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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MICHELLE SEMPLE,

Plaintiff and Appellant,

v.

KOFAX, INC.,

Defendant and Respondent.

D058240

(Super. Ct. No. 37-2009-00083604-
CU-WT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed.

In this action for sex discrimination in violation of California's Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), Michelle Semple appeals a summary judgment for Kofax, Inc. (Kofax). Semple contends she raised triable issues of fact as to whether Kofax's stated reason for the termination of her employment—reorganization of its sales force—was pretextual and the real reason was discriminatory animus. We affirm the judgment.

BACKGROUND

Kofax is an international company that sells and services computer software products. In 2005 Kofax hired Semple "as an IBM Enterprise Alliance Manager." In July 2007 Kofax promoted Semple to "Director of Enterprise Sales." Semple was the only female director at Kofax, and she was one of its top salespersons. Kofax recruited Semple from Captiva Software Corporation (Captiva), a competitor of Kofax that Reynolds Bish co-founded. In November 2007 Bish joined Kofax as its CEO. Kofax terminated Semple's employment in January 2008 on the ground the company was reorganizing its sales force.

In a first amended complaint (complaint), Semple sued Kofax for sex discrimination in violation of the FEHA.¹ The complaint alleged the stated reason for her firing was pretextual, and the real reason was that Bish "targeted her for termination because [she] was a woman in what he considered to be a man's job."

Kofax moved for summary judgment. The court granted the motion, explaining "the evidence presented does not imply a discriminatory motive is more likely than Kofax's proffered explanation for Plaintiff's termination." Judgment was entered for Kofax.

¹ The complaint included several other causes of action, but they were disposed of before the summary judgment proceeding.

DISCUSSION

I

Burdens in Summary Judgment Proceeding

The FEHA prohibits an employer from terminating or otherwise discriminating against any employee on enumerated grounds, including sex. (Gov. Code, § 12940, subd. (a).) "Disparate treatment," the form of discrimination at issue here, "is *intentional* discrimination against one or more persons on prohibited grounds." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20 (*Guz*).)

Because direct evidence of discriminatory motive is ordinarily unavailable, California courts have adopted a "three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination . . . based on a theory of disparate treatment." (*Guz, supra*, 24 Cal.4th at p. 354, citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.)² Under the *McDonnell Douglas* test, (1) the plaintiff must set forth sufficient evidence to establish a prima facie case of discrimination; (2) the defendant must then articulate a legitimate, nondiscriminatory reason for the adverse employment action; and (3) the employee then has the opportunity to show the employer's articulated reason is pretextual. (*Guz, supra*, at pp. 354-356; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 520, fn. 2 (*Reid*) [affirming the three-stage burden-shifting test].)

² "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz, supra*, 24 Cal.4th at p. 354.)

A plaintiff's prima facie burden is minimal, and the specific elements may vary depending on the particular facts. Generally, the plaintiff must show "(1) he [or she] was a member of a protected class, (2) he [or she] was qualified for the position . . . sought or was performing competently in the position . . . held, (3) he [or she] suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz, supra*, 24 Cal.4th at pp. 354-355.)

Code of Civil Procedure section 437c, subdivision (c)³ provides for summary judgment when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. Notwithstanding the *McDonnell Douglas* test, "like all other defendants, the employer who seeks to resolve the matter by summary judgment must bear the initial burden of showing the action has no merit." (*Le Bourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1058; *Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1156.) A defendant satisfies this burden by showing one or more of plaintiff's prima facie elements is lacking, that the adverse employment action was based on legitimate, nondiscriminatory factors, or that there is a complete defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*); *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203, citing *Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 255, fn. 8.) " 'Once the defendant . . . has met that burden, the burden shifts to

³ Further undesignated statutory references are also to the Code of Civil Procedure.

the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' " (*Aguilar, supra*, at p. 849.)

We review a summary judgment ruling de novo, applying the same standards as the trial court. (*Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 999.) "In reviewing a motion for summary judgment, we accept as undisputed fact only those portions of the moving party's evidence that are uncontradicted by the opposing party. In other words, the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn therefrom are accepted as true." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1001.)

II

Analysis

A

1

Kofax moved for summary judgment on the ground the termination of Semple's employment was based on a legitimate, nondiscriminatory factor, the reorganization of the company's sales force. Kofax submitted the declaration of Michael Giove, who was Semple's supervisor and reported directly to Bish. The declaration provides the following information.

When Bish joined Kofax he instructed Giove "that it was my primary task over the next month to reorganize my sales teams." Bish conveyed that Kofax's "sales function was too decentralized throughout the world," and he "wanted Kofax's sales employees to

better focus their selling efforts, create clearer lines of authority, responsibility and accountability and improve our sales productivity."

Giove decided that "under the new plan, there would be two teams of salespeople responsible for Americas accounts, divided into the Western Area and the Eastern Area of the United States." At the time, however, three sales teams had responsibility for these areas, one of which was headed by Semple "for Enterprise Sales nationwide." The other teams were respectively responsible for managing west coast and east coast regional sales. Giove "hoped that under the reorganized system, the sales teams would be able to focus on direct customer sales of all Kofax products and that we could eliminate the redundancies involved in the prior marketing system where numerous sales people selling different products called on the same companies."

Further, each of the three existing groups "had commission agreements that paid them an overlay, meaning that their sales resulted in commissions to them and other groups. Payment of these commissions to numerous people adversely affected Kofax's net income. In fact, in 2007, Ms. Semple was paid over \$400,000, which seemed to be excessive for a person with her experience in her position and exceeded the income paid to many people at Kofax with far greater seniority, experience and responsibilities." Semple's team "focused on Fortune 400 companies regardless of location. Under the new company structure, that position was to be eliminated as it did not fit the geographic division that was at the heart of the reorganization."

Giove contemplated three options for Semple: terminate her employment, move her to the east coast to oversee operations there, or allow her to head up west coast operations. Both positions involved severe pay cuts, and the west coast position was a demotion from director to manager. Giove believed that under either scenario Semple would quickly leave Kofax, and he wanted to avoid having her on the payroll during her search for another job. The declaration also states the decision to terminate her employment was his. While Bish had overriding authority, he "had minimal involvement . . . in deciding the details of the sales force reorganization." Giove denied that Semple's termination was related to her gender.

Bish also submitted a declaration, which corroborated the information in Giove's declaration. The declaration also states, "I first met Ms. Semple while I was at Captiva . . . Although I would see her from time to time in the office or at company functions . . . , I had very little interaction with her. Similarly, I very rarely saw her during the three months we were both at Kofax." In addition to Semple, Kofax terminated the employment of more than 50 employees because of the reorganization, including Richard Bosworth, Semple's supervisor and a vice-president of sales for the Americas.

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The court found that Kofax's evidence established a legitimate, nondiscriminatory reason for her firing, a corporate reorganization that eliminated her position. "Job elimination or office consolidation is a sufficient nondiscriminatory reason for

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discharge." (*Armendariz v. Pinkerton Tobacco Co.* (5th Cir. 1995) 58 F.3d 144, 150; *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807 (*Horn*) [restructuring of position and employee's lack of fit for restructured position was sufficient nondiscriminatory reason for termination]; *Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885, 892 [decentralization of human resources function and assumption of duties by others at corporate level was sufficient nondiscriminatory reason for termination].) The court also determined that in her opposition, Semple presented a prima facie case of sex discrimination.

Thus, at this point the presumption of unlawful discrimination " 'simply drop[ped] out of the picture.' " (*Horn, supra*, 72 Cal.App.4th at p. 807, citing *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 511.) "Consequently, the burden shifted to [Semple] to 'produce "substantial responsive evidence" that the employer's showing was untrue or pretextual. [Citation.]' [Citations.] 'To avoid summary judgment, [appellant] "must do more than establish a prima facie case and deny the credibility of the [defendant's] witnesses." [Citation.] [She] must produce "specific, substantial evidence of pretext." [Citation.]' [Citation.] We emphasize that an issue of fact can only be created by a conflict of evidence. It is not created by speculation or conjecture." (*Horn, supra*, at p. 807.)

" '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 employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence." ' ' (*Hersant, supra*, 57 Cal.App.4th at p. 1005.)

3

The court determined the evidence on which Semple relies does not imply a discriminatory motive is more likely than Kofax's stated reason for terminating Semple's employment. Semple asserts her evidence creates triable issues of fact as to whether Kofax's stated reason for her termination is untrue and pretextual.⁴

Semple presents two main theories of Bish's discriminatory animus. The first is that when Bish joined Kofax he disparaged her to Giove. In deposition, Giove testified that Bish said "he was never fully impressed with her over at Captiva," and he was surprised Kofax hired her in a management position. Bish confirmed the conversation in his deposition. He explained that Semple was not a manager at Captiva, and "therefore, it surprised me that she . . . had so rapidly developed the experience grid necessary to manage a group."

⁴ Some of Semple's points are supported by citations to certain pages of Bosworth's deposition testimony, which she did not submit in opposition to the summary judgment motion. "Obviously, since this evidence was not before the court when it rendered its decision on the summary judgment motion, it could not have created a triable issue of fact." (*Peerless Lighting Corp. v. American Motorists Ins. Co.* (2000) 82 Cal.App.4th 995, 1015, fn. 12.) She unsuccessfully attempted to submit the evidence in support of a motion for reconsideration, which we discuss below.

Semple's characterization of Bish's comments as a "tirade" against her is hyperbole. Moreover, Giove's testimony indicates Bish's criticism was not gender-based. When asked whether Bish complained about any other Kofax employees, Giove testified: "Bish pretty much hated the entire Kofax sales force. Okay? I mean, if you'll excuse my language, he was pretty much an equal-opportunity a—. Okay? He especially hated anybody that came from Captiva. Seemed to look at them as traitors, seemed to see, in his mind, that they basically left the company that provided [for] them well to go work somewhere else, and didn't look highly upon them for leaving Captiva the way that they did. [¶] And [he] similarly looked at people who left Kofax and wanted to come back to Kofax the same way. [¶] His term was, 'They're traitors, we're never taking them back.' But in his mind, anyone who had worked at Kofax in the sales group, were incompetent, couldn't do a good job, and he didn't understand why we held on to the people as long as we did." Giove also testified that Bish nonetheless did not tell him to fire anyone.

Semple's second theory pertains to rumors Bish circulated about her when they both worked at Captiva. She testified during her deposition that a coworker had copied her on an email he sent to Bish and she inferred from it that Bish had accused her of having sex with individuals at IBM to obtain business. Semple did not have a copy of the email. She testified that the coworker told her Bish "was questioning how I had these relationships with IBM and that . . . it was something that he [the coworker] had to defend on to [Bish]." She asked the coworker if he meant Bish "was accusing me of sleeping my way through IBM," and he said yes. She also testified she asked another

coworker whether Bish had made that comment, and he confirmed that Bish had.⁵

Bosworth testified in deposition, "There was not an ongoing rumor. [Semple] had done really fabulous work at IBM. And I think from a jealousy standpoint, people said, in gist, she must be sleeping with someone."

Even assuming Bish made the remarks, they do not indicate he influenced Giove to terminate Semple's employment at Kofax. Giove's declaration states, "The decision to terminate Ms. Semple was mine. Mr. Bish did not demand that she be terminated." The declaration also states, "I have been informed that Ms. Semple claims that her lay off was due to Mr. Bish's desire to eliminate her, despite the fact that she had exceeded her sales goals set by the company. Mr. Bish, while not involved in the details of the reorganization, had overriding authority over the changes. He had minimal involvement, however, in deciding the details of the sales force reorganization. Those decisions were *exclusively mine* and were based on my own knowledge and familiarity of the personnel involved. My decision was not at all affected by issues concerning Ms. Semple's gender." (Italics added.)

We reject Semple's assertion the court weighed the evidence and gave more credibility to Bish's denial of circulating rumors about her. (See *Saylin v. California Ins. Guarantee Assn.* (1986) 179 Cal.App.3d 256, 261 ["court has no power in a summary proceeding to weigh one inference against another or against other evidence"].) At the

⁵ Kofax points out that Semple's deposition testimony contains hearsay. The court, however, denied Kofax's hearsay objection because it did not specify any particular testimony to which it objected. We consider all evidence except that to which objections were sustained. (§ 437c, subd. (c).)

hearing the court specifically denied weighing the evidence, and the order does not indicate any weighing of the evidence or other improper consideration. The court explained that assuming Bish made the remarks, they do not create a triable issue because it was Giove, not Bish, who decided to terminate her employment. Semple adduced no evidence suggesting Bish was involved in the decision.

Semple's reliance on a November 4, 2007 email chain is also unavailing on the rumor issue. Bish wrote to Semple: "I understand that you've now heard the news about me joining [Kofax] as its CEO. I also understand you may have some concerns about you leaving Captiva/going to Kofax and how I might feel about that. Please be assured there are absolutely no hard feelings or bad memories on my part and I sincerely look forward to working with you again." In her response, Semple solicited Bish's view on her performance at Captiva. The email states, "I've known you for a very long time and believe I've proven I know the business well and have great results. I'd just like to talk to you about how you think I did that as I've heard rumors on how you perceived the accomplishments." Bish's response states, "I always thought you did a great job as a result of your persistence/hard work and building strong personal relationships with IBM and the individual channel partners . . . and that's probably the best way to succeed in such a job. I never had any real criticisms or concerns other than wanting you *and others* to work out of the office rather than your home. I did hear some others complain about you wanting to spend more than the Captiva travel policy allowed for some [airfares] and hotels but never personally [*sic*] worried about or got involved in those discussions."

(Italics added.)

Semple asserts her November 4 email to Bish "asked Bish if he still believed she obtained her business by sex," and his response "indicat[ed] that he still believed she obtained business by sex." The emails say nothing of the sort. Semple also claims that the ellipsis in Bish's response signifies his "affirmation" of his comments at Captiva that she obtained business from IBM through sex. "We will not, however, draw inferences from thin air." (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.) "An inference must be the product of logic and reason." (*Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584.) Further, contrary to Semple's claim, Bish did not criticize her for her business expenditures. To the contrary, he said he was unconcerned with the matter. Also, while he did object to her working at home, he also objected to other employees doing the same thing.

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Moreover, Semple's assertion the court relied on the "stray remarks" doctrine is mistaken. "Under this 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." (*Reid, supra*, 50 Cal.4th at p. 537.) In *Reid*, an age discrimination case, our high court held the appellate court properly rejected the stray remarks doctrine in favor of "consider[ing] evidence of alleged discriminatory comments made by decision makers and coworkers along with all other evidence in the record." (*Id.* at p. 545, fn. omitted.) The opinion explains the trial court "recognized '[t]here are certainly cases that in the context of the evidence as a whole, the remarks at issue provide such weak

evidence that a verdict resting on them cannot be sustained. But such judgments must be made on a case-by-case basis in light of the entire record, and on summary judgment the sole question is whether they support an inference that the employer's action was motivated by discriminatory *animus*." (*Id.* at p. 538.)

Here, there is no indication the court relied on the stray remarks doctrine or rejected any evidence. The court's order includes a lengthy and thoughtful discussion of all the evidence and explains why it does not withstand summary judgment.

5

We also reject Semple's assertion the evidence creates a triable issue of fact as to whether Giove acted as Bish's "cat's paw," or instrumentality, in terminating her employment. The "cat's paw" doctrine pertains to the element of causation. "Of course, proof of discriminatory animus does not end the analysis of a discrimination claim. There must also be evidence of a causal relationship between the animus and the adverse employment action." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 550.) The "cat's paw" doctrine rejects the notion that an employer satisfies its duty of negating the causation element by showing that the specific corporate actor who took the adverse employment action has no discriminatory or retaliatory animus. "[S]howing that a significant participant in an employment decision exhibited discriminatory animus is enough to raise an inference that the employment decision itself was discriminatory, even absent evidence that others in the process harbored such animus." (*Id.* at p. 551.) Employers may be held "responsible where discriminatory or retaliatory actions by supervisory personnel bring about adverse employment actions through the

instrumentality or conduit of other corporate actors who may be entirely innocent of discriminatory or retaliatory animus." (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 116 (*Reeves*)).⁶

Simple attempts to analogize the facts here and in *Reeves, supra*, 121 Cal.App.4th 95. In *Reeves*, the court held the employer was not entitled to summary judgment in an action for retaliation under the FEHA because the "cat's paw" doctrine was potentially applicable. In *Reeves*, a district manager fired a 29-year employee for shoving a coworker. The district manager relied solely on a phone conversation she had with a security officer, who knew the plaintiff had reported sexual harassment of female employees to his supervisor, who trivialized the matter. The evidence supported findings that the supervisor had retaliatory motives, and he knew a referral to security would likely result in the plaintiff's dismissal; the security officer conducted a "predetermined investigation" (*id.* at p. 120); he presented the matter to the district manager "in a highly unbalanced way" by not presenting "numerous potential ameliorating circumstances" (*ibid.*); and her decision to fire the plaintiff "really amounted to little more than the ratification of [the officer's] recommendation." (*Id.* at p. 110.)

⁶ For an explanation of the historic roots of the "cat's paw" metaphor, see *Reeves, supra*, at pages 114-116, fn. 14. The United States Supreme Court recently adopted the "cat's paw" doctrine in the context of the Uniformed Services Employment and Reemployment Rights Act of 1994. (*Staub v. Proctor Hosp.* (2011) __U.S.__ [131 S.Ct. 1186, 1194] ["[I]f a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable. [Fns. omitted.]"].)

The court explained that a "fact finder could conclude that [the officer] saw his function not as gathering objective evidence to pass to [the district manager] but as lending credence to [the supervisor's] report that 'workplace violence' had occurred. From this it follows that whether or not [the security officer] personally felt retaliatory animus towards plaintiff, the purpose and effect of his involvement was merely to effectuate the will of [the supervisor]. He made himself a tool, witting or unwitting, for a supervisor who might wish, as [the supervisor there] could be found to wish, to retaliate against workers for protected activities." (*Reeves, supra*, 121 Cal.App.4th at p. 121.)

Here, no evidence raises an inference Bish used Giove as an instrumentality to fire Semple. Her assertion that "Giove went along with the discriminatory termination rather than being himself subject to retaliation for failing [to] carry out the termination" is sheer conjecture. Further, her reliance on the deposition testimony of coworker Kevin Graham is unavailing, as he merely speculated that Giove's decision to fire Semple came from Bish. A "party 'cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact.' " (*Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1144-1145.)

6

Also without merit is Semple's argument that the reference in Giove's declaration to her as "high maintenance" raises an inference of discriminatory animus. His declaration states he decided not to offer Semple the west coast position because it would

be a demotion from a director to a manager position, and while she "had good customer interaction experience, as noted by her increased sales from her relationship with IBM, . . . [she] was very high maintenance and was perceived as requiring a lot of validation. This limited her ability to lead any of the sales teams in the restructured organization." The declaration also states, "This required her supervisors, primarily Richard Bosworth, to spend an inordinate amount of time dealing with her issues."

Semple has cited no authority establishing Giove's use of the term "high maintenance" connotes sex discrimination. We conclude the term, standing alone, is not gender-specific because both male and female employees may require more supervision than the average employee. (See, e.g., *Zenni v. Hard Rock Cafe Intern., Inc. (N.Y.)* (S.D.N.Y. 1995) 903 F.Supp. 644, 648 [male employee classified as high maintenance because of lack of social skills].) The same goes for Giove's descriptions of Semple as not a "team player" and not a "good fit." Moreover, Semple accuses Bish, not Giove, of having discriminatory animus.

Additionally, Semple asserts she showed pretext based on evidence that no reorganization actually took place at Kofax. She cites the deposition testimony of Sandi Shadbolt, who was involved in Kofax sales, that after Semple was fired in January 2008, the company's "Sales Governance Plan" continued in effect until the end of the fiscal year on June 30. The Sales Governance Plan includes an "Enterprise Sales Team," and Semple was director of that team when her employment was terminated. Shadbolt's testimony does not mean, however, that no reorganization actually took place or that Kofax replaced Semple in the same position. Semple concedes "there was a change in

the structure for the following fiscal year, 2009." Even if the reorganization took longer than anticipated, no inference of discriminatory animus is raised.

We conclude the court properly granted Kofax summary judgment. "[T]here must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions." (*Guz, supra*, 24 Cal.4th at p. 361.) Summary judgment for the employer is "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." (*Id.* at p. 362.) Such is the case here.

B

Additionally, Semple argues the "court exceeded its authority in granting summary judgment where the defendant failed to strictly comply with the statutory requirements for a separate statement." (Capitalization omitted.) She complains that Kofax's separate statement is insufficient because it does not address why during the reorganization it did not assign her to either the west coast or east coast position.

The separate statement does state Giove contemplated three options for Semple: termination of her employment, a move to the east coast, or oversight of west coast operations. This is supported by a reference to paragraph 16 of Giove's declaration. The separate statement does not set forth Giove's reasoning for not moving her to the east coast, but paragraph 16 of his declaration provides, "I did not feel that she would appreciate being forced to move back east, especially as the move would be accompanied

with a severe cut in pay." The separate statement also does not reference paragraph 17 of the Giove declaration, which explains his reasons for not assigning her to head up west coast operations.

The court, however, had discretion to consider evidence appearing in other parts of the record, and we find no abuse of discretion. Kofax placed significant reliance on Giove's declaration, it was clearly called to Semple's attention, and she had sufficient notice to address it in her opposing papers. (*Varshock v. Department of Forestry & Fire Protection* (2011) 194 Cal.App.4th 635, 652-653.)⁷

III

Motion to Supplement the Record and for Reconsideration

A

Semple also contends the court erred by denying her motion under section 473 to supplement the record and for reconsideration of its summary judgment ruling under section 1008. Kofax counters that an order denying a motion for reconsideration is a separately appealable order, and since Semple's notice of appeal does not identify the order we lack jurisdiction to consider the matter. We disagree with Kofax.

Section 1008, subdivision (a) provides that "any party affected by [an] order may, . . . based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend,

⁷ In her reply brief, Semple claims her opening brief does not challenge the court's discretion to consider all the evidence. In her opening brief, however she argues Kofax's failure to reference all evidence in its separate statement "is fatal to" the motion for summary judgment.

or revoke the prior order." "To be entitled to reconsideration, a party should show that (1) evidence of new or different facts exist, and (2) the party has a satisfactory explanation for failing to produce such evidence at an earlier time." (*Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1160-1161 (*Kalivas*).

"The majority of courts addressing the issue have concluded an order denying a motion for reconsideration is not appealable, even when based on new facts or law." (*Powell v. County of Orange* (2011) 197 Cal.App.4th 1573, 1576 (*Powell*)). In *Annette F. v. Sharon S.* (2005) 130 Cal.App.4th 1448, this court observed, "The order [denying reconsideration] is not appealable. [Citations.] Section 904.1 . . . does not authorize appeals from such orders, and to hold otherwise would permit, in effect, two appeals for every appealable decision and promote the manipulation of the time allowed for an appeal.'" (*Id.* at p. 1459.)

Effective January 1, 2012, the Legislature amended section 1008 to expressly provide an order denying a motion for reconsideration is not appealable. The legislation further amends section 1008 to provide that if the order that was the subject of the motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order. (*Powell, supra*, 197 Cal.App.4th at p. 1577.) Thus, Semple's notice of appeal of the judgment subsumes the court's order on her motion for reconsideration.

B

To support her motion for reconsideration, Semple sought to supplement the record with certain pages of Bosworth's deposition testimony to show how he defined the term "high maintenance." She asserts that if "Giove meant the same thing [by using the term 'high maintenance'] that Bosworth meant . . . it would not be just cause for termination."

The court may relieve a party from a judgment "taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." (§ 473, subd. (b).) A motion for relief under section 473, subdivision (b) is addressed to the sound discretion of the trial court and an appellate court will not interfere unless there is a clear showing of abuse. (*Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1266.) A ruling that is arbitrary or capricious constitutes abuse of discretion. (*Ibid.*)

Semple's counsel submitted a declaration that stated he assigned the task of lodging the pages with the court and he was unaware that the task was not performed. A court may reasonably deny relief when an attorney assigns work to a staff member, because the attorney is ultimately responsible for its performance. (*Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 231.) The court, however, did not rely on this rule. Rather, the court cited a lack of diligence in rectifying the problem. The court determined counsel should have known about the omission before the summary judgment hearing because Kofax specifically referenced the problem in its reply.

Counsel admitted he did not read the reply, as was his custom in summary judgment proceedings.

The court determined the failure to read the reply and request a continuance was "inexcusable and not [a] sufficient basis for support relief" under section 473, subdivision (b). We cannot say the court abused its discretion.

In any event, as the court noted, the deposition pages would not have created a triable issue of material fact. Bosworth was asked whether he had heard Semple described as "high maintenance." He responded, "Describe what you mean by 'high maintenance.'" He was read Giove's declaration statement, "Based on my knowledge of her performance, . . . Semple was very high maintenance and was perceived as requiring a lot of validation." Bosworth then testified, "I will characterize what I mean by 'high maintenance.' [¶] Sales performers who generate numbers have demands, and those demands generally are for programming and accountability, and when you perform, you're generally considered high maintenance because you bring business in and make opportunities. [¶] So, in that regard, . . . Semple was high maintenance."

The court noted that while Bosworth's testimony characterized the term "high maintenance" in a positive light, it did not refute Giove's declaration that she was a high maintenance employee. The court also noted that casting the term in a positive light undermined Semple's claim that Giove's use of the term showed discriminatory animus. Bosworth's definition of the term "high maintenance" does not suggest it is gender-based. Additionally, Semple does not accuse Giove of having any discriminatory animus.

Semple also sought to supplement the record with portions of the deposition testimony of Nick Kukulski, a Kofax employee, on the issue of whether Kofax actually reorganized its sales force or had a valid need to terminate her employment. Her counsel's declaration states he was unable to travel to Chicago to take the deposition before her opposition to the summary judgment motion was due because he was injured in a car accident. Counsel took the deposition on June 24, 2010, however, and the hearing on the summary judgment motion was held on July 2, 2010. Semple did not mention the testimony or seek a continuance. The court denied relief on the ground she provided no reasonable explanation for late submission of the evidence. Again, we find no abuse of discretion.

Semple's reliance on *Kalivas, supra*, 49 Cal.App.4th 1152, is misplaced. *Kalivas* held the trial court erred by denying the plaintiff's motion for reconsideration of a summary judgment against her. *Kalivas* concluded that a local courtroom rule conflicted with state law and misled the plaintiff's counsel into believing the proceeding was taken off calendar pending an ordered meet and confer. (*Id.* at p. 1156.) As a result, counsel filed no opposition and separate statement and did not appear at the hearing. (*Id.* at p. 1157.) Here, there was no confusing rule that led to Semple's failure to bring any helpful testimony of Kukulski to the court's attention at the summary judgment hearing, and to ask for a continuance for its presentation. She offered no explanation for not doing so.

Further, the court found the Kukulski evidence would not raise a triable issue of material fact. The court explained, "While Kukulski testifies to the current make up of

the Kofax sales force, Kukulski was hired over one year and eight months after [Semple] was terminated and does not know [her]." Semple does not cite any of his testimony to show its relevance or explain how the court's finding is error.

The court properly denied Semple's motion to supplement the record under section 473. Because she presented no "new or different facts, circumstances, or law" (§ 1008, subd. (a)), the court was required to deny her motion for reconsideration.

DISPOSITION

The judgment is affirmed. Kofax is entitled to costs on appeal.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

AARON, J.