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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ROBERT GUTIERREZ,

Plaintiff and Appellant,

v.

THE MEADOWS OF NAPA VALLEY,

Defendant and Respondent.

A132705

(Napa County  
Super. Ct. No. 26-49809)

**I. INTRODUCTION**

Plaintiff Robert Gutierrez sued defendant The Meadows of Napa Valley (The Meadows), a retirement community, asserting claims for employment discrimination and retaliation in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). Gutierrez contended that The Meadows failed to promote him, and later terminated his employment as a maintenance supervisor, because of his national origin and ancestry (Hispanic), age (over 40 years old) and disability (allergies affecting his sense of smell); he also alleged the termination was in retaliation for his filing a sexual harassment complaint. The trial court granted summary adjudication in favor of The Meadows as to those claims, and subsequently entered judgment. Gutierrez appeals, contending triable issues of material fact precluded summary adjudication as to his claims for ancestry/national origin discrimination.<sup>1</sup> We affirm.

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<sup>1</sup> Gutierrez apparently does not contend that the trial court erred in granting summary adjudication as to his claims for age and disability discrimination and retaliation.

## II. FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

### A. Gutierrez's Employment at The Meadows

Gutierrez began working at The Meadows as a maintenance supervisor, an at-will position, in August 2005, when he was 52 or 53 years old. Gutierrez was hired by the then-facilities services director of The Meadows, Tito Galvez (who is Filipino), with the approval of the executive administrator, Wayne Panchesson.

In July 2007, Galvez resigned as facilities services director. Panchesson asked Gutierrez to serve as the interim facilities services director until a permanent replacement was hired. Panchesson and Barbara Hudson, the director of human resources, conducted an initial interview of Gutierrez for the permanent position, but did not select him to continue to the next stage of the application process. A six-member hiring committee ultimately selected Jay Huling, who was 70 years old (and apparently Caucasian), for the position. In October 2007, Gutierrez returned to his former position as maintenance supervisor.

On February 15, 2008, The Meadows terminated Gutierrez's employment. The Meadows provided Gutierrez with a termination notice stating he was being terminated "effective immediately" for poor performance, i.e., for failing to improve his communication skills after being given numerous opportunities to do so. The notice identified several instances in which Gutierrez had failed to communicate or perform effectively.

### B. The Complaint

Gutierrez filed a complaint against The Meadows, asserting claims for discrimination on the basis of his ancestry/national origin, age and disability (first, second and third causes of action), wrongful termination in violation of public policy (fourth cause of action), and termination in retaliation for filing a sexual harassment complaint (eighth cause of action). Gutierrez also asserted claims for violation of Labor Code provisions pertaining to overtime and meal and rest breaks (fifth and sixth causes of

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<sup>2</sup> We set forth additional facts as necessary in our discussion of the issues.

action), and a claim for unfair business practices under Business and Professions Code section 17200 (the section 17200 claim) (seventh cause of action).

**C. The Meadows' Motion for Summary Judgment/Adjudication**

The Meadows filed a motion for summary judgment or summary adjudication. As to the discrimination claims, The Meadows contended that its adverse employment actions (including disciplining Gutierrez, not promoting him to the permanent facilities services director position, and ultimately terminating him) were based on legitimate, performance-based reasons. The Meadows submitted evidence (including declarations from Panchesson, Hudson, and Mary Schramm, the assisted living administrator at The Meadows) of a number of incidents, several involving formal disciplinary write-ups, that The Meadows contended showed Gutierrez's communication and performance problems. As we discuss in part III.C below, these incidents involved a variety of alleged conduct, including failing to complete work timely and properly, failing to report employee requests for leave, mishandling charges of misconduct by subordinates, and sexually harassing a female coworker. The Meadows argued that Gutierrez had no evidence that the stated reasons for its actions were pretextual or that The Meadows was motivated by a discriminatory purpose.

In his opposition, Gutierrez contended that The Meadows's explanation for the adverse employment actions, i.e., his history of performance and communication problems, was pretextual. In addition, Gutierrez argued that remarks made by Panchesson provided evidence of discriminatory animus.

The trial court granted summary adjudication in favor of The Meadows as to Gutierrez's discrimination, retaliation and wrongful termination claims (first, second, third, fourth, and eighth causes of action), and denied summary adjudication as to the wage-and-hour and section 17200 claims (fifth, sixth and seventh causes of action). As to the discrimination claims, the court stated that, assuming Gutierrez had met his initial burden to establish a prima facie showing of discrimination, The Meadows, by presenting evidence of Gutierrez's history of performance and communication problems, had met its burden to show a legitimate, nondiscriminatory reason for the adverse employment

decisions. The court concluded that the evidence Gutierrez presented on the questions of pretext and discriminatory animus did not raise triable issues of fact.

After a jury verdict in favor of Gutierrez on the wage-and-hour claims, the court entered judgment. Gutierrez filed a notice of appeal.<sup>3</sup>

### III. DISCUSSION

#### A. Scope of Review

“The rules of review are well established. If no triable issue as to any material fact exists, the defendant is entitled to a judgment as a matter of law. [Citations.] In ruling on the motion, the court must view the evidence in the light most favorable to the opposing party. [Citation.] We review the record and the determination of the trial court de novo. [Citations.]” (*Shin v. Ahn* (2007) 42 Cal.4th 482, 499; accord, *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860; *Certain Underwriters at Lloyd’s of London v. Superior Court* (2001) 24 Cal.4th 945, 972 [summary adjudication order is reviewed de novo].) The trial court’s stated reasons for granting summary relief are not binding on the reviewing court, which reviews the trial court’s ruling, not its rationale. (*Kids’ Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

#### B. Legal Standards Governing Proof of Discrimination

In the absence of direct evidence of intentional discrimination, California courts apply the three-stage burden-shifting test established by the United States Supreme Court

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<sup>3</sup> After the verdict on the wage-and-hour claims, the trial court entered judgment on May 19, 2011. Gutierrez’s July 15, 2011 notice of appeal stated that, on July 12, 2011, the trial court “determined” the section 17200 claim, and “notice of this decision was entered thereby completing the final judgment from which [Gutierrez] appeals.” The trial court issued its written decision on the section 17200 claim on August 25, 2011, and entered a final judgment disposing of all claims on October 4, 2011. We deem Gutierrez’s appeal to be from that judgment. (See *Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11, 14, fn. 1, citing Cal. Rules of Court, rule 8.100(a)(2); see also Cal. Rules of Court, rule 8.104(d)(2).)

The Meadows appealed a posttrial order relating to costs (No. A132836). We address that appeal in a separate opinion.

in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*).<sup>4</sup> (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*); *DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 549-550 (*DeJung*)). To establish a prima facie case of unlawful discrimination under the first prong of the *McDonnell Douglas* test, the employee must show: “(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive. [Citations.]” (*Guz, supra*, 24 Cal.4th at p. 355.) If a prima facie case is established, the employer must (under the second prong of the test) produce admissible evidence of a “legitimate, nondiscriminatory” reason for the adverse action. (*Id.* at pp. 355-356.) In this context, “legitimate” reasons “are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of *discrimination*. [Citations.]” (*Id.* at p. 358, original italics.)

Under the third prong, to avoid summary judgment, the employee must “offer substantial evidence that the employer’s stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.” (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005 (*Hersant*)). “ “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. [Citations.] Rather, the [employee] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the . . . proffered legitimate reasons for [the] action[s] that a reasonable factfinder *could* rationally find them “unworthy of credence,” [citation], and hence infer

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<sup>4</sup> As we discuss further below, the record does not contain direct evidence of discrimination. Accordingly, the *McDonnell Douglas* test applies.

“that the employer did not act for the [asserted] non-discriminatory reasons.” [Citations.]’ [Citations.]” (*Id.* at p. 1005, original italics.) Applying these standards, “summary judgment for the employer may . . . be appropriate where, given the strength of the employer’s showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred.” (*Guz, supra*, 24 Cal.4th at p. 362.)

**C. The Meadows Presented Evidence of Legitimate, Nondiscriminatory Reasons for the Adverse Employment Decisions**

We will assume, as did the trial court, that Gutierrez met his initial burden of establishing a prima facie case of discrimination. As to the second prong of the *McDonnell Douglas* test (evidence of legitimate, nondiscriminatory reasons for adverse employment decisions), The Meadows presented evidence (primarily through the declarations of Panchesson, Hudson, and Schramm) of the following:

On January 12, 2006, Panchesson directed Gutierrez to remove construction debris from the grounds of The Meadows in anticipation of a tour by Pacific Retirement Services, the company that manages The Meadows, and members of the board of directors of Odd Fellows Homes of California, Inc., the owners of The Meadows. Panchesson called Gutierrez again on the morning of January 13 “to remind him that his task was urgent, important and must be completed right away.” When Panchesson arrived at work on January 13, he saw that trash had been left behind. The board members and executives who were with Panchesson saw the debris and “were embarrassed by the unsightliness.” At Panchesson’s instruction, Schramm issued Gutierrez a written warning for failing to follow Panchesson’s directive.

In April and May 2006, after suffering a work-related injury, Gutierrez missed three physical therapy appointments, causing The Meadows to incur charges. The Meadows issued Gutierrez a written warning.

In October 2006, Gutierrez brought his nine-year-old son to work and allowed him to ride The Meadows’s bus (without Gutierrez) on a resident outing. Gutierrez’s son

became unruly on the bus, resulting in an injury to a resident. When Schramm spoke to Gutierrez, he agreed he had exercised poor judgment in allowing his son to ride the resident bus unsupervised. The Meadows issued Gutierrez a written warning. As a result of this incident, Panchesson instituted a policy prohibiting employees from bringing their children to work except in limited circumstances.

In January 2007, Kathy Cook, an employee of The Meadows, reported that Gutierrez took her pen, placed it in his shirt area, asked Cook to retrieve it, and stated “ ‘Feel how hard it is.’ ” Hudson investigated Cook’s complaint, including asking Gutierrez to provide his “ ‘side of the story.’ ” After conducting the investigation, The Meadows concluded that Gutierrez had violated company policy prohibiting sexual harassment, and issued him a “Final Written Warning” on February 1, 2007. (The Meadows did not, however, terminate Gutierrez for another year; in fact, as noted above, in July 2007, The Meadows promoted Gutierrez to interim facilities services director.)

In June 2007, Gutierrez provided a letter in response to the February 1 written warning, as well as a written complaint alleging that Cook had sexually harassed him by “groping” his arm in an April 2007 meeting. Hudson investigated Gutierrez’s complaint by interviewing Gutierrez and Cook. Based on the timing and circumstances of Gutierrez’s complaint and after conducting the interviews, Hudson formed the opinion that Gutierrez was not making a good faith complaint of sexual harassment, but was instead retaliating against Cook for her complaint against him. Hudson nevertheless counseled Cook to “be aware of her surroundings, specifically who she is touching, and what she is saying as it could be misconstrued or taken out of context.”

In August 2007, The Meadows issued Gutierrez a written warning for mishandling a resident’s accusation of theft against one of Gutierrez’s subordinates. Gutierrez allegedly took the employee to the resident’s unit and allowed the resident to confront the employee without giving the employee an opportunity to explain what had happened. The warning issued to Gutierrez stated that he had failed to follow investigational protocol and failed to support his subordinate.

Also in August 2007, Panchesson sent an email to Schramm documenting his concern that Gutierrez had not communicated effectively about repairs to the Meadows's irrigation system, resulting in delay and confusion. Panchesson instructed Schramm: "Keep for the next write up."

In December 2007, Gutierrez allegedly used profanity when speaking to a subordinate about another subordinate's use of a cleaning product on a soiled carpet. Gutierrez stated: " 'Oh come on, fuck her, why did she use Power Force.' "

Also in December 2007, Gutierrez failed to inform Huling (his direct supervisor at the time of his termination) and human resources that a subordinate had asked to take leave under the Family Medical Leave Act (FMLA). Huling and Hudson believed the employee was on an unexcused absence from work. On January 2, 2008, Huling and Hudson met with Gutierrez and instructed him to "keep a log of call-in activity from all Facilities Services [e]mployees affecting work, attendance, or requests for time off." Huling gave Gutierrez a memorandum documenting the meeting and stating: "Open consistent reliable communication is the heart of all business relationships. I expect this from you."

On January 25, 2008, Gutierrez allegedly mishandled a resident's accusation that two of his subordinates had engaged in intimate behavior in the resident's apartment. The female employee was distraught and left work in tears because of the allegation and the perceived lack of support from Gutierrez.

On February 6, 2008, Gutierrez failed to communicate to human resources and to upper management that another of his subordinate employees had requested extended time off from work due to an illness.

As noted above, Gutierrez was terminated on February 15, 2008.

#### **D. Gutierrez Did Not Demonstrate a Triable Issue of Fact**

Because The Meadows presented evidence of legitimate, nondiscriminatory reasons for its actions, the burden shifted to Gutierrez to "demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory animus, such that a

reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action. [Citations.]” (*DeJung, supra*, 169 Cal.App.4th at p. 553; accord, *Hersant, supra*, 57 Cal.App.4th at pp. 1004-1005.)

### **1. Performance and Disciplinary Issues**

To demonstrate pretext, Gutierrez presented evidence, including the declaration of Huling and the deposition testimony of Galvez (his direct supervisor until July 2007), that he was a dedicated and hard worker. Galvez also testified that he disagreed with the decision to discipline Gutierrez for the January 2006 debris removal incident, and that he was unaware of, or not involved in, some of the other disciplinary actions against Gutierrez. Huling stated in his declaration that he was not involved in the decision to terminate Gutierrez and “did not believe it was timely.”

In his appellate briefs, Gutierrez also seeks to show pretext by disputing the merits of the disciplinary actions and other performance problems identified by The Meadows. Gutierrez characterizes his disciplinary record as a “ ‘paper trail’ ” that was “fabricated” by senior managers, including Panchesson, Hudson and Schramm. He also addresses the incidents individually: As to the January 2006 write-up for failure to remove construction debris, Gutierrez presented evidence that he followed instructions and that a contractor was in the process of removing the debris but could not complete the job in one trip. Gutierrez also argued that Panchesson did not provide a clear timeline as to when the job had to be completed.

In his deposition, Gutierrez testified that the reason he missed physical therapy appointments was that he was busy at work; he also testified that he later heard The Meadows was not actually charged for the missed appointments. Galvez testified that he believed a verbal warning would have been sufficient discipline for this incident.

As to the October 2006 incident in which Gutierrez’s son attended a resident outing, Gutierrez presented evidence that other employees brought their children to work and were not disciplined. (Gutierrez also asserts here, without citation to the record, that the activities director assured him his son would be supervised on the outing.)

Addressing his February 2007 write-up for sexual harassment, Gutierrez presented evidence that Kathy Cook, who complained of Gutierrez's harassment, often joked about sexual matters.

In response to his August 2007 write-up for mishandling a resident's allegation of theft against a subordinate employee, Gutierrez contends on appeal that he was not aware of the accusation of theft when he took the employee to the resident's unit.<sup>5</sup> Gutierrez stated in his opposition below that, because of his diminished sense of smell resulting from his allergies, he took the employee with him to investigate a report of an odor in the unit.

As to his failures to report employee requests for FMLA leave, Gutierrez presented evidence that Huling did not consider his January 2008 memorandum to Gutierrez about this issue to be a formal disciplinary write-up. Gutierrez also stated that he obtained permission from Huling before letting a distraught employee who had been accused of infidelity go home early.<sup>6</sup>

The above evidence does not constitute substantial evidence of pretext sufficient to raise a triable issue of fact as to whether The Meadows intentionally discriminated against Gutierrez. (See *DeJung, supra*, 169 Cal.App.4th at p. 553; *Hersant, supra*, 57 Cal.App.4th at pp. 1004-1005.) As the trial court noted, "[a] person can certainly be a dedicated and hard worker, but still be terminated or rejected for a higher position on account of a pattern of failing to follow proper procedures or to communicate adequately,

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<sup>5</sup> Hudson testified in her deposition that both the resident and the employee told Hudson the resident had previously told Gutierrez about the alleged theft and about the resident's suspicions of the employee.

<sup>6</sup> In his reply brief, Gutierrez criticizes the trial court for considering disciplinary incidents that were raised in The Meadows's summary judgment papers, but were not explicitly discussed in Gutierrez's termination notice. To the extent Gutierrez contends the trial court erred, we decline to consider this claim of error, which Gutierrez did not raise in his opening brief. (See *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [appellate court ordinarily will not consider points raised for the first time in reply brief].) In any event, Gutierrez's disciplinary record is relevant in determining whether The Meadows's stated reasons for its adverse employment decisions were legitimate or pretextual.

particularly a person in a supervisory position.” Moreover, Gutierrez has not shown that the disciplinary write-ups or the reasons given for the adverse employment decisions were shifting or inconsistent; his evidence on this issue establishes only that he or other employees disagreed as to whether the disciplinary actions were warranted.

In these circumstances, Gutierrez’s evidence at most raises triable issues “concerning whether the actions of [The Meadows] were reasonable and well considered. A trier of fact could find either they were or they were not.” (See *Hersant*, *supra*, 57 Cal.App.4th at p. 1009.) The evidence, however, is insufficient to allow a reasonable trier of fact to conclude that The Meadows’s stated reasons for its actions were “implausible, or inconsistent or baseless”; it would not be reasonable to conclude that the stated reasons were pretextual and used merely to veil an act of discrimination.<sup>7</sup> (See *ibid.*) Finally, Gutierrez’s speculation that his history of disciplinary write-ups and the concerns raised by upper management about his performance and communication skills were part of an elaborate effort to “fabricate” a “paper trail” to justify his termination is not sufficient to create a triable issue of material fact.<sup>8</sup> (See *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807 [speculation or conjecture cannot create triable issue of fact].)

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<sup>7</sup> Gutierrez argues that this case differs from *Hersant*, in which the employee ignored company policies and directives. (See *Hersant*, *supra*, 57 Cal.App.4th at pp. 1006-1007.) He argues that in his case The Meadows failed to communicate its expectations to him clearly. But Gutierrez’s contention that he should not have been disciplined because The Meadows allegedly failed to provide “clear direction,” raises at most a triable issue of fact as to whether The Meadows’s actions were reasonable; they do not raise a triable issue as to whether those actions were implausible, inconsistent or baseless. (See *id.* at p. 1009.)

<sup>8</sup> Gutierrez suggests that Wayne Panchesson’s instruction to Schramm to keep his comments about the August 2007 irrigation project “for the next write up” was evidence of a plan to use negative comments against Gutierrez later. But this apparent instruction does not show that Panchesson’s concerns about the project were fabricated or insincere. Moreover, in light of the series of write-ups Gutierrez had already received by August 2007, it is not surprising that Panchesson anticipated that there might be more in the future.

## 2. Discriminatory Remarks

In contending that a triable issue exists under the third step of the *McDonnell Douglas* test, Gutierrez also relies on certain alleged discriminatory remarks by Wayne Panchesson, the executive administrator of the Meadows.

### a. Background

Tito Galvez testified in his deposition that he and two other Filipino employees were working on a renovation project when Panchesson stated: “ ‘You guys work like [] Mexican[s].’ ” Panchesson was smiling, and, at the time, Galvez did not take the comment as a racial slur.

Maribel Domantay, who is Filipino and was the director of nursing when Gutierrez worked at The Meadows, stated (in her declaration and deposition) that, after a resident complained about a missing check, Panchesson looked over the personnel roster for the day, pointed to a Filipino name, and stated in a raised voice: “ ‘This Filipino is a thief.’ ”<sup>9</sup> Panchesson also stated: “ ‘These Filipinos can’t even speak English.’ ”<sup>10</sup> Panchesson apologized a few minutes later.

Finally, Gutierrez testified in his deposition that, on two occasions, Panchesson made statements to Gutierrez about difficulties communicating with housekeeping staff made up significantly of non-English-speaking persons, including Hispanics and Filipinos.<sup>11</sup> Gutierrez could not recall Panchesson’s exact words, and, as the trial court noted, Gutierrez’s recollection of the incidents was vague. He believed they occurred in late 2006 or early 2007, but was not certain. Gutierrez agreed in his deposition that there

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<sup>9</sup> In her declaration, Domantay stated that the angry manner in which Panchesson made this statement gave her the impression that he thought all Filipinos were thieves. In her subsequent deposition, Domantay testified that she no longer believed that Panchesson thinks all Filipinos are thieves.

<sup>10</sup> In her declaration, Domantay stated that Panchesson made these two statements on different occasions. In her deposition, Domantay recalled that Panchesson made both remarks on the same occasion, i.e., when the resident’s check was missing.

<sup>11</sup> Gutierrez, whose first language is English, is not fluent in Spanish.

was a language barrier between supervisors and some members of the housekeeping staff.<sup>12</sup>

Addressing these comments, the trial court stated that, “as inappropriate as they may have been, none of them evidence a discriminatory animus toward Hispanic employees who speak English.” The court found that the evidence proffered by Gutierrez on this point was insufficient to allow a trier of fact to conclude that the actual motivation for the adverse employment decisions was discriminatory.

**b. Analysis**

In *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 (*Reid*), our Supreme Court explained that discriminatory remarks can be relevant in determining whether intentional discrimination occurred: “Although stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered. Thus, a trial court must review and base its summary judgment determination on the totality of evidence in

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<sup>12</sup> In addition to the three groups of comments discussed in the text, Gutierrez asserts, without citation to the record, that Panchesson also disparaged the cleanliness of Hispanic housekeeping staff, and stated that a work truck with power windows was “too good” for Gutierrez and his crew. (Gutierrez’s only record citation pertaining to these comments (in his reply brief) is to Panchesson’s deposition, in which Panchesson *denies* making both comments, while stating that he told Gutierrez that a maintenance truck with power windows would be an unnecessary purchase, and that roll-up windows would be sufficient.) Because Gutierrez has cited no evidence that the alleged disparaging statements were made, as required by California Rules of Court, rule 8.204(a)(1)(C), he has forfeited any argument to that effect. (See *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.)

the record, including any relevant discriminatory remarks.”<sup>13</sup> (*Reid, supra*, 50 Cal.4th at p. 541.) The *Reid* court further stated: “A stray remark alone may not create a triable issue of . . . discrimination. . . . But when combined with other evidence of pretext, an otherwise stray remark may create an ‘ensemble [that] *is* sufficient to defeat summary judgment.’ [Citation.]” (*Reid, supra*, 50 Cal.4th at pp. 541-542, original italics.) This “totality of the circumstances analysis” allows courts to “winnow[] out cases ‘too weak to raise a rational inference that discrimination occurred.’ . . .”<sup>14</sup> (*Id.* at p. 541, citing *Guz, supra*, 24 Cal.4th at p. 362.)

Applying these standards, we conclude that Panchesson’s alleged remarks do not create a triable issue of material fact as to whether The Meadows engaged in intentional discrimination. Although Panchesson was involved (along with others) in the decisions not to promote, and later to terminate, Gutierrez, the timing and context of Panchesson’s alleged remarks are also relevant in determining whether the remarks create a triable issue of fact. (See *Reid, supra*, 50 Cal.4th at p. 541.) Panchesson did not make the

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<sup>13</sup> The *Reid* court noted that, under the “stray remarks” doctrine, federal circuit courts “deem irrelevant any remarks made by nondecisionmaking coworkers or remarks made by decisionmaking supervisors outside of the decisional process, and such stray remarks are insufficient to withstand summary judgment. [Citations.]” (*Reid, supra*, 50 Cal.4th at p. 537.) The *Reid* court declined to adopt this rule of categorical exclusion of “stray remarks” evidence, concluding that a trial court should instead base its summary judgment decision on all evidence in the record, including any relevant discriminatory remarks. (*Id.* at p. 541.) Consistent with *Reid*, the trial court here admitted and considered evidence of the alleged remarks discussed in the text.

<sup>14</sup> Gutierrez notes that a decisionmaker’s discriminatory remarks can provide *direct* evidence of discrimination (and thus render inapplicable the *McDonnell Douglas* burden-shifting test), if there is evidence of a causal relationship between the remarks and the adverse employment decision. (See *DeJung, supra*, 169 Cal.App.4th at pp. 549-550; *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1148.) But Gutierrez does not contend that evidence of such a causal relationship exists here, or that the *McDonnell Douglas* test is inapplicable. Instead, Gutierrez relies on the alleged remarks (which were not made in connection with the adverse decisions at issue) as part of his showing under the third step of the *McDonnell Douglas* test, arguing that the comments create a triable issue as to whether “discriminatory animus” motivated the adverse decisions, and that they “corroborate[]” evidence of pretext.

alleged statements in the context of the adverse employment decisions. Nor has Gutierrez shown that Panchesson made any of the statements contemporaneously with the adverse decisions. Panchesson apparently made the alleged comment to Galvez in early 2007, and in any event prior to Galvez's resignation in July 2007. Panchesson's conversation(s) with Gutierrez may have occurred in late 2006 or early 2007. Domantay testified (in her December 2010 deposition) that she did not recall when Panchesson made the remarks she heard; Domantay then stated that the incident occurred more than three years prior to her deposition (i.e., prior to December 2007). This evidence fails to show that the alleged comments were made contemporaneously with the decision not to promote Gutierrez to facilities services director (which occurred after Galvez's July 2007 resignation). Nor is there evidence that any of the comments were contemporaneous with Gutierrez's February 2008 termination. Moreover, none of the alleged comments was about Gutierrez specifically, and two of them were not made in his presence.

As to the content of the alleged remarks, we note that Gutierrez had only a vague recollection of Panchesson's comments about the difficulty of communicating with non-English-speaking members of the housekeeping staff.<sup>15</sup> Moreover, neither this statement nor Panchesson's alleged statement to Domantay about Filipino employees not speaking English shows that discriminatory animus motivated The Meadows's actions against

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<sup>15</sup> Panchesson stated in his declaration that he did discuss the language barrier issue with Gutierrez, and that he stated to Gutierrez that The Meadows needed to employ more bilingual managers to better communicate with the staff members whose first language is not English. Panchesson stated that his "concerns were based upon legitimate business concerns and personnel management at The Meadows."

Gutierrez, a non-Filipino whose first language is English.<sup>16</sup> Panchesson’s alleged statement to Domantay that a Filipino employee was a thief, while apparently made in a raised voice or an angry tone, was an accusation against a specific employee; Panchesson did not state that Filipinos as a group were dishonest. Finally, Panchesson’s alleged statement to Galvez that he and his Filipino crew “work like [] Mexican[s],” while inappropriate,<sup>17</sup> is somewhat vague, and, in our view, it does not constitute (alone or with the other alleged comments) substantial evidence that The Meadows acted with discriminatory animus. (See *DeJung, supra*, 169 Cal.App.4th at p. 553; accord, *Hersant, supra*, 57 Cal.App.4th at pp. 1004-1005.)

Finally, considering the remarks in the context of the entire record, they do not “corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence.” (See *Reid, supra*, 50 Cal.4th at p. 541.) As discussed above, the other evidence presented by Gutierrez (i.e., evidence disputing the merits of the disciplinary actions against him) is insufficient to allow a reasonable trier of fact to conclude that the stated reasons for his nonpromotion and termination were pretextual. This evidence does not add to the significance of Panchesson’s alleged remarks. The two categories of evidence, taken together, do not create a triable issue of fact.

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<sup>16</sup> The trial court noted that none of Panchesson’s comments evidenced discriminatory animus toward Hispanic employees who speak English. Gutierrez contends that the trial court, by making this statement, inappropriately “limit[ed]” the statutorily protected class. We note that, on appeal, we review the trial court’s ruling, not its rationale. (*Kids’ Universe v. In2Labs, supra*, 95 Cal.App.4th at p. 878.) In any event, we disagree with Gutierrez’s argument. In our view, the trial court, rather than inappropriately narrowing the protected class, was properly considering the relevant circumstances, including the content of the alleged remarks and the context in which they were made, to determine whether they evidenced discrimination. (See *Reid, supra*, 50 Cal.4th at p. 541.)

<sup>17</sup> As noted above, it is not clear whether this alleged statement was intended or understood as an insulting or negative comment about Mexicans. Galvez testified that Panchesson was smiling when he made the statement, and that, at the time, he (Galvez) did not take the comment as a racial slur.

In support of his argument based on Panchesson’s alleged remarks, Gutierrez cites *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138 (*Sada*), but that case is distinguishable.<sup>18</sup> In *Sada*, a hospital supervisor made a series of discriminatory remarks before, during and after interviewing the plaintiff, a registry nurse who was Mexican-American and a United States citizen, for a position as a full-time employee on the nursing staff. (*Id.* at pp. 145-147, 154.) At some point prior to the interview (while apparently unaware of the national origin of the plaintiff, who had blond hair, was light complected, and spoke English without an accent), the supervisor stated to the plaintiff: “ ‘Hispanics spend 20 or 30 years in this country and do not bother to learn English, but they sure can find those public offices where they can get food stamps and all kinds of public assistance.’ ” (*Id.* at p. 145, fn. omitted.) During the interview, the supervisor, upon learning that the plaintiff was born in Mexico and had lived there at one point while commuting to work at hospitals in the United States, asked: “ ‘Well why don’t you just go back to Mexico and work there?’ ” (*Ibid.*) The supervisor then ended the interview and told the plaintiff she was not eligible for the job. (*Id.* at pp. 145-146.) After the plaintiff filed suit, the supervisor told a coworker: “ ‘Those Mexicans. Sada better drop her lawsuit. We are going to send all their asses back to Mexico.’ ” (*Id.* at p. 147.) Based on this record, the appellate court stated: “Suffice it to say that the remarks attributed to [the supervisor]—before, during, and after the job interview—permit an inference that the Medical Center did not consider Sada’s application on its merits but, instead, made a hiring decision based on Sada’s national origin and ancestry.” (*Id.* at p. 154, fn. omitted.)

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<sup>18</sup> Gutierrez also cites *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 123-124 (*Pantoja*), in which the appellate court held that a supervisor’s disparaging remark about Mexican-Americans was “relevant to the intent element of [a] racial discrimination cause of action,” and therefore should have been admitted into evidence. This holding does not assist Gutierrez. That the remarks are relevant and admissible does not establish that they create a triable issue of fact precluding summary adjudication. (See *Pantoja, supra*, 198 Cal.App.4th at p. 124 [noting that remarks might not have been sufficient to avoid summary adjudication or a nonsuit].)

The factors discussed above, including the timing, context, and content of Panchesson’s alleged remarks, distinguish them from the pattern of hostile and discriminatory statements attributed to the decisionmaker in *Sada*. Those statements, some of which occurred during the job interview, demonstrated animosity toward Hispanics as a group and antipathy toward the plaintiff because she was Hispanic. In contrast, the alleged remarks in this case did not occur in the context of the adverse employment decisions, were not directed at Gutierrez specifically, and did not involve hostility toward Hispanic employees exhibited by the decisionmaker in *Sada*. For those reasons, and because of the other factors discussed above, *Sada* does not persuade us that the remarks in this case create a triable issue of fact.<sup>19</sup>

We conclude that, in light of the strength of The Meadows’s showing of legitimate, nondiscriminatory reasons for its employment decisions, the evidence presented by Gutierrez (including both the evidence of alleged remarks and evidence as to the merits of the disciplinary issues) is “too weak to raise a rational inference that discrimination occurred.” (See *Guz, supra*, 24 Cal.4th at p. 362; *Reid, supra*, 50 Cal.4th at p. 541.)

#### IV. DISPOSITION

The judgment is affirmed. The Meadows shall recover its costs on appeal.

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<sup>19</sup> The federal cases cited by Gutierrez also are distinguishable, as they involved explicitly discriminatory remarks, in some cases directly connected to the employment decisions at issue. (See *Dominguez-Curry v. Nevada Transp. Dept.* (9th Cir. 2005) 424 F.3d 1027, 1038 [decisionmaker’s sexist remarks included statement that he wished he could get men to do the jobs held by women employees, and that women should only do subservient jobs]; *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1221 [decisionmaker stated he “ ‘did not want to deal with another female’ ”; record also included other evidence of discriminatory animus toward women as employees]; *Meaux v. Northwest Airlines, Inc.* (N.D.Cal. 2010) 718 F.Supp.2d 1081, 1089-1090 [supervisor “jokingly” referred to African-Americans as “ ‘coons’ ” and “ ‘gorillas’ ”].)

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RUVOLO, P. J.

We concur:

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REARDON, J.

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SEPULVEDA, J.\*

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\* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.