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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

NEZAR ALSAYYAD,  
Plaintiff and Appellant,  
v.  
REGENTS OF THE UNIVERSITY  
OF CALIFORNIA,  
Defendant and Respondent.

A164704

(Alameda County  
Super. Ct. No. RG18926551)

Nezar AlSayyad was a professor at the University of California, Berkeley when his employment was suspended for three years for violating the University’s Faculty Code of Conduct pertaining to sexual harassment and unprofessional conduct toward colleagues. After resigning his position in 2018, AlSayyad filed an unsuccessful petition for writ of mandate challenging his suspension on due process grounds. In the present action, AlSayyad alleges that the Regents discriminated against him on the basis of his national origin in violation of the Fair Employment and Housing Act (FEHA). (Govt. Code, § 12940 et seq.) The trial court granted the Regents summary judgment. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

AlSayyad, who was born in Cairo, Egypt, began teaching at U.C. Berkeley in 1985, and became a professor in the departments of Architecture and City and Regional Planning. In 2016, a former student filed a complaint against AlSayyad, which precipitated the disciplinary proceeding at issue in the present litigation.

### **I. AlSayyad's Three-Year Suspension**

In March 2016, Eva Hagberg Fisher (Fisher) made a complaint about AlSayyad to the chair of the Architecture department. Fisher alleged that when she was an Architecture Ph.D. student, AlSayyad behaved inappropriately when interacting with her by, among other things, repeatedly asking her out for dinner or drinks, making disparaging comments about his colleagues to Fisher, and creating a division between Fisher and the rest of the Architecture department by telling Fisher that faculty members other than AlSayyad were skeptical of her abilities.

Fisher's complaint described several interactions with AlSayyad, including an incident in early 2013 when AlSayyad visited Fisher at her home where she was recovering from a serious surgery and gave her a hug. Fisher also described an October 2013 incident when she met AlSayyad for drinks to discuss her upcoming exam. During the encounter, AlSayyad told Fisher he loved her very much, and later, when they were in AlSayyad's car, he invited her on a paid trip to Las Vegas and put his hand on her upper thigh. Fisher allegedly responded by asking to be dropped off immediately instead of having AlSayyad drive her to her destination. Several months later, Fisher saw AlSayyad when she took her qualifying exam for her Ph.D. Before the exam, he told her that he hoped she felt as good as she looked, and afterward, he told her that he had fought for her in voting for her exam

performance. Although Fisher passed her exam, AlSayyad allegedly told her afterward that he had to fight for her because others felt she was “not a scholar.” Fisher reported that AlSayyad offered her a job as a research assistant, which she declined, and soon thereafter, she petitioned to have AlSayyad removed from her dissertation committee.

The University’s Office for the Prevention of Harassment and Discrimination (OPHD) initiated an investigation of Fisher’s complaint. In October 2016, an outside investigator submitted a report stating that she found by a preponderance of the evidence that AlSayyad violated University policy prohibiting sexual harassment and recommending that the matter be referred to the Vice Provost for the Faculty for review under the Faculty Code of Conduct. Vice Provost Benjamin Hermalin appointed two faculty investigators to determine whether a disciplinary proceeding should be instituted with the Committee on Privilege and Tenure (the P&T Committee).

In April 2017, the faculty investigators issued a report, which stated that they found probable cause that some incidents alleged by Fisher occurred and thus that AlSayyad violated the Faculty Code of Conduct. On May 3, AlSayyad was notified that the University intended to lodge a complaint with the P&T Committee. The notice, sent to AlSayyad by the University’s then Interim Executive Vice Chancellor and Provost, Carol Christ, stated that the administration intended to propose AlSayyad be dismissed from his employment as a sanction for his conduct, and advised him of his right to request mediation before the matter was submitted to the P&T Committee.

In June 2017, Vice Provost Hermalin lodged a complaint with the P&T Committee, which sought AlSayyad’s dismissal for violating the Faculty Code

of Conduct. The Committee heard testimony from 19 witnesses during a three-day hearing in November 2017, and issued a report in February 2018. The Committee found AlSayyad violated the Faculty Code of Conduct by engaging in sexual harassment, and by failing to show “ ‘due respect for the opinions of his colleagues’ by exhibiting unprofessional conduct toward them.” The Committee recommended that AlSayyad be suspended for one year without pay, a letter of censure be placed in his personnel file, and he be required to “ ‘undergo sensitivity training.’ ” In March 2018, AlSayyad sent a letter to then Chancellor Christ, which stated that the one-year suspension recommended by the P&T Committee was “ ‘excessively disproportionate’ ” to the Committee’s findings.

On August 13, 2018, Chancellor Christ sent AlSayyad notice of her decision to “ ‘issue [him] a letter of censure and suspend [him] from University employment for three (3) academic years effective immediately.’ ” Christ stated her decision was based on a “ ‘comprehensive assessment of the P&T Committee’s report and the evidence in this case,’ ” which led her to conclude that AlSayyad’s sexual harassment was “ ‘quite serious,’ ” his “ ‘pattern of unwelcome, manipulative and divisive behavior was harmful to students and other faculty,’ ” and his failure “ ‘to accept responsibility for the impact of [his] behavior [was] troubling.’ ” Based on her experience as a tenured faculty member and campus leader, Christ determined that a more serious sanction was required than the one-year suspension recommended by the P&T Committee. Christ also advised AlSayyad that if he decided to retire rather than serve his suspension, she would seek curtailment of his emeritus status, under the same conditions outlined in the suspension.

On August 13, 2018, Chancellor Christ submitted her recommendation to U.C. Berkeley President Janet Napolitano that if AlSayyad elected to

retire instead of serving his suspension, he should be subject to a three-year curtailment of emeritus benefits. The following week, Napolitano sent a letter to Christ, which stated that she had adopted Christ's recommendation. Napolitano characterized AlSayyad's conduct code violations as serious, and she recommended to Christ that AlSayyad should be required to undergo sexual harassment prevention training before returning to University employment, "as it is not clear that [he] has taken responsibility for his actions.'" A copy of Napolitano's letter was sent to AlSayyad. AlSayyad retired effective July 31, 2018, and the three-year curtailment of his emeritus status went into effect.

## **II. AlSayyad's Writ Proceeding**

In September 2018, AlSayyad filed a petition for writ of administrative mandamus against the Regents and Chancellor Christ, claiming that his due process rights were violated during the disciplinary proceeding and that the Chancellor's decision to impose a three-year suspension constituted an abuse of discretion. In May 2019, the trial court denied AlSayyad's writ petition, a ruling that a different panel of this court affirmed on appeal. (*AlSayyad v. Superior Court* (Oct. 19, 2020, A157389) [nonpub. opn.] )

In his prior appeal, AlSayyad argued that the Regents' administrative process violated due process principles of procedural fairness because: the same person, Chancellor Christ, brought charges against AlSayyad and then made the final decision as to those charges; Christ made findings that conflicted with the P&T Committee findings; and Christ made findings without personally attending the evidentiary hearing and assessing the credibility of witnesses. Rejecting these contentions, the appellate court found that Vice Provost Hermalin (not Chancellor Christ) managed the investigation and brought charges against AlSayyad. Moreover, Chancellor

Christ's statements explaining her decision to AlSayyad did not constitute findings of fact, did not require her to personally assess witness demeanor or credibility, and were not contrary to the findings of the P&T Committee. The appellate court also found that Christ's decision to impose a three-year suspension for AlSayyad's misconduct did not constitute an abuse of discretion.

### **III. AlSayyad's FEHA Complaint**

In October 2018, the month after AlSayyad filed his writ petition, AlSayyad filed a complaint against the Regents seeking damages "to remedy discrimination based on national origin and for failure to prevent discrimination." The complaint alleges the following facts: AlSayyad met Fisher in 2010, when she took a class from him. Fisher was eager to interact with AlSayyad and over the next four years they developed a friendly professional relationship. In March 2016, Fisher accused AlSayyad of sexual harassment. The following year, the University filed a complaint against AlSayyad, made accusations AlSayyad denied, and sought his dismissal. The P&T Committee determined that AlSayyad had made a " 'momentary overstep in a private context' " by touching Fisher's thigh for a couple of seconds, and rejected many other accusations made against AlSayyad. The Committee found that dismissal would be unduly punitive and recommended instead a one-year suspension. Chancellor Christ made findings that were contrary to the Committee's decision even though she did not attend the administrative hearing and thus could not evaluate the credibility of witnesses, and she "overruled" the Committee's determinations, including by imposing a three year suspension without pay. Christ also made the decision that AlSayyad's emeritus status would be curtailed if he retired.

AlSayyad also alleged that during the five-year period before his suspension was imposed, “several other University faculty members whose national origin is not Egyptian have been subject to complaints of sexual harassment,” and in those cases, the Regents “imposed penalties less harsh” than the penalty imposed on AlSayyad. AlSayyad alleged that the disproportionate treatment he received violated two provisions of the FEHA, in that the Regents (1) discriminated against him based on his national origin, and (2) failed to provide a workplace environment free of discrimination. (Citing Govt. Code, § 12940, et seq.)

#### **IV. Summary Judgment**

In May 2021, the Regents filed a motion for summary judgment, which was argued and decided by applying the burden-shifting framework used to analyze federal discrimination claims based on circumstantial evidence, a framework that has been adopted in California. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802; e.g., *Mackey v. Trustees of California State University* (2019) 31 Cal.App.5th 640, 661.) The Regents argued there is no direct evidence of discrimination, evidence produced in support of its summary judgment motion establishes that AlSayyad was disciplined for legitimate nondiscriminatory reasons, and there is no basis for inferring discrimination from the University’s treatment of other individuals who were disciplined for comparable misconduct. AlSayyad argued in opposition that the Regents failed to establish a legitimate, nondiscriminatory reason for Chancellor Christ’s decision to overrule the P&T Committee’s recommendation, and that the University’s disparate treatment of similarly situated individuals does support an inference of discrimination.

## **A. Evidence Regarding Comparators**

In addition to the evidence pertaining to AlSayyad's disciplinary proceeding (summarized above), the parties proffered evidence about other U.C. Berkeley professors who are not of Egyptian descent and who have been disciplined for sexual harassment. The appellate briefs focus on four specific cases and refer to the individuals involved by using initials.<sup>1</sup>

**J.S.:** A June 2017 OPHD report concluded that J.S. sexually harassed a student and research assistant. Vice Provost Hermalin filed a complaint seeking permanent curtailment of J.S.'s emeritus status, which was the most severe form of discipline available for an emeritus faculty member. In 2019, the P&T Committee held a hearing and made a recommendation to permanently curtail J.S.'s emeritus status. Chancellor Christ reviewed the Committee report, accepted its findings, and made a recommendation to President Napolitano to order the permanent curtailment of J.S.'s emeritus status. Napolitano adopted the recommendation.

**J.O.:** An October 2018 OPHD report concluded J.O. sexually harassed a graduate student from another university while attending an overseas conference. In August 2019, Vice Provost Hermalin filed a complaint seeking a three-year suspension. The P&T Committee held a four day hearing before issuing a report in February 2020 that recommended a written censure and one-year suspension. J.O.'s counsel sent a letter to Chancellor Christ, opposing the Committee's recommendation. The letter stated that J.O. was "deeply sorry" for the distress he caused and "sincerely remorseful." The letter requested that J.O. be permitted "to return to educating students as a

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<sup>1</sup> The summary judgment evidence was filed pursuant to a sealing order to "redact the names of complaining students who are not parties to this case and professors who are arguably similarly situated who are not parties to this case."

deeply chastened member of the University community.” Chancellor Christ adopted the Committee’s recommendation to issue a written censure and suspend J.O. for one year. Christ also advised J.O. that if he elected to retire rather than serve his suspension, Christ would seek curtailment of J.O.’s emeritus status, under the same conditions as outlined in the suspension.

**A.T.:** In August 2017, OPHD investigated a complaint that A.T. sexually harassed a former graduate student for a period of five years (from 2003–2008) while A.T. was serving as the student’s advisor. After Vice Provost Hermalin received a report from OPHD and consulted a peer review committee, he notified A.T. that he intended to bring charges and seek termination as a sanction for A.T.’s conduct. In response, A.T.’s counsel contacted Hermalin and they negotiated an “early resolution . . . settlement agreement.” Hermalin recalled some of the settlement terms during his deposition. A.T. was required to be away from campus for two years, one of which would be unpaid. He would give up his endowed chair, receive a written censure, and be put on probation in the sense that if another incident occurred, Hermalin could immediately impose further sanctions without going to the P&T Committee.

**A.A.:** An August 2018 OPHD report concluded that A.A. sexually propositioned a student while serving as her advisor, but OPHD rejected the complainant’s allegation that A.A. retaliated against her after she rebuffed his advances. A peer review committee recommended a one-year suspension without pay, and Vice Provost Hermalin notified A.A. of his intent to seek that sanction by filing a complaint with the P&T Committee. In response, A.A. immediately sought a negotiated settlement. The parties agreed that A.A. would receive a one-semester suspension instead of a one-year suspension. A.A. also relinquished his endowed chair and received a written

censure. In agreeing to this settlement, Hermalin considered the fact that A.A. had apologized for his conduct and sought to “remediate the problem,” that the financial penalty would have been substantial to A.A., and that A.A. intended to retire once the incident was resolved, which he did.

### **B. The Summary Judgment Order**

On December 13, 2021, the trial court granted the Regents summary judgment in a six-page order. Applying the *McDonnell Douglas* burden-shifting framework, the court made three material findings in support of its order. First, it found evidence to support a prima facie case of discrimination. ALSayyad showed that he is in a protected class of Egyptian national origin, he was qualified for the position he held, and he suffered an adverse employment action when the Chancellor decided to impose a greater discipline than the P&T Committee recommended. He also “identified a circumstance that suggests discriminatory motive” by presenting evidence that the Regents imposed greater discipline on him than on non-Egyptian faculty, the court found.

Second, the Regents presented undisputed evidence establishing legitimate nondiscriminatory business reasons for its employment action. In this regard, the court indicated that the October 2020 decision in ALSayyad’s related writ proceeding “might have claim preclusion effect on the issue of ‘legitimate business reasons for the employment action,’ ” since the Court of Appeal found that the Regent’s disciplinary action against ALSayyad was supported by substantial evidence and did not constitute an abuse of discretion. However, because the appellate court had not considered “the issue of unlawful discrimination,” the prior judgment did not have claim or issue preclusion effect with respect to issues of discrimination, the trial court

found.<sup>2</sup> Therefore, the court based its summary judgment ruling on undisputed evidence establishing that the P&T Committee found AlSayyad engaged in improper conduct, the Chancellor found AlSayyad's improper conduct warranted a three-year suspension, and there was a factual basis as well as legitimate business reasons for both determinations.

Third, AlSayyad did not raise a triable issue of fact that the Regents' stated reasons for the disciplinary action was a pretext for discrimination. In the summary judgment proceeding, AlSayyad did not challenge the Committee's recommendation, but argued instead that "the Chancellor's decision to deviate from the recommendation was motivated by unlawful discrimination." As proof of this theory, AlSayyad relied on four non-Egyptian "counterparts" who had been disciplined for harassment, J.O., A.A., A.T., and S.C.<sup>3</sup> The court found that only one of these individuals, J.O., was a potentially relevant comparator, as his case involved a hearing before the P&T Committee, a recommendation by the Committee, and a resulting decision by the Chancellor. However, the court concluded that J.O. was not similarly situated to AlSayyad, and that pretext could not be inferred "based

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<sup>2</sup> As neither party disputes this finding, we do not address it in this appeal, other than to note there is some authority holding that the primary right to continued employment is distinct from the primary right to be free from employment discrimination. (See *George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1483–1484; *Koosemans v. Siskiyou Joint Community College*, (E.D.Cal. Aug 20, 2021, No. 2:17-cv-00809-TLN-DMC) 2021 U.S.Dist. Lexis 158789, \*28 [applying California law]; but see *Franklin v. City of Kingsburg* (E.D.Cal. Mar. 17, 2022, No. 1:18-cv-0824-AWI-SKO) 2022 U.S.Dist. Lexis 48157, \*26–\*27 [citing cases for contrary conclusion].)

<sup>3</sup> On appeal, AlSayyad does not contend that S.C. and AlSayyad are similarly situated. We note that after the University filed a complaint against S.C., he filed a lawsuit, which concluded in a settlement, and neither Christ nor Hermalin was involved in that settlement.

on different discipline for two persons when the basis for the discipline was materially different.”

The court also rejected AlSayyad’s contention that discrimination could be inferred from other circumstances surrounding Chancellor Christ’s decision in this case. In this regard, the court found that the Chancellor had authority to depart from the Committee’s recommendation, and the mere fact that she followed the recommendation as to J.O. but not as to AlSayyad did not support an inference of discrimination. Moreover, AlSayyad’s disagreement with the Chancellor’s decision was not evidence supportive of an inference of pretext, the court found.

## **DISCUSSION**

AlSayyad contends the grant of summary judgment to the Regents must be reversed because (1) he established a prima facie case of discrimination, (2) the Regents failed to establish a legitimate nondiscriminatory reason for the Chancellor’s decision, and (3) if the Regents did establish a legitimate basis for the decision, there is nevertheless a triable issue of fact as to pretext and/or discriminatory motive. We review a grant of summary judgment de novo, “considering all the evidence set forth in the moving and opposition papers” to determine whether the defendant is entitled to judgment as a matter of law. (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).

### **I. The *McDonnell Douglas* Test**

As we have noted, the Regents’ summary judgment motion was argued and decided within the *McDonnell Douglas* framework. The “*McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the

test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.” (*Guz, supra*, 24 Cal.4th at p. 354.)

“At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination,” a burden that is not onerous but must at least show that actions by the employer, if not otherwise explained, could support an inference that it is more likely than not the actions were based on discriminatory criterion. (*Guz, supra*, 24 Cal.4th at pp. 354–355.) Establishing this prima facie case creates a rebuttable presumption of discrimination and shifts the burden to the employer to produce admissible evidence sufficient to justify a judgment for the employer that the challenged action was taken for a legitimate, nondiscriminatory reason. (*Id.* at pp. 355–356.) If the employer carries this burden, the presumption of discrimination disappears and the plaintiff must be afforded 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.)

Although the *McDonnell Douglas* test is designed to apply at trial, it has been adapted for purposes of summary judgment. (*Guz, supra*, 24 Cal.4th at p. 356.) However, courts of appeal have disagreed about how summary judgment standards affect the first step of the *McDonnell Douglas* test, which requires the plaintiff to establish a prima facie case of discrimination at trial; the dispute pertains to whether the *McDonnell Douglas* burdens are reversed when applied to a defense motion for summary judgment, or if the plaintiff has some initial burden even in that context. (*Id.* at p. 357.) In *Guz*, our Supreme Court acknowledged this disagreement but declined to resolve it because an “alternative analysis” disposed of the

plaintiff's cause of action in that case. (*Ibid.*) The *Guz* defendant had not based its motion solely on the prima facie elements of the plaintiff's claim, but also satisfied the second step of the *McDonnell Douglas* test by setting forth "competent, admissible evidence" of reasons for its decision that were unrelated to bias. (*Ibid.*) And since the plaintiff did not rebut the defendant's showing with evidence raising a "rational inference that intentional discrimination occurred," the judgment could be affirmed on appeal without a determination as to whether a prima facie case was made in the first instance. (*Ibid.*) The same is true in this case.

## **II. The Prima Facie Case Requirement**

The elements of a prima facie case can vary, but generally require the plaintiff to present evidence that he (1) was part of a protected class, (2) was qualified to perform his job, (3) suffered an adverse employment action, and (4) "some other circumstance" that suggests a discriminatory motive. (*Guz, supra*, 24 Cal.4th at p. 355.)

AlSayyad and the Regents disagree about element (4)—whether the evidence establishes a circumstance suggesting a discriminatory motive. The trial court found this element satisfied by the evidence that Chancellor Christ imposed a more severe sanction on AlSayyad "than on non-Egyptian faculty" punished for sexual harassment. This finding is consistent with authority holding that very little evidence of discriminatory intent is required to withstand summary judgment because such intent often depends on inferences. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 283 & 286.) On appeal, AlSayyad asks that we affirm that he satisfied the prima facie case requirement by finding that the University's dissimilar treatment of several "comparators" gives rise to an inference of discrimination. For its part, the Regents contend that AlSayyad cannot establish a prima facie case

of discrimination, and they seek affirmance of the judgment on this ground, notwithstanding the trial court's contrary finding.

Ultimately, we need not decide if there is sufficient evidence of a prima facie case of discrimination for purposes of summary judgment. The Regents, like the *Guz* defendant, also presented evidence to satisfy their burden under the second step of the *McDonnell Douglas* test, and AlSayyad responded by attempting to raise a triable issue of fact as to pretext and/or discriminatory motive. Following *Guz*, we focus our review on the second and third prongs of the *McDonnell Douglas* test, which are dispositive without regard to whether AlSayyad had (and carried) an initial burden to establish a prima facie case. (*Guz, supra*, 24 Cal.4th at pp. 357 & 360.)

### **III. Legitimate Nondiscriminatory Reasons**

AlSayyad contends the Regents did not produce sufficient evidence to establish legitimate, nondiscriminatory reasons for Chancellor Christ's decision to impose a three-year suspension rather than the one-year suspension recommended by the P&T Committee.

“A legitimate, nondiscriminatory reason is one that is unrelated to prohibited bias and that, if true, would preclude a finding of discrimination. [Citation.] The employer's evidence must be sufficient to allow the trier of fact to conclude that it is more likely than not that one or more legitimate, nondiscriminatory reasons were the sole basis for the adverse employment action.” (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1158 (*Featherstone*)). We affirm the trial court's finding that the Regents made this requisite showing, and that AlSayyad raised no material issue of fact with respect to this second prong.

The three individuals involved in the decision to discipline AlSayyad have all provided legitimate nondiscriminatory reasons for the three-year

suspension. Vice Provost Hermalin testified at deposition that he filed the complaint recommending dismissal (a more severe sanction) because AlSayyad's misconduct was egregious. Hermalin and administrators who assisted him in making the decision to seek AlSayyad's termination believed that AlSayyad's behavior included "grooming the student, isolating the student, providing the student with false information that harmed her career, involving the student in departmental politics and sexually harassing the student, including touching her." The summary judgment evidence also includes Hermalin's sworn declaration confirming these nondiscriminatory reasons for recommending AlSayyad's termination, which states explicitly that Hermalin's opinion about an appropriate sanction to seek against AlSayyad "was not motivated by Professor AlSayyad's national origin or any other factor" aside from the reasons he gave in his deposition and identified in the complaint that he filed with the P&T Committee.

Chancellor Christ testified that her decision to impose a three-year suspension was based on AlSayyad's serious violations of the Faculty Code of Conduct by sexually harassing his student and by making disparaging comments about his colleagues, and that she imposed a greater sanction than the P&T Committee recommended because evidence gathered during the administrative proceeding showed that AlSayyad's conduct was egregious, far more serious and pervasive than simply touching a student's leg. Christ also filed a sworn declaration in which she confirmed these nondiscriminatory reasons for the challenged employment decision and stated explicitly that her decision was not motivated by AlSayyad's national origin. Christ's letter to AlSayyad further corroborates that her reasons for imposing a three-year suspension were unrelated to AlSayyad's national origin and that her

decision took account of AlSayyad's "continuing failure to accept responsibility for the impact of [his] behavior."

Finally, President Napolitano, not Chancellor Christ, made the decision to curtail AlSayyad's emeritus status for three years should he elect to retire, and she testified in her sworn declaration that her decision was not based on AlSayyad's national origin, but on his "serious violations of the Faculty Code of Conduct."

These sworn statements about legitimate reasons for the challenged employment action are corroborated by the administrative record of proceedings pertaining to AlSayyad's case, which includes Fisher's complaint, the outside investigator's 50-page report, the faculty investigators' report of their findings that there was probable cause to institute disciplinary proceedings against AlSayyad, the P&T Committee report of its findings and recommendations, and the record of the P&T Committee hearing, which Chancellor Christ reviewed before making her decision.

AlSayyad contends that the Regents' showing is insufficient to justify summary judgment because simply saying that administrators did not discriminate is "no evidence at all." This argument ignores that the Regents produced extensive evidence of AlSayyad's misconduct and of legitimate reasons for the decision to impose a three-year suspension, as we have explained. The reasons advanced by the Regents are "legally sufficient" to establish that AlSayyad's FEHA claims have no merit because those reasons "were manifestly unrelated" to AlSayyad's national origin. (*Guz, supra*, 24 Cal.4th at p. 360.)

#### **IV. AlSayyad Failed to Raise A Triable Issue As to Pretext or Discrimination**

Because the Regents established legitimate nondiscriminatory reasons for the adverse employment action, the burden shifted to AlSayyad to present

evidence “sufficient to support a reasonable inference that discrimination was a substantial motivating factor in the decision.” (*Featherstone, supra*, 10 Cal.App.5th at p. 1159.) “Although an employee’s evidence submitted in opposition to an employer’s motion for summary judgment is construed liberally, it ‘remains subject to careful scrutiny.’ [Citation.] The employee’s ‘subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations.’” (*Ibid.*) “The employee’s evidence must relate to the motivation of the decision makers and prove, by nonspeculative evidence, ‘an actual causal link between prohibited discrimination’” and the challenged employment decision. (*Ibid.*)

The standard for proving pretext is well established. To show that an employer’s reasons for an adverse employment action were pretextual, the “employee ‘cannot simply show that the employer’s decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.’” [Citation.] To meet his or her burden, 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,’” and hence infer “‘that the employer did not act for [the asserted] non-discriminatory reasons.’”” (*Featherstone, supra*, 10 Cal.App.5th at p. 1159.)

AlSayyad contends that comparative evidence raises a triable issue of fact as to pretext, arguing that the Regents’ treatment of J.O., A.T. and A.A. shows that white employees who are not of Egyptian descent were not subject

to the same treatment as AlSayyad received.<sup>4</sup> To establish “pretext in this manner,” AlSayyad must show that these other individuals were “similarly situated employees.” (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 172.) “Another employee is similarly situated if, among other things, he or she ‘ “engaged in the same conduct without any mitigating or distinguishing circumstances.” ’” (*Ibid.*) More generally, it has been said that individuals may be similarly situated when they have similar jobs and display similar conduct. (*Gupta v. Trustees of California State University* (2019) 40 Cal.App.5th 510, 520.) As a baseline, comparative data is probative of a discriminatory motive if it shows “disparate treatment between employees who are similarly situated to the plaintiff in *all* relevant respects.” (*Id.* at pp. 519–520, italics added.) In this case, the summary judgment evidence shows that J.O., A.T., and A.A. were all professors accused of sexual harassment but that material dissimilarities distinguish their cases from the present case.

J.O. received a one-year suspension for violating the Faculty Code of Conduct. AlSayyad contends that J.O.’s case supports an inference of discriminatory treatment because (1) “the U.C. administration” proposed a three-years suspension for J.O. while it proposed termination for AlSayyad, and (2) while the P&T Committee recommended a one-year suspension in both matters, Chancellor Christ accepted the recommendation for J.O. but “tripled it” as to AlSayyad. These contentions rest on the erroneous assumption that AlSayyad and J.O. were disciplined for essentially the same conduct.

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<sup>4</sup> The summary judgment evidence does not disclose the national origin of individuals AlSayyad identifies as white, but the trial court assumed they are not Egyptian for purposes of ruling on the summary judgment motion.

According to the report of the P&T Committee in his case, J.O. was disciplined for an isolated incident involving a Ph.D. student from a different university that occurred at a bar in Singapore, where J.O. and the complainant were attending a conference. The incident did not take place on university property, the conference was not a U.C. Berkeley program, and the P&T Committee determined that the version of the University’s policy against sexual harassment that was in effect when the incident occurred did not apply, although J.O. did violate a different policy against harassment of colleagues within the “ ‘community of scholars.’ ”<sup>5</sup> Although J.O. disputed having violated University policy, he expressed remorse for causing the complainant emotional harm.

AlSayyad, by contrast, was disciplined for using his role as a supervisor in the University’s Architecture department to sexually harass his own supervisee, for engaging in divisive behavior that injured both students and faculty at his own university, and for refusing to accept any responsibility for the harm he caused. On this last point, after the P&T Committee rendered its report, AlSayyad wrote a letter to Chancellor Christ accusing the complainant of “pursu[ing] the case as a means to enhance her career as a journalist,” and expressing the view that his own “mistake was not a ‘momentary overstep’ as the [P&T C]ommittee characterized it, but rather a misjudgment about an individual who I assumed was a friend . . . .” The only remorse AlSayyad expressed in the letter was for the effects of the allegations on his own career. These material distinctions between AlSayyad’s behavior

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<sup>5</sup> At oral argument before this court, AlSayyad’s counsel stated that J.O.’s harassment involved physical touching that, in his view, was more egregious than the finding of improper physical touching made against AlSayyad. However, the P&T Committee report from J.O.’s case contains no finding of improper physical touching by J.O.

and J.O.'s are established by undisputed evidence. Thus, the fact that J.O. received a one-year suspension and AlSayyad a harsher penalty does not support an inference that the University's stated reasons for imposing a three-year suspension on AlSayyad were pretextual.

AlSayyad's other comparators, A.T. and A.A., were both accused of sexually harassing graduate students, but the University did not make formal findings regarding these accusations because both matters were settled without an administrative hearing. Neither of these individuals is similarly situated to AlSayyad, whose pleaded theory of discrimination is that Chancellor Christ imposed a longer suspension than recommended by the P&T Committee because of AlSayyad's national origin. The A.T. and A.A. matters did not involve a P&T hearing, and neither individual was disciplined by Chancellor Christ.

AlSayyad contends that the fact that a different faculty member disciplined A.T. and A.A. is not dispositive, citing *Hawn v. Executive Jet Management, Inc.* (9th Cir. 2010) 615 F.3d 1151 (*Hawn*). In that federal case, male pilots sued their former employer for gender discrimination after they were fired for creating a hostile work environment. Plaintiffs alleged that female flight attendants, including the woman who complained about them, engaged in similar conduct but were not terminated because they were female. (*Id.* at p. 1153.) In granting a defense motion for summary judgment, the district court found that the female flight attendants were not similarly situated to plaintiffs because they did not report to the same supervisor and because their conduct did not give rise to a complaint. (*Id.* at p. 1156.)

The *Hawn* judgment was affirmed on appeal, but the appellate court found that the district court erred by imposing a "strict 'same supervisor'

requirement.” (*Hawn, supra*, 615 F.3d at p. 1157.) The court reasoned that the determination whether individuals are similarly situated is usually a question of fact and that “the presence or absence of a shared supervisor might be relevant in some cases.” (*Ibid.*) But in *Hawn*, the undisputed facts demonstrated that whether the plaintiffs and female flight attendants shared the same direct supervisor was not determinative of whether the two groups were similarly situated because the plaintiffs’ supervisor “was excluded from the decision to terminate them,” and the “relevant decision-maker” was aware of both the allegations that had been made against the plaintiffs and the plaintiffs’ allegations against the female flight attendants when he made the decision to terminate the plaintiffs’ employment. (*Id.* at pp. 1157–1158.) Despite the error in the district court’s mechanical reliance on a same supervisor rule, summary judgment was affirmed pursuant to the district court’s alternative finding that the female flight attendants were not similarly situated because their conduct was not unwelcomed and never resulted in a complaint. (*Id.* at p. 1158.)

*Hawn* is factually distinguishable and legally consistent with the outcome of this case. Here Chancellor Christ is the relevant decisionmaker, as it is her decision that AlSayyad relies on to support an inference of discrimination, and Christ simply was not a decisionmaker with respect to the A.A. and A.T. matters. Moreover, AlSayyad ignores the important distinction that A.A. and A.T. accepted responsibility and negotiated settlements with Vice Provost Hermalin, whereas AlSayyad was afforded a full administrative hearing, which resulted in findings of misconduct, and yet he continued to deny responsibility for his conduct.

AlSayyad contends that the fact that he and A.A., A.T. and J.O. were all disciplined for sexual harassment by Christ “and/or” Hermalin, makes

these other cases sufficiently similar for purposes of the minimal showing required to make out a prima facie case of discrimination. We do not address that issue, as we have explained, because undisputed evidence establishes legitimate, nondiscriminatory reasons for the discipline imposed on AlSayyad. AlSayyad relies on exactly the same comparator evidence to establish a prima facie case and to support an inference of pretext. We affirm the trial court's finding that this evidence does not create a triable issue of fact as to whether the Regents' legitimate reasons for disciplining AlSayyad were pretextual because AlSayyad's comparators are not similarly situated to him in all material respects.<sup>6</sup>

AlSayyad contends an inference of discrimination can be drawn from Chancellor Christ's "disregard of the weakness of the case against" AlSayyad. The record shows that the case against AlSayyad was not weak. Beyond that, AlSayyad mischaracterizes the pertinent issue, which is " 'whether discriminatory animus motivated the employer.' " (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005; see also *Guz, supra*, 24 Cal.4th at p. 358 [issue is whether employer acted with motive to discriminate, not whether reasons for employment decision were wise or correct].) As explained, the Regents showed that they had legitimate nondiscriminatory reasons for the disciplinary action taken against AlSayyad

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<sup>6</sup> The Regents contend AlSayyad's showing fails for the additional reason that he ignores the disciplinary action taken against J.S., a Caucasian professor who received more severe punishment than AlSayyad for similar conduct. (Citing e.g., *Simpson v. Kay Jewelers, Div. of Sterling, Inc.* (3rd Cir. 1998) 142 F.3d 639, 645, 646–647 [plaintiff cannot create triable issue of fact by "selectively" choosing single comparator while ignoring "a significant group of comparators who were treated equally" to her].) Although the Regent's legal point is well taken, we note that J.S.'s case involved circumstances that materially distinguish that case from this one, including explicit sexualized conduct, as well as retaliation.

and that Chancellor Christ had legitimate, nondiscriminatory reasons for imposing a harsher punishment than the P&T Committee recommended. AlSayyad's subjective belief that the Regents' witnesses are lying about their motivations is not evidence of the defendant's actual motivation. (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 398.) Because AlSayyad failed to produce evidence to create a triable issue of fact as to pretext or discrimination, summary judgment was properly granted.

### **DISPOSITION**

The judgment is affirmed. Costs are awarded to respondent.

TUCHER, P.J.

WE CONCUR:

FUJISAKI, J.  
RODRÍGUEZ, J.