Filed 5/29/14 Honig v. County of Los Angeles CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

AUDREY HONIG, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, Defendant and Respondent.	B244787 (Los Angeles County Super. Ct. No. BC457581)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa Sanchez-Gordon, Judge. Affirmed.

Law Offices of Joseph Y. Avrahamy and Joseph Y. Avrahamy for Plaintiff and Appellant.

Peterson Bradford Burkwitz, Avi Burkwitz and Gil Burkwitz for Defendant and Respondent.

The Los Angeles Sheriff's Department (LASD or the Department) notified civilian employee Audrey Honig, Ph.D., of the intent to demote her from her position as Director of Employee Support Services following an internal affairs investigation into her conduct that led to her arrest for driving under the influence of prescription medications (Veh. Code, § 23152, former subd. (a)).[1] Honig alleges the severity of the discipline, that is, demotion rather than suspension, was based on a "tainted investigation," and the real reason for her demotion was based on her medical condition. Honig sued the County of Los Angeles (County) alleging disability discrimination and retaliation in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). Honig appeals from a judgment entered after the trial court granted summary judgment in favor of the County. Honig contends the trial court erred in sustaining objections to the declaration of Ronnie Williams, a retired chief of the Department, that would have raised triable issues of fact to show the decision to demote her was a pretext for disability discrimination based on her medical condition. We conclude the trial court did not abuse its discretion in excluding the declaration. We further conclude that the trial court properly granted summary judgment in favor of the County. Thus, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Honig was disciplined after an internal affairs investigation revealed that she was involved in a rear-end collision while driving a County vehicle, was arrested for driving under the influence of prescription medications, and acted in an unprofessional manner toward the arresting officer. Honig, as Director of Employee Support Services, directly oversaw the LASD drug and alcohol program. Her position is the civilian equivalent of a captain.

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[1] The statute was amended effective January 1, 2014. Subdivision (e) provides: "It is unlawful for a person who is under the influence of any drug to drive a vehicle."

1. *The Second Amended Complaint*

Honig's lawsuit against the County alleged that the recommended discipline to demote her was excessive when compared with other employees who had been arrested for driving under the influence, and the real reason for her demotion was based upon her medical condition. Honig alleged in the operative second amended complaint (complaint)[2] that for approximately 18 years before the May 7 accident, she suffered from various illnesses, including "migraine headaches, back problems, osteoporosis and osteoarthritis and fibromyalgia, Sjogren's syndrome, an autoimmune disease and Raynaud's disease, a rare disorder of the blood vessels which developed sometime around 2007." In addition, Honig has "suffered from cervical cancer, additional and/or exacerbating orthopedic injuries to her lumbar spine, knee and hip, and had to undergo a diskectomy of her lumbar spine and surgery to fix a complex fracture of her right femur." Honig's medical condition caused chronic fatigue, reduced stamina, and her Sjogren's syndrome affected her eyesight and speech. Honig had been prescribed various medications to cope with her daily pain, to maintain her health, and to accomplish her required job tasks.

After the May 7 accident, Honig was relieved of her duties pending an internal affairs investigation. Following the internal affairs investigation, Honig was notified that she would be demoted.

Honig alleges that her discipline was overly harsh because other LASD employees who have been arrested for driving under the influence were suspended for 15 days and did not have to endure a protracted investigation. Honig's treatment allegedly was based upon her medical condition. Honig further alleged she was "targeted," and retaliated

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[2] The complaint alleges causes of action for disability discrimination and retaliation in violation of the FEHA (Gov. Code, § 12940, subds. (a), (h)). Although not separately alleged, Honig also alleges failure to take reasonable steps to remedy or to prevent discrimination. Honig made no legal arguments in the trial court or on appeal on this claim. An element of this claim requires an essential foundational predicate of discrimination. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289.)

against because of her medical condition. After answering the complaint, the County moved for summary judgment.

2. *Motion for Summary Judgment*

The County moved for summary judgment on several grounds, including Honig could not prevail on her disability discrimination claim because the County had legitimate business reasons for demoting Honig, and Honig could not establish that the County's proffered reasons were pretextual.[3] As for the retaliation claim, the County moved on the grounds that Honig did not engage in any protected activity, and even if she had, there was no causal connection between her demotion and any protected activity. Honig does not challenge the trial court's ruling on the retaliation claim. Thus, our focus is on the disability discrimination claim.

a. *County's Showing*

By way of background, Honig was involved in three automobile accidents during a 45-day period while driving a County vehicle. On March 24, 2009, she was driving a County vehicle and rear-ended another car. This accident resulted in a civil claim against the County. On April 23, 2009, Honig rear-ended another car while driving a County vehicle. She told the investigating officer that "she felt sleepy and may have dozed off." On May 7, 2009, Honig was driving a County vehicle and rear-ended another car. The County settled a lawsuit brought by the victim.

(1). *May 7 Accident*

Officer Terrence Roach of the California Highway Patrol (CHP) responded to the scene of the May 7 accident. Roach observed that Honig had slurred speech, glassy eyes, and smaller than normal pupils. Roach testified at his deposition that Honig told him she was not taking any medication. Roach conducted a field sobriety test.

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[3] Because we affirm on the ground that Honig did not raise a triable issue of fact to show that the County's reasons for the demotion were pretextual or showed discriminatory animus, we do not address the County's argument that Honig could not establish a prima facie case of disability discrimination.

Honig answered Roach's questions and was cooperative but unprofessional. Honig's demeanor completely changed when Roach arrested her. She called him an "asshole" or "Adam Henry," which is police officer vernacular for "asshole." This conduct occurred at the scene of the accident and throughout the booking process. Honig also told Roach that he did not know what he was doing, she was going to have his job, and then she pulled rank.

Deputy John T. Caffrey, a sergeant with the Department was called to the scene because Honig was driving a County vehicle involved in an injury traffic collision. He prepared a report and was later interviewed as part of the internal affairs investigation.

After Honig was placed under arrest and taken to the Van Nuys station of the Los Angeles Police Department, CHP officer Kevin Baxter, a drug recognition expert, performed an evaluation. He concluded that Honig was under the influence of a controlled substance prescription drug.

Pursuant to LASD protocol, Commander Marilyn Baker came to the Van Nuys station. Honig told Baker about what she considered to be Roach's inappropriate behavior, and admitted she called Roach an "asshole" or "Adam Henry." Honig was relieved of duty pending an investigation surrounding her accident and subsequent arrest.

Before the May 7 accident, Honig did not notify her supervisor or Sheriff Lee Baca of her medical condition or formally request an accommodation. Ten days after the incident, Honig asked her supervisor for an accommodation under the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.) "in terms of both schedule modification and the ability to telecommute once returned to duty." The County was not informed until May 29, 2009 of Honig's medical condition.

On June 10, 2009, an attorney with the Los Angeles City Attorney's Office filed three charges against Honig, including driving under the influence of drugs (Veh. Code, § 23152, former subd. (a)), being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)), and unlawful possession of a controlled substance (Bus. & Prof. Code, § 4060).

In October 2009, Honig entered into a plea agreement and the three original charges were dismissed. Honig pleaded nolo contendere to a minor traffic infraction.

(2). *Internal Affairs Investigation into May 7 Accident*

As required by County policy, the internal affairs investigation commenced after the resolution of the criminal case.

Roach and Caffrey were interviewed concerning Honig's behavior at the scene of the May 7 accident. Roach told investigators that Honig said she was " 'gonna have [his] job,' " and he " 'didn't know what [he] was doing as an officer.' " Caffrey told investigators that Honig refused to answer Roach's questions on medical privacy grounds. Caffrey paraphrased Honig's comments, in which she stated: " 'You don't know who I am. You don't have a right to ask these questions,' and, 'You're going to have a problem you know, as a result of asking these medical questions.' " Caffrey related to investigators that it was his opinion Honig was under the influence of drugs, and he would have arrested her.

Baker told investigators that while they were at the Van Nuys station, Honig was speaking to her and recalls that Honig called the arresting officer either "Adam Henry" or "asshole." Baker also stated that in Roach's presence, Honig told her the arresting officer did not know what he was doing. During the release procedures, Baker had to warn Honig to be quiet. Baker told investigators that it was her opinion Honig was under the influence, and Honig's behavior was an embarrassment to the Department.

Baxter, the CHP drug recognition expert, told investigators that Honig admitted she was taking Soma, Hydrocodone, and possibly Valium. Baxter concluded Honig was under the influence of a controlled substance.

The Department's expert, interviewed as part of the investigation, reviewed the reports prepared by the CHP, and reached the opinion that Honig was " 'under the influence of central nervous system depressants.' " The toxicology reports revealed the presence of seven different central nervous system depressants in Honig's system.

Honig told the investigator that she suffered from a medical condition and the signs of impairment that she exhibited on May 7, 2009 were not caused by her medical condition, nor the prescription medications she had taken. She had prescriptions for the drugs that came back positive on the toxicology report. Honig did not believe she was driving while impaired or driving under the influence.

(3). *Notice of Intent to Demote*

By October 2010, the Department had concluded the internal investigation. Before rendering a decision, the Department asked Honig to inform them of whether she would be able to return to work. Honig's doctor sent a letter to the Department stating Honig's medications "do not interfere with her ability to return to her prior position."

The Department notified Honig in a letter prepared by the Internal Affairs Bureau under the command of James Lopez (Lopez letter) that it intended to demote Honig from her position as director to assistant director. Given Honig's position within the Department, which included "providing ongoing psychological counseling to personnel struggling with alcohol or other forms of substance abuse to include prescription drug addiction," the Department took the position that Honig's ability to "effectively oversee the Department's drug and alcohol program ha[d] been significantly impaired due to [her] own unprofessional and irresponsible conduct."

The Lopez letter stated three policy violations that warranted Honig's demotion. First, Honig violated the policies addressing general behavior, obedience to laws, regulations and orders in connection with the May 7 accident, citing her behavior at the scene of the accident and the toxicology report in which Honig tested positive for several central nervous system depressants. Second, Honig's conduct violated the Department's policy by obstructing an investigation, citing witness statements that Honig was "uncooperative with police officers and/or interfered with or delayed their investigation, and/or made intimidating comments or used insulting terms of speech," which included comments directed to the arresting officer. Third, Honig violated Department policy by making false statements to the arresting officer during the official investigation.

(4). *Administrative Proceedings, Demotion, Disability Retirement*

After a *Skelly* hearing,[4] the County demoted Honig. Honig appealed the decision to the Civil Service Commission.

Honig has never returned to work. Before she was demoted, she filed for disability retirement.

b. *Honig's Showing of Pretext*

In opposition, Honig takes issue with the conclusions reached following the internal affairs investigation, describing the investigation as "tainted." Honig presented evidence that the criminal investigation into the May 7 accident concluded that she was not driving under the influence, and instead the accident was caused by a symptom related to her medical condition. As for being uncooperative, Honig cites the accident report Roach prepared and Caffrey's report in which she was described as being "cooperative," along with her declaration in which she states that she never called Roach a derogatory name to his face. Honig was asked during her deposition if she used the term " 'asshole' " or "Adam Henry" to refer to the arresting officer. She responded: "Actually, I don't know if I called him – I'm not saying I called him Adam Henry. I may have called him an asshole. I called him one or the other. They're both the same in my head, so I don't know which one I actually said."

Honig also submitted the Williams declaration, in which he described his familiarity with the Department's discipline policy, to show that Honig's demotion was unduly harsh compared with other LASD employees who were arrested for driving under the influence. The County objected to the admission of the Williams declaration in its entirety as lacking foundation to qualify him to testify as an expert witness (Evid. Code, § 720), and asserted 26 other objections to specific paragraphs of the Williams declaration on multiple grounds.

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[4] *Skelly* hearing refers to the administrative hearing required by *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194.

3. *Trial Court Grants Summary Judgment, Appeal*

In ruling on the summary judgment motion, the trial court assumed that Honig could state a prima facie case of discrimination, and noted the County set forth evidence of a legitimate business reason for its employment decision, "being the car accidents, including the alleged DUI arrest and display of unprofessional conduct." The trial court concluded that Honig did not meet her burden to present admissible evidence to create a triable issue of fact that the decision to demote her was pretextual and the real reason was based on her medical condition. In reaching this conclusion, the trial court stated the Williams declaration addressing other LASD employees who were suspended, not demoted, after being arrested for driving under the influence was irrelevant and inadmissible as the other incidents were based on circumstances different than the circumstances presented here. Moreover, the trial court noted that prior to the May 7 accident, Honig had not disclosed her medical condition or requested an accommodation.

The trial court granted summary judgment. Honig filed this timely appeal from the judgment challenging only the summary adjudication of the disability discrimination claim. Honig contends the evidence she submitted, including the Williams declaration which was improperly excluded, establishes a triable issue of fact to show that the County's reasons for demoting her were a pretext for disability discrimination based on her medical condition. As shall be discussed, we disagree.

DISCUSSION

1. *Standards of Review*

We review the trial court's decision to grant of summary judgment de novo considering " 'all of the evidence set forth in the [supporting and opposition] papers, except that to which objections have been made and sustained by the court, and all [uncontradicted] inferences reasonably deducible from the evidence.' " (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.)

The appropriate standard of review for summary judgment evidentiary rulings is an issue the California Supreme Court has, so far, declined to address. (See *Reid v.*

Google, Inc. (2010) 50 Cal.4th 512, 535.) The majority of California appellate courts, however, including this one, have held that summary judgment evidentiary rulings are reviewed, like other evidentiary rulings, for abuse of discretion. (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181.)

2. *Summary Adjudication of a Disability Discrimination Claim*

When an employee contends that she suffered disability discrimination (Gov. Code, § 12940, subd. (a)) in violation of the FEHA, we undertake a three-step burden-shifting inquiry in order to evaluate the claim. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354-356 (*Guz*).) Here, we assume a prima facie case of disability discrimination[5] based on Honig's medical condition,[6] thus our focus is on the second and third step of the inquiry. (*Id*. at pp. 355-356.) The second step shifts the burden to the employer to come forward with a legitimate, nondiscriminatory reason for the adverse employment action. (*Ibid.*) The third step gives the employee the opportunity to attack the proffered reasons as pretexts for discrimination or to offer evidence of a discriminatory motive. (*Id*. at p. 356; see also *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005 (*Hersant*).)

To avoid summary judgment, an employee must offer substantial evidence to establish there is a triable issue of fact that the employer's stated nondiscriminatory

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5 A prima facie case for discrimination on grounds of physical disability under the FEHA requires Honig to show: (1) she suffers from a disability; (2) she is otherwise qualified to do her job; and (3) she was subjected to an adverse employment action because of the disability. (*Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.)

6 "Medical condition" is statutorily defined in Government Code section 12926, subdivision (i) as either of the following: "(1) Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer. [¶] (2) Genetic characteristics," which are further statutorily defined as inherited characteristics that are known to cause disease. (Gov. Code, § 12926, subd. (i)(2)(A), (B).) Honig's complaint alleges she suffered from chronic diseases, and has suffered from cervical cancer. Honig, however, refers to her "medical condition" in a much broader sense than the statutory definition.

reason for the adverse action was untrue or pretextual, or the employer acted with discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude discrimination. (*Hersant*, *supra*, 57 Cal.App.4th at pp. 1004-1005.) An employee may make this showing by offering circumstantial rather than direct evidence and is not limited to a direct attack on the employer's explanation. (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 816.)

Honig challenges the trial court's conclusion that the County's decision to demote her was for a nondiscriminatory reason by attacking the adequacy of the investigation and presenting comparative evidence regarding the severity of the discipline to show pretext. We conclude the trial court properly determined the County met its burden and Honig failed to meet her burden.

3. *The County Met its Burden to Show a Nondiscriminatory Reason*

Here, the County presented evidence that Honig was demoted after a lengthy internal affairs investigation established that she violated several Department policies after the May 7 accident. Given Honig's position within the LASD, the Department determined a demotion was the appropriate discipline. This evidence of a legitimate, nondiscriminatory reason for Honig's demotion shifted the burden to Honig to produce " ' "substantial responsive evidence" that the employer's showing was untrue or pretextual,' " thereby raising at least an inference of disability discrimination. (See *Hersant*, *supra*, 57 Cal.App.4th at pp. 1004-1005.)

4. *Honig Did Not Meet her Burden to Raise a Triable Issue*

Honig argues the investigation was "tainted," for the sole purpose of removing her from her position as director, and the severity of the discipline raises an inference of discriminatory animus.[7]

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[7] In making this argument, Honig also refers to the personal animosity toward her by LASD command, Assistant Sheriff Paul K. Tanaka, and then Undersheriff Larry L. Waldie, before the May 7 accident. An inference of pretext may arise when an investigation is "not truly independent." (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 119-120.) There is no circumstantial evidence in the record from which

a. *Adequacy of Investigation*

Honig contends pretext is shown because the County failed to further investigate exculpatory evidence that she was not driving under the influence, ignored evidence that she was cooperative during the investigation, and exaggerated her use of derogatory language in making the decision to demote her. An inference of pretext may arise where an investigation is insufficiently " 'thorough' " (*Nazir v. United Airlines, Inc.*, *supra*, 178 Cal.App.4th at p. 277.)

(1). *Finding Addressing Honig's Behavior on May 7, 2009*

The investigative report includes both the city attorney's conclusion that Honig was not driving under the influence, and Honig's statements to the same effect that the accident was caused by symptoms of her medical condition and a reaction to her attempt to reduce her medication.[8] The city attorney explained that over the course of his criminal investigation, he concluded that Honig "was not . . . under the influence of prescribed drugs, but actually she was suffering some of the emergence of some of the symptoms that the medications were intended to ameliorate, and she had come off of these drugs so fast, as these symptoms emerged, it was actually the return of the symptoms, which caused the traffic accident."

Honig's argument is essentially that the city attorney's investigation was more thorough because he came to the right conclusion. The city attorney's conclusion as to whether to pursue criminal charges is a separate inquiry from whether Honig violated the Department's policies after the May 7 accident. Moreover, the city attorney did not have

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to infer that either Tanaka or Waldie influenced the investigation or the investigator. (See contra, *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 277.) Tanaka and Waldie reviewed and approved Lopez's decision to demote Honig as part of the chain of command.

[8] Honig challenges the trial court's evidentiary ruling excluding evidence related to the symptoms of Sjogren's syndrome, and what she believed was the cause of the accident. This evidence is in the record as part of the internal affairs investigation. Thus, any claim of error did not result in a miscarriage of justice. (Evid. Code, § 354.)

the toxicology report in which Honig tested positive for: "Carisoprodol (Brand name Soma); Meprobamate (Brand name Miltown or metabolite of Carisoprodol); Topiramate (Brand name Topamax); Tramadol (Brand name Ultram); Nortramadol (Metabolite of the Tramadol); Duloxetine (Brand name Cymbalta); Hydrocodone (opiate already found and indicated in system); and Desethylchloroquine (Brand name Aralen or Plaquenil and/or a metabolite of Chloroquine)."

Honig maintains the toxicology report does not show the amount of the controlled substances in her system, which would have established whether she was under the influence. To avoid summary judgment where an employer has provided a legitimate, nondiscriminatory reason for an employment decision, an employee "can not 'simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee " 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [. . . asserted] non-discriminatory reasons." [Citations.]' [Citations.]" [Citation.]' [Citation.]" (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4h 52, 75.) Honig's evidence does not make this showing.

(2). *Finding that Honig Obstructed an Investigation*

Honig next contends that the County's investigation was inadequate in connection with the charge that she obstructed the arresting officer's investigation following the May 7 accident because the internal affairs investigator failed to ask Roach and Caffrey why their contemporaneous accident reports did not document Honig's uncooperative behavior. Roach's accident report lists Honig as cooperative. Caffrey's report states: "I observed as Officer Roach conducted his DUI investigation. He began by asking investigative questions prior to conducting standardized field sobriety tests. Dr. Honig was hesitant to answer questions about her medical condition claiming privacy rights. I advised Dr. Honig that the questions were part of a standard DUI investigation and it was

in her best interest to cooperate. Dr. Honig complied and began to answer the required investigative questions. . . . During the investigation, Dr. Honig refused most field sobriety tests claiming pre-existing injuries. . . ."[9]

Honig admitted using derogatory language when describing Roach. Honig attacks Roach's credibility on this point because Roach's deposition testimony differed from his internal affairs investigation interview. Roach's deposition occurred after Honig was demoted and could not have been considered by the County in determining the severity of the discipline. Roach told the investigator that Honig was cooperative but acted unprofessional when he decided to arrest her, stating Honig threatened him. Thus, there was a sufficient basis from which the Department could conclude that Honig obstructed Roach's investigation following the May 7 accident, failed to cooperate, and used derogatory language.

(3). *Finding that Honig made a False Statement*

The third and final finding that Honig violated Department policy is based upon her false statement to Roach at the accident scene, which Honig refers to in her opening brief as "disingenuous." Honig cites to the record in which she admitted to taking certain prescription medication, but that admission was at the Van Nuys station after she had been arrested. The evidence is undisputed that Honig did not admit to Roach that she had taken any prescription medication. Thus, the cited evidence does not raise a triable issue regarding the thoroughness of the Department's investigation, or that the decision to demote Honig based on these policy violations was implausible or unworthy of credence so as to raise an inference of pretext.[10]

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[9] Caffrey's report also indicates he videotaped the interview, but "minimal audio recording was captured." The videotape was not admitted into evidence to support or oppose the summary judgment motion. Thus, we disregard Honig's arguments relying on this evidence.

[10] Contrary to Honig's contention, the findings that Honig violated Department policy were not based upon her two prior accidents during the 45-day period. Those incidents are not addressed in the policy violations that resulted in her discipline.

b. *Inquiry Before Imposing Discipline*

Relying on *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, Honig contends that pretext is shown by Lopez's inquiry as to whether she was able to return to work before reaching a decision in her case. In *Dark*, the plaintiff suffered from epilepsy and experienced an aura that often preceded a seizure. (*Id*. at p. 1081.) He ignored the warning and reported to work, told no one of the potential problem, and suffered a seizure while driving his employer's vehicle. (*Ibid*.) The employer terminated the plaintiff but gave two divergent explanations for its decision, that is, lack of fitness to perform the duties because of the presence of poorly controlled idiopathic epilepsy and misconduct in ignoring the immediate safety issue. (*Id*. at pp. 1083-1084.)

As the Ninth Circuit noted, conduct resulting from the disability is considered to be part of the disability. (*Dark v. Curry County*, *supra*, 451 F.3d at p. 1084.) Thus, the employer's decision was not based on a legitimate, nondiscriminatory reason.

Even if the employer's decision were based on misconduct, a nondiscriminatory reason, the *Dark* court concluded there was substantial evidence that the proffered reason of " 'misconduct,' " was a pretext for disability discrimination. (*Dark v. Curry County*, *supra*, 451 F.3d at p. 1085.) Before termination, the employer sought a medical evaluation to determine the employee's fitness for duty, which was unnecessary to terminate him for misconduct. (*Ibid*.) Honig focuses on this reasoning, arguing the County did not need to know whether she was able to return to work before making its decision to demote her for violating Department policies.

Lopez's inquiry appears to suggest the decision in her case was dependent upon whether she intended to return to work. In an e-mail exchange between Honig and Lopez, however, after he made this initial inquiry, he makes clear that Honig's "ability to return to work does not impact the IAB [Internal Affairs Bureau] finding, but directly relates when you will be able to return to the department." This situation is not analogous to the employee in *Dark*. In *Dark*, the employer's request that the employee undergo a fitness-for-duty examination raised an inference that the alternative reason for

terminating him for misconduct was a pretext. Unlike *Dark*, Lopez's inquiry concerning Honig's return to work does not raise an inference that the stated reasons in the Lopez letter were untrue, or that the Department acted with a discriminatory motive arising from her medical condition. The Lopez letter did not state both a discriminatory and nondiscriminatory reason for Honig's demotion, and the County did not require that Honig prove she could perform her job duties despite her medical condition before she returned to work. Thus, the reasons for Honig's demotion were unrelated to her medical condition.

c. *Comparative Evidence*

Honig cites the Williams declaration that other similarly situated employees received less severe discipline, claiming this comparative evidence creates an inference of discriminatory animus. (*Guz, supra*, 24 Cal.4th at p. 369.) To raise an inference of discrimination, Honig must present comparative evidence that she was treated differently than similarly situated employees because of her medical condition. (See *ibid*. ["Any inference that Guz's raw age comparisons indicate age-based discrimination is further blurred by the weak evidence that the workers retained or hired over him were similar or comparable except for their dates of birth."].)

Honig contends the trial court abused its discretion in excluding the Williams declaration because the stated objection was to Williams' qualifications as an expert, not the grounds stated on the record.[11] The testimony of an unqualified expert is not relevant testimony. Williams retired in 2008, two years before Honig was demoted and was not qualified to testify regarding the Department's current discipline policy. Thus, any error in sustaining the objection on these grounds did not result in a miscarriage of justice. (Evid. Code, § 354.)

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[11] During argument on the motion, the trial court also noted that the comparative evidence was weak because the other employees referenced in the Williams declaration were not similarly situated.

In the alternative, we have reviewed the County's evidentiary objections numbered 2-27, raising multiple grounds to exclude specific paragraphs of the Williams declaration. The trial court did not abuse its discretion. On appeal, Honig ignores our deferential standard of review and for the first time presents written opposition to the County's objections.[12] Many of the objectionable paragraphs contain irrelevant information that is unrelated to this case. The paragraph in which Williams described the 15-day suspension policy for driving under the influence is inadmissible because it lacks foundation. Moreover, none of the remaining paragraphs presented evidence of similarly situated employees who received less severe discipline to raise an inference of disability discrimination based on Honig's medical condition. Likewise, the trial court did not abuse its discretion in sustaining objections to Honig's statements that she was treated differently than similarly situated employees. Thus, in this case, there is no admissible comparative evidence to raise an inference that Honig's demotion evidences discriminatory animus. Summary judgment was properly granted.

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[12] After the trial court announced its rulings on the evidentiary objections, Honig's counsel did not bring to the court's attention that the objection to the Williams declaration in its entirety was based on Evidence Code section 720. The County asserts that Honig has waived any claim of error on appeal for failing to bring this issue before the trial court, or to oppose the County's objections either by filing a written opposition or presenting oral argument during the hearing on the summary judgment motion. As a general rule, a party cannot raise a new theory on appeal unless the theory involves a purely legal question. (*People ex rel. Totten v. Colonia Chiques* (2007) 156 Cal.App.4th 31, 39-40.) There also is authority that when a proponent of hearsay testimony, for example, relies on a hearsay exception, the proponent must have alerted the trial court to the exception relied upon to preserve the issue on appeal. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 282-283.) But, based upon our review of the County's evidentiary objections, the trial court could render its decisions without the benefit of an opposition. Given our deferential standard of review, however, the proponent of the evidence might find presenting an opposition in the trial court would provide a better opportunity to argue the admissibility of the proffered evidence rather than present the issue for the first time on appeal challenging the evidentiary rulings as an abuse of discretion.

DISPOSITION

The judgment is affirmed. No costs are awarded on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.