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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ANDRE DECOHEN, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, Defendant and Respondent.	B268796 (Los Angeles County Super. Ct. No. BC545912)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard Rico, Judge. Affirmed.

Haley & Young and Steven H. Haney for Plaintiff and Appellant.

Peterson Bradford Burkwitz, Avi Burkwitz and Lilit Vardanian for Defendant and Respondent.

Plaintiff and appellant Andre DeCohen is a fire captain employed by defendant and respondent County of Los Angeles. DeCohen is African-American. One day, a group of firefighters under the command of DeCohen and a Caucasian captain, Tom Brady, played volleyball on Venice Beach while they were on duty. The firefighters and their supervising captains were all disciplined for the volleyball game. The two captains, DeCohen and Brady, each received a 15-day suspension. DeCohen brought suit, alleging that his 15-day suspension constituted discrimination and harassment based on race, within the meaning of the Fair Employment and Housing Act (FEHA). The County obtained summary judgment. Concluding that there is no admissible evidence that the suspension was motivated by DeCohen's race, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Background Facts*

DeCohen joined the Los Angeles County Fire Department in 1988. He was promoted to firefighter specialist in 2006 and captain in 2011. Before this incident, he had never once been disciplined in his career with the Department. At the time of the facts leading to this discipline, he was assigned to Fire Station 38, in View Park. He was happy with this assignment.

2. *The Volleyball Game*

On February 25, 2012, DeCohen was working an overtime shift at a different station, Fire Station 110, at Marina Del Rey. Brady was another captain working the same shift; Brady was assigned to Fire Station 110 regularly. DeCohen would subsequently take the position that, because he was a visiting captain working an overtime shift (and because he was captain in charge of an engine, not the rest of the station), he was

subordinate to Brady on the shift. Other than his own declaration on this point, DeCohen's only evidence that a visiting captain would be subordinate to the local captain on the same shift was the deposition of his union representative that this was an "informal rule or guideline" or "unwritten rule."

In the Department, firefighters, including captains, are required to participate in physical training for at least one hour per day. When DeCohen arrived at Fire Station 110 for his overtime shift, Brady told him that the crew plays volleyball as its exercise activity. This was not something Brady privately told DeCohen; he said it to the room full of firefighters. The consensus was "that that's, really, what everyone wanted to do." DeCohen gathered from the room's reaction that they played volleyball all the time. He testified at deposition that he thought volleyball was "fire station 110's thing. That's what they did up until that time. That was their station activity."

DeCohen took the firefighters under his command to play volleyball, although he told Brady that he would not be playing; he preferred to walk instead. Brady did not mind.

The questions would later arise as to (1) whether volleyball was prohibited by the Department at this time; and, if so, (2) whether DeCohen knew that it was. On this point, DeCohen testified in deposition that he could have decided that he did not want to go, but did not make that decision. He testified, "There was no impetus to make me feel that there was anything wrong with what he [Brady] was requesting." When asked if he told Brady that he had any concerns about playing volleyball, he responded, "I may have, I'm not sure." Moreover, regardless of whether DeCohen considered himself subordinate to Brady in rank for the shift, DeCohen testified that Brady did not *order* him

to play volleyball or *tell* him to play volleyball. Instead DeCohen testified that Brady "*asked* me to accompany him to facilitate volleyball." (Emphasis added.) DeCohen was not concerned that if he did not comply, he would be subjecting himself to discipline or being insubordinate.

This was not, however, the position DeCohen took in his later declaration. In contrast to his deposition testimony, he declared that he was "*instructed* by the lead Captain at Fire Station 110 to permit the firefighters to play volleyball for their recreational activity, and I did as I was instructed." (Emphasis added.) He further stated, "I object[ed] to [Fire Station] 110 playing volleyball and set an example by not participating in the sport. Additionally, I was given a *direct order* by the Station Captain to take the team to play volleyball despite my objection." (Emphasis added.)

In any event, the firefighters from Station 110 played volleyball that day. Brady and four of the firefighters went to Venice Beach in a truck; DeCohen and two of the others drove over in the fire engine. DeCohen and one other firefighter walked while the others played volleyball on the beach. An issue would later arise as to whether Venice Beach was within Fire Station 110's jurisdiction or if, to the contrary, the entire shift of firefighters had left the station's jurisdiction while on duty in order to play volleyball. While DeCohen relied on some evidence that there had been training drills at Venice Beach in the past, the evidence was undisputed that the volleyball courts were 100 feet outside the district line.[1]

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[1] DeCohen conceded that the courts were 100 feet outside the district line, but argued that "the line is not determinative."

A member of the public took a video of the firefighters playing volleyball and posted it on YouTube, under the title, "Your Tax Dollars At Work 2-25-12." According to testimony from Deputy Chief David Richardson, "The video further criticized the Department for improperly using public funds, since it was alleged that 'most mornings' members of the Fire Department could be found playing volleyball on Venice Beach and questioned whether these employees could be providing more valuable services to the community. The You[T]ube 'volleyball incident' video greatly embarrassed the County and jeopardized the public's trust of the Department."

3. *Investigation*

A second volleyball game was played, on March 3, 2012. There is no suggestion that DeCohen was involved in any way with that game. The Department conducted an internal investigation with respect to both volleyball games. Over a dozen employees faced discipline over the two games.

4. *The Propriety of Volleyball*

Although not strictly necessary to our resolution of the appeal, it is helpful to briefly address both sides of the dispute regarding whether, in February 2012, Department firefighters were permitted to satisfy their daily exercise requirement by playing team sports.

The applicable rule was found in Volume 2, Chapter 7, Subject 10 of the Department's General Operations Manual. That Subject discusses the "Physical Fitness Program." Personnel are required to participate in three sections: cardiovascular conditioning, muscular strength/endurance conditioning, and flexibility. We are here concerned with the first element, cardiovascular conditioning. The governing language

adopted in 2008, and applicable in February 2012 explained, "Approved cardiovascular conditioning shall be vigorous walking, running, or other approved training within each individual's target heart rate range, to be performed continuously for a minimum of 30-60 minutes." It further stated, "Alternatives to vigorous walking or running shall be the stationary bicycle specific cardiovascular training equipment, or other approved modes of exercise."

In November 2012, nearly nine months after the volleyball game for which DeCohen was suspended, Volume 2, Chapter 7, Subject 10 of the General Operations Manual was modified to include the following language: "Station personnel shall not engage in any sport, game, or exercise activity that has been shown to be associated with high rates of injury or poor public perception. Those activities include, but are not limited to: basketball, football, volleyball, softball, baseball, racquetball, tennis, paddle tennis, surfing."

The majority of firefighters participated in a voluntary program called Fitness for Life. Participation provided employees a 3 percent increase in salary. DeCohen participated in Fitness for Life. In February 2009 (three years before the volleyball game here), Fitness for Life participants were taught that team sports had a high rate of injury which cost the Department a lot of money. The Fitness for Life module included an "Exercise policy," which stated, "Station personnel shall not participate in team sports in lieu of, or in addition to, the Department's Exercise program of stretching, strength and cardiovascular conditioning. Team sports include but are not limited to, basketball, football, volleyball, softball, baseball,

racquet ball, tennis, paddle tennis and any other game or sport that could possibly cause an injury to occur."

DeCohen takes the position that since Fitness for Life was voluntary, he could not be punished for violating the policy it taught. Instead, DeCohen argues that the only applicable policy is the official language in the General Operations Manual, which did not specifically prohibit volleyball until months after the game was played. However, as we now explain, DeCohen was not disciplined for violating Fitness for Life or the subsequently amended language of the Operations Manual. Instead he was disciplined on the basis that the 2008 Operations Manual limited permissible cardiovascular exercise to walking, running, stationary bicycle, and other approved methods – with no suggestion that volleyball was somehow approved.

5. *DeCohen's Suspension*

DeCohen was charged and investigated. He exercised his right to respond. Ultimately, he was suspended for 15 days. On April 25, 2013, he received his notice of suspension, signed by Deputy Chief Richardson.

The notice explained the facts upon which the suspension was based as follows: "On February 25, 2012, while on duty and assigned to Engine 110 as a Fire Captain and leader of your crew you participated in physical fitness activity at Venice Beach in public. During your physical fitness activity, Engine 110 was parked in the parking lot at Venice Beach. Venice Beach is not within the Department's jurisdiction. As Engine 110 was out of its assigned service area there was increased potential for the public to be without timely service should an emergency arise in your assigned area. Further, as a Fire Captain you are in a leadership position. Thus, as a leader your conduct on this

occasion encouraged others to violate policies and procedures, which is an aggravating factor in this matter. [¶] During your administrative interview, you were shown a copy of Volume 2, Chapter 7, Subject 10, of the Department's General Operations Manual, specifically Sections IV.B.3 and IV.C.[2] You acknowledged that these sections listed only walking, jogging and the stationary bicycle as approved aerobic exercises. Thus, prior to February 25, 2012, you were aware of the written policy and your obligations as a Department Fire Captain and leader to follow the policies and procedures, yet you intentionally disregarded the policy and failed to intervene by allowing your crew to participate in team sports, a prohibited physical activity, in a public location which brings discredit to the Department and is not a good example for your crew who look to you to be an example of what they should do or not do. As a Fire Captain you used extremely poor judgment in encouraging your subordinates to violate numerous policies and procedures in public."

The notice went on to explain that aggravating factors were considered, including that DeCohen contributed to his crew being outside the Department's jurisdiction which "exposed the Department to potential liability by not ensuring timely emergency response coverage for Fire Station 110's assigned jurisdictional area." Additionally, the notice stated, "Your improper conduct and failure to use good judgment was displayed to the immediate public to which you serve. Unfortunately, this same improper conduct was also displayed and made available to the entire viewing public worldwide as your conduct was video

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[2] These citations appear mistaken. There is no section IV.B.3 in either the 2008 or 2012 version of the Manual. Section IV.C pertains to flexibility.

recorded and posted on a video-sharing website, YouTube. Furthermore, your conduct not only exposed the Department to ridicule, but also diminishes the confidence of the public towards the Department's mission to protect lives, the environment and property."

In imposing discipline, the Department also acknowledged that DeCohen had been working for the Department since 1988 and had suffered no prior administrative action.

The Department has a progressive range of discipline imposed for first, second, and third violations of various provisions. For a first offense of bringing discredit upon the Department through on- or off-duty behavior, the penalty is a reprimand or 3-30 days suspension; for a first offense of failing to exercise good judgment or take proper action, the penalty is a reprimand or 3-10 days suspension; for a first offense of failing to adhere to Department procedures, the penalty is a warning or reprimand. DeCohen was suspended for 15 days.

6. *Other Volleyball-Related Penalties*

DeCohen was not the only firefighter disciplined for the February 25 and March 3, 2012 volleyball games. Three captains were disciplined. DeCohen and Brady were each suspended for 15 days. Another African-American captain had been a probationary captain at the time; he was reduced in rank. Two other firefighters, one African-American and one Asian/Pacific Islander, received 9-day suspensions. Eight further firefighters – two Caucasian, three African-American, one Asian/Pacific Islander and two Hispanic – each received a 3-day suspension.

Deputy Chief Richardson declared that DeCohen and Brady received 15-day suspensions because, as captains, they are held to a higher standard than the firefighters they supervise.

He explained that the discipline "was handed down based on rank and conduct in regards to the volleyball incident(s) and had nothing to do with race."

7. *DeCohen's Complaint*

On May 15, 2014, DeCohen brought suit against the County, alleging three causes of action: (1) discrimination based on race in violation of FEHA; (2) harassment based on race in violation of FEHA; and (3) failure to prevent discrimination and harassment in violation of FEHA.

The discrimination cause of action was based on disparate treatment from Brady, on the theory that DeCohen only allowed his subordinates to play volleyball once, while Brady had allowed his to play multiple times, but they both received the same penalty. He further alleged that he had been subordinate to Brady, so should have received a lesser penalty.

The harassment cause of action alleged a hostile work environment arising from the investigation, hearing and discipline itself. DeCohen also alleged that, when verbally admonished, he was "yelled at, screamed at, cursed at, and publicly grossly embarrassed, causing severe emotional anguish and distress."

The third cause of action, for failure to prevent discrimination and harassment, was based on the first two.

8. *The County's Motion for Summary Judgment*

On July 27, 2015, the County moved for summary judgment. As to the cause of action for race discrimination, the County argued that its actions were motivated by legitimate, non-discriminatory reasons, and not by race. On this point, the County's strongest evidence was that it had disciplined 13 firefighters, of many different races, as a result of the volleyball

incidents. Specifically, Brady, who was Caucasian, received the same 15-day suspension as DeCohen. In short, the two captains in charge of the crew who played volleyball on February 25, 2012 were disciplined the exact same amount, and race had nothing to do with it.

As to the cause of action for harassment, the County argued there was no evidence of severe or pervasive conduct sufficient to constitute harassment. Indeed, the evidence appeared to show only a standard personnel investigation resulting in discipline.

9. *DeCohen's Opposition*

DeCohen's opposition relied almost exclusively on his own declaration and attached exhibits. Other than his declaration, the only testimony on which he relied consisted of some brief excerpts from the deposition of his union representative referring to the unwritten rule by which overtime captains like DeCohen should defer to regular station captains like Brady.[3]

We emphasize the critical importance DeCohen's declaration had to his opposition to the summary judgment motion. In the entirety of the factual section of DeCohen's opposition memorandum, all but two citations are to his declaration. DeCohen's opposition to the County's separate statement of undisputed facts added 85 new facts, each of which was simply a quotation from his declaration.

The County objected to nearly all of DeCohen's declaration.

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[3] DeCohen also included some short excerpts from the deposition of Battalion Chief Tom Sullivan, which we find irrelevant to our resolution of the appeal.

10. *Ruling, Judgment and Appeal*

The trial court first sustained approximately half of the County's objections to DeCohen's declaration. The result was that DeCohen's declaration – particularly with respect to his purported evidence of racial discrimination and harassment – was decimated.

The trial court then granted the motion for summary judgment. As to race discrimination, the court concluded there was insufficient evidence that DeCohen's suspension was based on race; the court was persuaded by the fact that DeCohen and Brady were of the same rank and had received the same suspension. The court recognized that DeCohen argued that he should have received a lesser suspension than Brady because DeCohen was, under the unwritten rule, subordinate to Brady. The court found, however, that such an informal rule was insufficient to establish racial animus in the Department's decision to punish the two captains equally.[4] As to harassment, the court concluded that DeCohen's only admissible evidence of harassment was the suspension itself, which was insufficient to

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[4] Although the trial court did not specifically recognize it, we note that DeCohen believes an unwritten rule should have governed the relative discipline between himself and Brady, but argues that the "Exercise policy" actually written in Fitness for Life should have no bearing on his discipline, because that program was not official mandatory policy. While DeCohen relies on unofficial policies when he believes they support his argument and claims they should be ignored when they does not, the County's position has been consistent throughout: Volleyball was not one of the permitted exercises in the Operations Manual *and* there is no official rule which would have placed DeCohen under Brady's command on February 25, 2012.

support a cause of action. The cause of action for failure to prevent discrimination and harassment fell with the first two.

DeCohen filed a notice of appeal before judgment was actually entered. We treat the notice of appeal as filed immediately after entry of judgment. (Cal. Rules of Court, rule 8.104(d)(2).)

DISCUSSION

1. *Standard of Review*

" 'A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail.' [Citation.] The pleadings define the issues to be considered on a motion for summary judgment. [Citation.] As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. [Citation.]" (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) We review orders granting or denying a summary judgment motion de novo. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579.)

We exercise "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to

judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) We consider all of the evidence set forth in the moving and opposing papers except that to which objections were made and sustained. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1035.) On appeal, DeCohen does not challenge any of the trial court's evidentiary rulings. In his reply brief, he briefly suggests appellate courts should not blindly accept erroneous trial court evidentiary rulings. While we agree with this proposition, DeCohen has not presented any argument against any specific evidentiary rulings made by the trial court. As such, we consider the trial court's evidentiary rulings to be conclusive.

"In determining whether any triable issue of material fact exists, the trial court may, in its discretion, give great weight to admissions made in deposition and disregard contradictory and self-serving affidavits of the party. [Citations.] 'In reviewing motions for summary judgment, the courts have long tended to treat affidavits repudiating previous testimony as irrelevant, inadmissible, or evasive. [Citation.]' [Citation.] The rule is equally applicable to a conflict between the affidavit and the deposition testimony of a single witness." (*Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451.)

2. *No Triable Issue of Fact of Race Discrimination*

A. *Governing Law*

FEHA bars racially discriminatory employment practices. It is an unlawful employment practice "[f]or an employer, because of the race . . . of any person, to . . . discriminate against the person in compensation or in terms, conditions, or privileges of employment." (Gov. Code, § 12940, subd. (a).) A three-stage burden-shifting analysis applies. (*Guz v. Bechtel National Inc.*

(2000) 24 Cal.4th 317, 354.) The plaintiff must provide evidence that "(1) [plaintiff] was a member of a protected class, (2) [plaintiff] was qualified for the position . . . sought or was performing competently in the position . . . held, (3) [plaintiff] suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Id.* at p. 355.) Once the plaintiff has established a prima facie case, a presumption of discrimination arises. The burden then switches to the employer to rebut the presumption by producing admissible evidence sufficient to raise a genuine issue of fact that its action was taken "for a legitimate, nondiscriminatory reason." (*Id.* at pp. 355-356.) It does not matter if the employer's reasons were not wise or correct, as long as they were nondiscriminatory. (*Id.* at p. 358.) Once the employer has met the burden, the presumption of discrimination disappears. "The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive." (*Id.* at p. 356.) "The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." (*Ibid.*)

B. *The County Met Its Burden as Moving Party*

Here, there is no dispute that DeCohen was a member of a protected class (African-American), was performing competently in his position (captain), and suffered an adverse employment action (suspension). The only dispute in this case is whether the suspension was motivated by discrimination or was, instead, taken for a legitimate nondiscriminatory reason.

The circumstance that DeCohen was one of over a dozen employees, of many different races, disciplined for the volleyball

games is sufficient to meet the County's burden on summary judgment. The fact that so many firefighters were punished is evidence that the Department was, in fact, disciplining its firefighters and captains for the volleyball game, and not because of race. In this regard, we find DeCohen's arguments that volleyball was not technically prohibited in February 2012 and Venice Beach was not definitively outside Fire Station 110's jurisdiction to be beside the point. If DeCohen's arguments are correct, *none* of the firefighters and captains should have been disciplined for the volleyball games. Either the Department was right imposing discipline on all of the participants or it was wrong in doing so; but even if the Department had been wrong in imposing discipline on the group, it would not give rise to an inference of discrimination, as the disciplined group contained individuals of many different races.[5]

C. *DeCohen Failed to Raise a Triable Issue of Fact with Admissible Evidence*

1. *DeCohen was Not Unfairly Disciplined Compared to Brady*

The bulk of DeCohen's claim is one of unfair discipline compared to the discipline imposed on the Caucasian captain, Brady. "To establish discrimination based on disparate discipline, it must appear 'that the misconduct for which the employer discharged the plaintiff was the same or similar to what a similarly situated employee engaged in, but that the

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[5] At no point does DeCohen suggest that the Department intentionally baselessly punished three Caucasians, two Asian/Pacific Islanders, and two Hispanics as some sort of cover for its purportedly discriminatory discipline imposed on six African-Americans arising from the same incident.

employer did not discipline the other employee similarly.' [Citation.]" (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1535.) DeCohen's argument is the mirror image of this rule: he argues that he and Brady were not similarly situated, but they were improperly treated similarly.

It is, however, an argument not supported by admissible evidence. In his opening brief on appeal, DeCohen sets forth, no less than three times, a list of seven factors which he believes show that Brady is more culpable than he was. But this list is supported only by paragraphs 50 and 51 of his declaration, to which objections were sustained.

In the absence of DeCohen's list of factors purportedly distinguishing himself from Brady, DeCohen can only fall back on his theory that he was subordinate to Brady, and his declaration testimony that Brady had given him a direct order to take the team to play volleyball over his objection. Yet these statements in his declaration are in direct contradiction to DeCohen's admissions in deposition that Brady did not order or tell him to take the firefighters to play volleyball, he had simply asked DeCohen to facilitate the game. Moreover, DeCohen admitted in deposition that he did not fear a charge of insubordination if he did not comply and that, in fact, he did not think there was anything wrong with Brady's request. A plaintiff cannot create a triable issue of fact with a declaration so directly contradicting his own discovery admissions. (*Preach v. Monter Rainbow, supra,* 12 Cal.App.4th at p. 1451.) As such, there is no admissible evidence that DeCohen was less culpable than Brady because he was a subordinate who complied with his supervisor's order out of a fear of discipline. Instead, the undisputed admissible evidence is that DeCohen took his firefighters to Venice Beach at Brady's

request, because he did not think there was anything wrong with it. That volleyball had been Brady's idea and DeCohen willingly went along with it is not enough to raise a triable issue of fact that the two captains were so differently situated that imposing the same punishment on them both must have been discriminatory.

2. *There was No Other Admissible Evidence of Racial Bias*

DeCohen relies on several other arguments to support his claim of racial bias. None is supported by the evidence.

First, he suggests that the superior officers responsible for his discipline, Deputy Chief Richardson and Battalion Chief Sullivan, were under investigation by the Equal Employment Opportunity Commission for racial discrimination against other African-Americans, and settled a lawsuit in another claim of race discrimination. The only evidence in support of these facts consisted of statements in DeCohen's declaration, to which objections were sustained. Thus, no admissible evidence supports the argument.

Second, DeCohen argues that his punishment violated the Department's progressive discipline policy, as he believes he was punished as if he had committed a third offense, not a first offense. This argument, too, is supported only by paragraphs in DeCohen's declaration to which objections were sustained. In contrast, the notice of suspension itself – the only evidence on this point actually admitted – demonstrates that he was punished for a first offense, and his suspension was within the range of appropriate penalties for first offenses.

Third, DeCohen argues that two other Caucasian individuals were more culpable than he was, but were punished

less or not at all. First, he argues that the volleyball was played under Battalion Chief Sullivan's watch, but Sullivan received only a written reprimand. This, too, is based solely on a statement in DeCohen's declaration to which objections were sustained. Second, he relies on evidence regarding another Captain, Steve DeWitt. DeCohen's evidence regarding DeWitt is exclusively in his declaration. Objections were sustained to some, but not all, of this evidence.[6] The remaining admitted evidence regarding DeWitt was, in its entirety, "I was not playing volleyball in the YouTube video because I was not playing. The other Captain that did not play volleyball (although he let his crew play after Sullivan's direct order) did not receive any discipline. Therefore, discipline was not equally applied to me as it was to Captain De[W]itt who is Caucasian." A single phrase that DeWitt let his crew play volleyball after Sullivan's direct order is not sufficient to establish that DeWitt and DeCohen were similarly situated such that we can infer a racial basis for their different treatment – particularly not when Brady was similarly situated to DeCohen and received the same suspension.

As DeCohen failed to raise a triable issue of fact with admissible evidence, the court properly resolved the race discrimination cause of action against him.

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[6] Although the paragraph to which the objections were overruled appears to be equally as objectionable as the paragraphs to which objections were sustained (particularly as lacking in foundation or personal knowledge), the County does not argue on appeal that the court should have sustained its objections to this paragraph as well.

3. *No Triable Issue of Fact of Harassment Based on Race*

A. Governing Law

FEHA declares harassment on any improper basis to constitute an unlawful employment practice. (Gov. Code, § 12940, subd. (j)(1).) Not every act of harassment is actionable, however. Instead, in order to constitute actionable harassment, the harassment must "be sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment. [Citations.]" (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1312.)

Common personnel management decisions do not constitute harassment. " 'We conclude, therefore, that the Legislature intended that commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. These are actions of a type necessary to carry out the duties of business and personnel management. These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. Harassment, by contrast, consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management. This significant distinction underlies the differential treatment of harassment and discrimination in the FEHA.' [Citation.]" (*Reno v. Baird* (1998) 18 Cal.4th 640, 646-647.) This is not to say that personnel management decisions can

never be *evidence* of harassment. Under certain circumstances, the hostile message which constitutes harassment can be conveyed to the employee through personnel actions. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 708.) Nonetheless, when the cause of action is one for harassment, not discrimination, what matters is not personnel management decision, but "bias that is expressed or communicated through interpersonal relations in the workplace." (*Id.* at p. 707.)

B. *The County Met Its Burden As Moving Party*

Here, the County moved for summary judgment on the basis that DeCohen could not establish severe and pervasive harassment sufficient to alter the conditions of his employment and create an abusive working environment. The heart of DeCohen's harassment claim was the 15-day suspension and the process that led to it. The County established that this was simply a non-biased personnel management decision, not actionable as harassment.

C. *DeCohen Failed to Raise a Triable Issue of Fact with Admissible Evidence*

In response, DeCohen submitted his declaration, purporting to set forth incidents giving rise to his claim of harassment. As with his discrimination claim, objections were sustained to nearly all of his evidence. DeCohen's testimony regarding all of the following claimed facts is therefore not properly before us: (1) Deputy Chief Richardson knowingly allowed him to be harassed by supporting the ongoing investigation and ruling against him; (2) the Department knew he was subjected to this wrongful and illegal investigation merely because he was African-American; (3) he was subjected to continuous acts of misconduct amounting to a hostile work

environment; (4) on March 1, 2012, he was singled out for verbal admonishment as the only African-American among other non-African-American employees and publicly grossly embarrassed; (5) at his tribunal, he was verbally interrogated by non-African-American employees in a manner intended to disturb, shock, annoy, embarrass, and perpetrate harassment on him; (6) that after having been verbally admonished, his suspension was an abuse of authority and merely a form of continued intimidation and embarrassment intended to cause unnecessary mental anguish and emotional distress because he is African-American; (7) in December 2012, he was sent to a hostile hearing where the County refused to acknowledge he had been discriminated against and harassed; (8) the suspension was issued as a way to distract him from performing his normal job responsibilities and alter his working conditions by embarrassing him and causing him severe mental anguish; (9) he suffered public humiliation by being satirized and embarrassed in front of his subordinates to the point that his reputation was damaged and he became known as the captain publicly humiliated, losing respect across the entire Department; and (10) his subsequent requests for information on promotion were ignored.

The *only* paragraph in DeCohen's declaration relating to harassment which was not successfully objected to stated, "This continued conduct was so severe that it made the work environment so hostile that I was forced to take medical stress leave for over a month as a means to get away from the adversity. The only other option I had, next to stress leave, was to retire." DeCohen's conclusion regarding the severity of his purported harassment is nothing without admissible evidence of actual harassment – of which there is none.

As such, the court did not err in resolving this cause of action against DeCohen.

4. *No Viable Cause of Action for Failure to Prevent Discrimination or Harassment*

There can be no cause of action for failure to prevent discrimination or harassment under FEHA without a viable cause of action for discrimination or harassment. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288-289.) As DeCohen's discrimination and harassment causes of action failed, his failure to prevent cause of action fails with them.

DISPOSITION

The judgment in favor of the County is affirmed. DeCohen is to pay the County's costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

GRIMES, J.

SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.