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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JEANINE DENISE MORGAN,

Plaintiff and Appellant,

v.

JCAL, INC., et al.,

Defendants and Respondents.

B276474

(Los Angeles County
Super. Ct. No. BC568101)

APPEAL from a judgment of the Superior Court of Los Angeles County, Susan Bryant-Deason, Judge. Reversed.

Law Offices of Victor L. George, Victor L. George and Wayne C. Smith for Plaintiff and Appellant.

Ford & Harrison, Lyne A. Richardson and Hilda Aguilar for Defendants and Respondents.

Appellant Jeanine Denise Morgan was employed as the Director of Operations for McDonald's franchise restaurants owned and operated by respondents JCAL, Inc. and JC-4, Inc. Following the termination of her employment, Morgan filed suit against JCAL, JC-4, and two affiliated companies, respondents JWEST, LLC and Inland Sun Management Corporation (collectively, "Respondents"), for age discrimination in violation of the California Fair Employment and Housing Act, Gov. Code § 12900 et seq. (FEHA) and wrongful termination in violation of public policy. The trial court granted summary judgment in favor of Respondents. We conclude there are triable issues of material fact as to whether Respondents terminated Morgan's employment on the basis of her age, and accordingly, reverse.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Morgan's Employment with Respondents

JCAL, JC-4, JWEST, and Inland Sun Management are business entities owned by a married couple, Jason and Julie Cartie.¹ The Carties have franchise agreements with McDonald's USA, LCC to operate multiple McDonald's franchise restaurants. Two of the Carties' companies, JCAL and JC-4, currently own and operate seven restaurants under the McDonald's franchise. Inland Sun Management employs certain management-level employees who work for the restaurants owned and operated by JCAL and JC-4. JWEST owns an office building and leases office space to Inland Sun Management to conduct business for JCAL

¹ For clarity and convenience, and not out of disrespect, we shall refer to Jason and Julie Cartie by their first names.

and JC-4. As of 2015, the various companies owned by the Carties had 450 to 500 employees.

In 2006, the Carties hired Morgan to work as the Director of Operations for the McDonald's franchise restaurants owned by JCAL and JC-4.² At the time of Morgan's hire, JCAL and JC-4 owned four McDonald's franchise restaurants and had approximately 150 employees. As the Director of Operations, Morgan reported directly to Jason and was responsible for overseeing the day-to-day operations of the restaurants. In 2011, after the Carties acquired a number of additional restaurants, they hired Larry Baetiong to work as a Supervisor. In this position, Baetiong reported to Morgan and was responsible for directly supervising three of the restaurants.

At some point during Morgan's employment, the Carties' adult daughter, Jessica Cartie Evans, joined the organization. At that time, Jason explained to Morgan that Evans was training to become an owner-operator of the franchise. Jason also assured Morgan that her position in the organization was not in jeopardy. Initially, Evans worked as a manager at one of the restaurants. In 2013, the Carties promoted Evans to a Supervisor. In this position, Evans had the same job duties as Baetiong, but she reported directly to Jason rather than to Morgan. Although Evans did not hold any ownership interest in the organization, the Carties considered her to be a part-owner of their business.

After Evans became a Supervisor, Morgan felt her work environment change. Morgan no longer had the same level of

² When Morgan was hired by the Carties, she had worked for the McDonald's organization in various capacities for close to 30 years.

autonomy over her day-to-day job duties. Instead, Jason began contacting Morgan on a frequent basis, questioning her schedule, and micro-managing her work. Morgan also was tasked with training Evans on various management operations. Morgan found the lack of clearly defined roles in the organization to be confusing. She expressed to Jason that it was difficult for her to perform her job as the Director of Operations when Evans was both Morgan's subordinate as a Supervisor and Morgan's superior as a part-owner of the organization. When Morgan asked Jason for guidance on her role relative to Evans, he simply responded, "You figure it out."

II. Morgan's Termination of Employment

On October 3, 2014, Jason and Baetiong came to the McDonald's restaurant where Morgan was working. Jason told Morgan that he needed to meet with her and Baetiong in the back room. After Morgan was seated, Jason extended his hand to her and said, "I want to thank you for your service." Jason then told Morgan she was being "laid off" that day because it was "in the best economic interest of [the] organization." After Morgan gathered her belongings, Jason escorted her from the restaurant to her car. In the parking lot, Morgan asked Jason to provide the reason for her termination in writing. Jason responded, "I already told you, it's economics."

Morgan did not have any history of performance issues during her employment. When the Carties terminated Morgan's employment, they did not lay off any other employees or make any other cost-cutting measures. Morgan's annual salary prior to her discharge was \$104,000. Following Morgan's discharge, the Carties increased Evans's salary by about \$10,000. Evans's resulting salary was approximately \$60,000 per year, which was

roughly the same as Baetiong's annual salary. At the time her employment was terminated, Morgan was 52 years old and Evans was 28 years old.

III. Morgan's Civil Complaint

On December 30, 2014, Morgan filed this action against Respondents, McDonald's Restaurants of California, Inc., and McDonald's Corporation.³ Morgan's complaint alleged two causes of action for age discrimination in violation of FEHA and wrongful termination in violation of public policy. The gravamen of the complaint was that Respondents terminated Morgan's employment without warning because of her age and replaced her with the younger Evans. Morgan sought both compensatory and punitive damages.

IV. Respondents' Motion for Summary Judgment

On October 29, 2015, Respondents filed a motion for summary judgment. In their motion, Respondents argued that Morgan failed to state a prima facie case of age discrimination because the undisputed facts showed that she was not replaced by Evans or any other younger employee. Respondents also asserted that they had a legitimate, nondiscriminatory reason for terminating Morgan's employment based on the financial circumstances facing the McDonald's franchise restaurants, and that Morgan could not establish pretext.

The motion was supported by declarations from the Carties, Evans, and Baetiong. Jason and Julie each stated that Morgan was laid off "due to financial circumstances," and that

³ The McDonald's defendants were later dismissed from the action pursuant to a settlement.

Jason thereafter assumed all of the job duties and responsibilities that Morgan had performed as the Director of Operations. Evans and Baetiong similarly declared that, following Morgan's termination, no other person had been named the Director of Operations, and Jason was the only individual who had assumed the duties and responsibilities of Morgan's former position. Both Evans and Baetiong also stated that, in their positions as Supervisors, they shared the duties of "overseeing all of the McDonald's franchise restaurants."

The motion also was supported by a declaration from Respondents' accountant, Jeffrey Quick, along with statements of revenues and expenses for JCAL and JC-4 for the years 2012, 2013, and 2014. Quick declared that he personally prepared the attached statements, and that net income started to decline for all of the McDonald's franchise restaurants from 2012 to 2014 due to declining profits and rising labor costs. Quick stated that JC-4's statements showed that total product sales, gross profits, and net income all declined for the company in 2013 and 2014. Quick also stated that JCAL's statements showed that JCAL sustained even greater losses than JC-4, and experienced a decline in net income in 2013 and again in 2014.

On December 11, 2015, Morgan filed a motion to reopen discovery to take Quick's deposition, along with an ex parte application for an order shortening time for a hearing on the motion. Morgan argued discovery should be reopened because Respondents did not produce unredacted copies of their statements of revenues and expenses until December 9, 2015. The trial court granted Morgan's ex parte application and scheduled a hearing on her motion for December 17, 2015. At the hearing, the court granted the motion to reopen discovery and

ordered Respondents to make Quick available for deposition within 10 days.

On December 28, 2015, prior to Quick's deposition, Morgan filed her opposition to the summary judgment motion. Morgan asserted that, contrary to Respondents' declarations, Evans had replaced her as the Director of Operations. In support of this claim, Morgan cited her own deposition testimony that another employee, Adela Jacks, had told Morgan in a text message that, following her termination, Evans announced at a manager's meeting that she was the new Director of Operations. Morgan also argued that Respondents' claim that her employment was terminated due to poor financial circumstances was pretextual because both JCAL and JC-4 experienced an increase in gross profits from 2012 to 2014, and their respective decline in net income was the result of remodeling certain restaurants and substantially increasing the management fees paid to Inland Sun Management. Morgan further contended that there was other circumstantial evidence of pretext, including Jason's conduct in asking Morgan about her retirement plans at a Christmas party in 2013, Jason's refusal to hire older qualified job applicants recommended by Morgan and Baetiong, and Jason's practice of treating younger employees more favorably than Morgan despite her strong job performance.

On January 6, 2016, Respondents filed their reply. Respondents reiterated their arguments that Morgan's position was eliminated due to financial circumstances, that Evans did not replace Morgan as the Director of Operations, and that Morgan's former duties and responsibilities were solely assumed by Jason. Respondents also asserted in their reply that Morgan's deposition testimony relating a statement allegedly made by

Evans about her new role as Director of Operations was inadmissible hearsay. Respondents did not, however, file any written objections to Morgan's evidence.

V. Supplemental Briefing on the Motion for Summary Judgment

On January 11, 2016, the trial court continued the hearing on the summary judgment motion to allow Morgan to take Quick's deposition, which was scheduled for the following week. After Quick was deposed, Morgan filed a supplemental opposition and Respondents filed a supplemental reply. In her supplemental opposition, Morgan argued that Quick's deposition testimony revealed he had made a number of false and misleading statements in the declaration he previously submitted for Respondents' summary judgment motion.⁴ Morgan also asserted that Quick's testimony showed that Respondents did not suffer the financial losses that they claimed had led to the decision to terminate Morgan's employment. In their supplemental reply, Respondents argued that Quick's deposition testimony continued to support their claim that both JC-4 and JCAL suffered a decline in profits and income from 2012 to 2014, which provided a legitimate, nondiscriminatory reason for the termination decision.

On March 7, 2016, the trial court resumed the hearing on Respondents' summary judgment motion. During the hearing, Respondents' attorney argued that Morgan had failed to establish a prima facie case of age discrimination because she had not

⁴ Morgan separately filed evidentiary objections to Quick's prior declaration on the ground that various statements in the declaration lacked an adequate foundation.

shown that she was replaced by a younger employee. In support of this argument, Respondents' attorney asserted that Morgan's deposition testimony about Evan's stated role as the new Director of Operations was "based on a double hearsay statement," and that Morgan had not submitted a declaration signed by Adela Jacks, the employee who allegedly heard the statement. The trial court agreed that Morgan had failed to show that she was replaced by Evans, and noted that it would not consider "the double hearsay statement of the person who hasn't even given us a declaration as to what happened or what was said." The court's tentative ruling was to grant the summary judgment motion. After hearing further argument, however, the court decided to take the matter under submission for a three-week period to allow the court to review all of the materials that had been submitted on the motion while the parties considered a possible settlement of the case. The court stated that if the parties were unable to reach a settlement during that time, it would issue its ruling.

On March 23, 2016, Morgan filed a declaration from Adela Jacks stating that her supervisor, Margarita Rivas, had attended a manager's meeting a few days after Morgan was discharged. Following the meeting, Rivas told Jacks that Evans was the new Director of Operations and that all issues pertaining to store operations were to be addressed to Evans. Rivas also told Jacks that Morgan was not allowed to enter the McDonald's restaurant where they worked, and that if Morgan did show up, she should be asked to leave.

On March 25, 2016, Respondents filed a second supplemental reply in support of their summary judgment motion. Respondents argued that Morgan still had not presented

any admissible evidence that she was replaced by Evans as the Director of Operations. Respondents asserted that Jacks's recently-filed declaration relating Evans's alleged statement about her new role was inadmissible hearsay because Jacks was not present at the meeting where the statement was made. Respondents did not, however, file separate written objections to Jacks's declaration. On April 27, 2016, Respondents filed a declaration from Rivas disputing Jacks's account. Rivas stated that she never attended any manager's meeting where Evans announced that she was the new Director of Operations. Rivas also denied telling Jacks that Evans had been named the Director of Operations, or that Morgan should be asked to leave if she ever attempted to enter the restaurant.

On the same day that Respondents filed the declaration from Rivas, Morgan filed a supplemental declaration from Jacks. Jacks stated that the McDonald's restaurant where she worked had a sign in the back office that advised employees who believed they were the victim of discrimination or harassment to contact the Director of Operations. Jacks also stated that the sign had identified Morgan as the contact person throughout Jacks's four years of employment, but following Morgan's termination, the name "Jeanine Morgan" was crossed out and the name "Jessica Evans" was written in its place.

On April 27, 2016, Morgan also filed a supplemental declaration on her own behalf in which she stated that she had been in contact with Rivas over the past 10 days and attached several of their text messages. In one message, Morgan asked Rivas to confirm that Evans's name had replaced Morgan's name on the sign for employees to report harassment. In response, Rivas stated, "I think it was hers cause she took over all the job

you were doing. . . .” Morgan also asked Rivas whether Evans had stated that she was the new Director of Operations. Rivas replied: “Not exactly those words but you know how they work[.]”

On April 29, 2016, Morgan filed an ex parte application to continue the summary judgment motion for the limited purpose of deposing Rivas and Jacks. Morgan argued that there was good cause for a continuance because the declarations of Rivas and Jacks created a triable issue of material fact as to whether Evans became the new Director of Operations and took over Morgan’s job duties. Morgan asserted that she did not have an opportunity to depose Rivas previously because Respondents did not submit Rivas’s declaration until April 27, 2016.

VI. Ruling on the Motion for Summary Judgment

On April 29, 2016, the trial court heard Morgan’s ex parte application for a continuance. The court also heard additional argument on the pending motion for summary judgment. At the conclusion of the hearing, the court denied Morgan’s request for a continuance and granted Respondents’ summary judgment motion. The court found that Morgan had not stated a prima facie case for age discrimination because Morgan’s deposition testimony that she was replaced by Evans was based on inadmissible hearsay. The court also found that Respondents had presented evidence that they had a legitimate, nondiscriminatory reason for terminating Morgan’s employment based on declining sales and rising labor costs in their business. In response to Morgan’s argument that Respondents did not actually suffer the financial losses that they claimed, the court noted that even if Respondents’ stated reason for terminating Morgan’s employment was mistaken or wrong, the relevant inquiry was whether it was the genuine reason for the

termination decision. The court found that Morgan had failed to provide any evidence to establish her termination was pretext for age discrimination, and that the only evidence offered by Morgan suggested that she was discharged to allow the Carties' daughter to take an increased role in the family's business, which was not prohibited under FEHA.

On March 23, 2016, the trial court entered judgment in favor of Respondents. Following the entry of judgment, Morgan filed a timely notice of appeal.

DISCUSSION

I. Standard of Review

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted (*Aguilar*)). "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action" (Code Civ. Proc., § 437c, subd. (p)(2); see *Aguilar, supra*, at p. 850.) The party opposing summary judgment "may not rely upon the mere allegations or denials of its pleadings," but rather "shall set forth the specific facts showing that a triable issue of material fact exists" (Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at p. 850.)

Where summary judgment is granted, we review the trial court's ruling de novo. (*Aguilar, supra*, 25 Cal.4th at p. 860.) We

consider all the evidence presented by the parties in connection with the motion (except that which was properly excluded) and all the uncontradicted inferences that the evidence reasonably supports. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037; *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 705; *Yanowitz v. L'Oreal USA, Inc.*, *supra*, at p. 1037.) We affirm summary judgment where it is shown that no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

II. Governing Legal Principles

FEHA prohibits an employer, from among other things, discharging a person from employment because of his or her age. (Gov. Code, § 12940, subd. (a).) When a plaintiff alleges a cause of action for discrimination under FEHA, California courts apply the three-step burden-shifting test set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*) to evaluate the claim. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 520 (*Reid*); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*).) The *McDonnell Douglas* test “reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially.” (*Guz, supra*, at p. 354.)

Under the three-part *McDonnell Douglas* test, the plaintiff has the initial burden of establishing a prima face case of discrimination by providing evidence that “(1) he [or she] was a member of a protected class, (2) he [or she] was qualified for the position he [or she] sought or was performing competently in the

position he [or she] held, (3) he [or she] suffered an adverse employment action, such as termination . . . , and 4) some other circumstance suggests discriminatory motive.” (*Guz, supra*, 24 Cal.4th at p. 355.) If the plaintiff establishes a prima facie case, “a presumption of discrimination arises.” (*Ibid.*) At this stage, “the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to ‘raise[] a genuine issue of fact’ and to ‘justify a judgment for the [employer],’ that its action was taken for a legitimate, nondiscriminatory reason.” [Citations.]” (*Id.* at pp. 355-356.) “If the employer sustains this burden, the presumption of discrimination disappears. [Citations.] The plaintiff must then have the opportunity to attack the employer’s proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. [Citations.]” (*Id.* at p. 356.)

In the context of a motion for summary judgment, “an employer may satisfy its initial burden of proving a cause of action has no merit by showing either that one or more elements of the prima facie case ‘is lacking, or that the adverse employment action was based on legitimate nondiscriminatory factors.’ [Citations.]” (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1181-1182.) If the employer shows it had a legitimate, nondiscriminatory reason for the action, the plaintiff “‘may establish pretext “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.’”” (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68-69.)

“In responding to the employer’s showing of a legitimate reason for the complained-of action, the plaintiff cannot “simply

show the employer's decision was wrong, mistaken, or unwise. Rather, the employee "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for the [asserted] non-discriminatory reasons.'"" [Citations.]" (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 389-390.) "[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz, supra*, 24 Cal.4th at p. 361.)

III. The Trial Court Erred In Granting Summary Judgment in Favor of Respondents

In granting Respondents' motion for summary judgment, the trial court concluded that Morgan failed to establish a prima facie case of age discrimination because she did not present admissible evidence showing that she was replaced by a younger employee. The court further concluded that, even if Morgan had made a prima facie showing, Respondents provided evidence that they terminated Morgan's employment based on declining profits, and Morgan failed to show that the proffered reason was pretext for discrimination. We conclude the trial court erred in granting summary judgment because there are triable issues of material fact as to whether Morgan established a prima facie case of age discrimination and whether Respondents' stated reason for discharging Morgan was pretext for unlawful discrimination.

A. Triable Issues of Fact Exist As to Whether Morgan Established a Prima Facie Case

To establish a prima facie case of age discrimination under FEHA, a plaintiff must present evidence that he or she “(1) is over the age of 40; (2) suffered an adverse employment action; (3) was performing satisfactorily at the time of the adverse action; and (4) suffered the adverse action under circumstances that give rise to an inference of unlawful discrimination, i.e., evidence that the plaintiff was replaced by someone significantly younger than the plaintiff. [Citation.]” (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 321.) It is undisputed that, at the time her employment was terminated, Morgan was 52 years old and was satisfactorily performing her job as the Director of Operations for Respondents. Indeed, both Jason and Julie Cartie admitted that Morgan never had any performance issues during her nine years of employment. Morgan therefore satisfied the first three elements of the prima facie case.

In moving for summary judgment, Respondents contended that Morgan could not satisfy the fourth element of the prima facie case because she was not replaced by a younger employee, but rather her position was eliminated. In support of this claim, Respondents submitted declarations from Jason, Julie, Evans, and Baetiong, all of whom similarly stated that, following Morgan’s termination of employment, no other person was named the Director of Operations and Jason solely assumed the job duties and responsibilities of the position.

In opposing the summary judgment motion, however, Morgan presented evidence that Evans, who was then about 28 years old, either replaced Morgan as the Director Operations or substantially assumed her job duties. Specifically, Morgan submitted two declarations from Jacks, a shift manager at one of

Respondents' restaurants. In one declaration, Jacks stated that, shortly after Morgan's termination, her supervisor, Rivas, told her that Evans was the new Director of Operations. In another declaration, Jacks stated that, after Morgan was discharged, a sign advising employees to contact the Director of Operations if they believed they were victims of discrimination or harassment had been modified to replace Morgan's name with Evans' name. Jacks's declaration also attached a photograph of the sign in question.

In addition, Morgan submitted her own declaration attaching text messages that she had exchanged with Rivas. In one message, Rivas told Morgan that Evans "took over all the job you were doing." When Morgan followed up by asking if Evans had stated at a manager's meeting that she was the new Director of Operations, Rivas replied: "Not exactly those words but you know how they work[.] [S]he did [say] you no longer were there and you weren't allow[ed] behind the counter and if you show to the store call her, or Jason immediately[.] [T]hat's what I remember other [than] that there was no information given." Rivas's text messages suggest that, while Evans did not formally announce that she was the new Director of Operations, she conveyed to those present at the meeting that she would be taking over Morgan's job duties.

Respondents contend that the declarations submitted by Jacks and Morgan cannot support a finding that Evans replaced Morgan as the Director of Operations because they are based on inadmissible hearsay. To preserve an evidentiary objection on appeal, however, a party must either timely file separate written objections in accordance with the California Rules of Court or orally object to the evidence at the summary judgement hearing.

(*Reid, supra*, 50 Cal.4th at pp. 531-532, citing Code Civ. Proc., § 437c, subds. (a), (b)(1)–(4) and Cal. Rules of Court, rules 3.1352, 3.1354(a).) Any separately filed written objections must, among other requirements, identify the specific material objected to and state the grounds for each objection to that material. (Cal. Rules of Court, rules 3.1354(b).) If the trial court fails to expressly rule on evidentiary objections that are properly made, “it is presumed that the objections have been overruled,” and that the “court considered the evidence in ruling on the merits of the summary judgment motion.” (*Reid, supra*, at p. 534.)

In this case, Respondents never filed separate written objections to any of the evidence submitted by Morgan in support of her summary judgment opposition. Respondents also did not orally object to the declarations of Jacks or Morgan at the April 29, 2016 summary judgment hearing.⁵ Additionally, there is no indication in the record that the trial court ever expressly ruled

⁵ At the prior hearing held on March 7, 2016, Respondents did orally object to Morgan’s deposition testimony relating that she had been told by Jacks that Evans had announced she was the new Director of Operations. Respondents did not, however, orally object to the declarations that were submitted by Jacks and Morgan for the continued hearing held on April 29, 2016. Rather, at the April 29, 2016 hearing, Respondents’ attorney made only a passing reference to alleged “hearsay testimony” when she asserted that “the only reason why [Morgan’s counsel is] trying to reopen discovery today is because now there’s that additional declaration submitted by Ms. Rivas where she’s contradicting a hearsay testimony which is still not admissible evidence of Adela Jacks.” Respondents’ attorney did not object to any specific material in the declarations of Jacks or Morgan, nor did she ask the trial court to exclude any statements in those declarations.

on the admissibility of the declarations in deciding the summary judgment motion. At the April 29, 2016 hearing, the trial court stated, in broad terms, that Morgan's "evidence of pretext" was "inadmissible hearsay," but it did not identify what particular evidence was hearsay and whether such evidence was being excluded on that ground. In its written order granting the summary judgment motion, the court expressly ruled that Morgan's deposition testimony that Evans was the new Director of Operations was based on "double hearsay," and was thus inadmissible to support a prima facie case. The court did not, however, address the admissibility of the written declarations submitted by either Morgan or Jacks, nor did it indicate whether it was excluding any material in those declarations in ruling on the motion. Because Respondents did not properly object to the declarations in the trial court, they failed to preserve their evidentiary objections on appeal.

In addition to the declarations of Morgan and Jacks, other evidence presented by Morgan reasonably could support a finding that she was replaced by Evans. At his deposition, Jason admitted that, after Morgan's discharge, Evans received a raise of \$10,000, bringing her annual salary to approximately \$60,000. While Evans denied that she was ever named the Director of Operations, she declared that, in her current position as a Supervisor, she was jointly responsible with Beationg for "overseeing all of the McDonald's franchise restaurants." Morgan testified, however, that the Director of Operations was solely responsible for overseeing all of the restaurants, while the Supervisors were each responsible for supervising a select number of restaurants. Given the conflict in the evidence about Evans's role in the organization following Morgan's discharge,

there is a disputed issue of material fact as to whether Evans either replaced Morgan as the Director of Operations or assumed the duties of the position. Respondents therefore were not entitled to summary judgment on the ground that Morgan failed to establish a prima facie case of age discrimination.

B. Triable Issues of Fact Exist as to Whether Respondents' Stated Reason for Discharging Morgan Was Pretext for Age Discrimination

In moving for summary judgment, Respondents asserted that they discharged Morgan due to the financial circumstances faced by their McDonald's franchise restaurants. In support of this claim, Respondents submitted a declaration from their accountant, Quick, along with statements of revenues and expenses for JC-4 and JCAL, the two entities that owned the restaurants, for 2012, 2013, and 2014. Quick declared that all of the McDonald's franchise restaurants experienced a decline in net income from 2012 to 2014, and that the statements of revenues and expenses for JC-4 and JCAL reflected these losses. Because Respondents presented evidence showing that they had a legitimate, nondiscriminatory reason for terminating Morgan's employment based on the financial condition of their business, the burden shifted to Morgan to submit evidence demonstrating that the proffered reason was pretext for age discrimination.

In opposing the summary judgment motion, Morgan presented evidence that Quick made a number of misleading statements in his declaration about the financial condition of JC-4 and JCAL, and omitted other information that would have provided a more accurate picture of the companies' profitability at the time of Morgan's discharge. Specifically, Quick stated in his declaration that JC-4 and JCAL owned seven "McDonald's

franchise restaurants,” and that “[n]et income started to decline for all of the McDonald’s franchise restaurants during the time from of 2012 to 2014.” Quick also stated that “[p]rofits were in decline coupled with explosive costs of workers compensation, labor, and reinvestment which caused net income to start the decline we continue to see today.” At his deposition, however, Quick admitted that these statements in his declaration described the profitability of McDonald’s restaurants in general, and did not refer to the specific restaurants owned by JC-4 and JCAL. Quick also stated in his declaration that the attached statements of revenues and expenses applied to the seven franchise restaurants owned by either JC-4 or JCAL. Quick failed to disclose, however, that JC-4’s 2012 statement of revenues and expenses also covered an eighth restaurant that was later sold. This omission was significant because Quick admitted at his deposition that JC-4’s reduction in profits from 2012 to 2013 resulted entirely from the sale of that restaurant in January 2013.

Quick’s declaration omitted other pertinent information about the companies’ financial condition. Quick stated that JC-4’s product sales, gross profits, and net income all declined from 2012 to 2014. JC-4’s net income, for instance, declined from \$669,760 in 2012 to \$153,829 in 2013 to a loss of \$115,714 in 2014. Quick did not set forth the product sales and gross profit figures for JCAL, but declared that JCAL “sustained even greater losses than JC-4,” and that JCAL’s net income declined from \$83,923 in 2012 to a loss of \$163,043 in 2013 to a loss of \$320,272 in 2014. The statements of revenues and expenses reflected, however, that JCAL’s product sales and gross profits actually increased from 2012 to 2014. Quick also acknowledged at his

deposition that the decline in net income for both JC-4 and JCAL was due, in part, to how the Carties chose to distribute “management fees” among their various companies to minimize their tax liability.⁶ The statements of revenues and expenses showed that, depending on the tax year, JC-4 and JCAL claimed as a general expense the management fees that they paid to Inland Sun Management, an affiliated company owned by the Carties. The management fees paid by JC-4 increased each year from \$0 in 2012 to \$338,429 in 2013 to \$550,000 in 2014. The management fees paid by JCAL likewise increased from \$50,000 in 2012 to \$225,000 in 2013, and then decreased to \$0 in 2014. The effect of this increase in the amounts paid to Inland Sun Management was to impose higher expenses on JC-4 and JCAL, which in turn reduced the net income of both companies.

Morgan also presented evidence that, of the approximately 450 employees that worked for Respondents as of October 2014, she was the only employee who was laid off. Apart from terminating Morgan’s employment, the Carties did not take any other cost-cutting measures to address the alleged financial losses facing their business. Instead, the Carties provided Evans with a \$10,000 raise, which reflected a 20 percent increase in her annual salary. The totality of the foregoing evidence casts doubt on Respondents’ claim that their business sustained significant financial losses between 2012 and 2014, and that such losses motivated their decision to discharge Morgan. On this record, a reasonable trier of fact could find Respondents’ explanation for

⁶ As described by Quick, management fees are the salaries paid to management-level employees that work for the franchise restaurants owned by JC-4 and JCAL.

terminating Morgan's employment "unworthy of credence," and thus, infer that Respondents did not act for the asserted nondiscriminatory reason. (*Guz, supra*, 24 Cal.4th at p. 361; see *Sandell, supra*, 188 Cal.App.4th at pp. 324-326 [reversing summary judgment where plaintiff offered evidence that employer's stated reasons for discharging him were false and a mere pretext for age discrimination].)

As our Supreme Court observed in *Guz*, "[p]roof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests the employer had cause to hide its true reasons. [Citation.] Still, there 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. [Citation.]" (*Guz, supra*, 24 Cal.4th at p. 361, italics omitted.) "[I]n a particular case, a plaintiff's showing of pretext, combined with sufficient prima facie evidence of an act motivated by discrimination, may permit a finding of discriminatory intent, and may thus preclude judgment as a matter of law for the employer. [Citation.]" (*Ibid.*, italics omitted.) On the other hand, "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." (*Id.* at p. 362.)

In this case, the totality of evidence presented by Morgan could support a rational inference that Respondents terminated her employment based on her age. In addition to the evidence showing that Respondents' proffered reason for discharging her

was false, Morgan presented evidence that the then 28-year-old Evans either replaced Morgan as the Director of Operations or substantially assumed the job duties of her position. Evans had been a Supervisor for about a year when Morgan's employment was terminated, and prior to her discharge, Morgan was asked to train Evans on various management operations. Morgan also offered evidence that Jason treated her less favorably than younger employees by allowing the younger salaried managers to schedule their days off on the weekends, but refusing Morgan's request for similar time off. Additionally, Morgan presented evidence that Jason was disinclined to hire older employees. Morgan testified that she, Baetiong, and Evans interviewed two candidates over the age of 40 for management positions, and both Morgan and Baetiong viewed the candidates favorably. Jason declined to hire either individual, however, and when Morgan asked him why, Jason stated, "I don't know, just not interested."

Morgan's circumstantial evidence of age-based bias by Respondents is not, standing on its own, sufficient to permit a inference of prohibited discrimination. However, such evidence, when combined with Morgan's showing that she was replaced by a substantially younger employee and that the stated reason for her discharge was potentially false, does raise a triable issue of fact as to whether Respondents' actual motive for terminating Morgan's employment was discriminatory. In granting summary judgment in favor of Respondents, the trial court concluded that Morgan's evidence of pretext merely suggested she was discharged to allow Evans to assume an increased role in the family's business. It is true that the evidence reasonably could support an inference that the Carties terminated Morgan's employment because they wanted their daughter to take on the

duties of the Director of Operations position in preparation for becoming a part-owner of the franchise. Nepotism is not a prohibited employment practice under FEHA. In moving for summary judgment, however, Respondents did not assert that they discharged Morgan to allow Evans to expand her role in managing the business. Rather, they claimed that they terminated Morgan's employment based solely on the poor financial circumstances facing their restaurants. Because the evidence as a whole could permit a rational inference that the proffered reason for discharging Morgan was false and that the actual motive was discriminatory, Respondents are not entitled to judgment as a matter of law on Morgan's causes of action for age discrimination in violation of FEHA and wrongful termination in violation of public policy.⁷

⁷ In light of our conclusion that Respondents were not entitled to summary judgment, we need not address Morgan's argument that the trial court erred in denying her request to continue the summary judgment motion for the purpose of deposing Jacks and Rivas.

DISPOSITION

The judgment is reversed. Morgan shall recover her costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.