaintiff, Plaintiff has sufficiently alleged that the decision not to hire him was based on his age acquired from the employment application form. Plaintiff points to the specific practice at issue and alleged that "obtaining job applicants' year of birth adversely affected the hiring of older workers as a group." Compl. ¶ 48.

In sum, the court denies the motion to dismiss the disparate impact claims.

IV. CLASS CLAIMS

BAC also argues that the class allegations must be stricken because they fail to comply with Fed.R.Civ.P. 8 and Fed.R.Civ.P. 23(a). BAC argues that the failure to strike the class allegations will

result in "any employee who claims to have suffered even a single, isolated violation of law could simply allege, without any plausible basis or information, that it occurred in connection with a 'policy' or 'procedure' that applied to a putative class of people." Motion at 11.[2]

The court notes that Plaintiff may indeed be challenged to comply with Fed.R.Civ.P. 23 as recently addressed by the Supreme Court in Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011). Plaintiff may also be challenged in pursing class-wide claims due to the very nature of an ADEA claim. A bare allegation that "age was a factor" in an age discrimination case fails to state a claim. The Supreme Court recently clarified that a plaintiff in an ADEA case, unlike a Title VII case, must establish that age was the 'but for' cause of the employer's adverse action." Gross v. FBL Financial Services, Inc., 557 U.S. 167, 129 Sct. 2343, 2351 (2009). The Supreme Court noted that while Congress had amended Title VII to allow for employer liability when discrimination "was a motivating factor for any employment practice," "it did not similarly amend the ADEA." Id. at 2350 n.3. The ADEA causation requirement is satisfied where age is the determining factor in the employee's discharge. See Medlock v. United Parcel Service Inc., 608 F.3d 1185, 1193 (10th Cir. 2010).

Notwithstanding the challenges confronted by Plaintiff to establish the appropriateness of class action treatment of his claims, the court presently declines to reach the arguments raised by BAC. The arguments raised are better addressed after the parties conduct class discovery and in connection with a motion for class certification. Connelly v. Hilton Grant Vacations Co., LLC, 2012 WL 2129364 at *3 (S.D. Cal. 2012) (explaining that Rule 23 requirements typically should not be examined on motion to dismiss); Kazemi v. Payless Shoesource, Inc., 2010 WL 963225 at *2 (N.D. Cal. 2010) (noting that class action allegations are only stricken in rare cases where the complaint demonstrates that class action requirements cannot be met); Lyons v. Bank of America, 2011 U.S. Dist. LEXIS 145176 at *19-20 (N.D. Cal. 2011) ("The granting of motions to strike class allegations before discovery and in advance of a motion for class certification is rare."). Accordingly, the court presently declines to address this motion and therefore denies the motion to strike or dismiss the class allegations as moot. Plaintiff is instructed to move for class certification within 90 days of entry of this order.

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[2] The MTD asks for the claims to be stricken, but later BAC requests that the claims be "dismissed or stricken," and largely fails to distinguish these requests.

V. CONCLUSION

In sum, the court denies the motion to dismiss or to strike the disparate impact age discrimination claims and declines to reach the motion to dismiss or strike the class allegations until after Plaintiff files a motion for class certification.

IT IS SO ORDERED.

DATED: October 30, 2012

Hon. Jeffrey T. Miller
United States District Judge

cc: All parties