

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES MITCHELL PADILLA,

Plaintiff and Appellant,

v.

AT&T SERVICES, INC.,

Defendant and Respondent.

D055019

(Super. Ct. No. 37-2008-00089105-
CU-OE-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Affirmed.

James Padilla sued his former employer, AT&T Services, Inc. (AT&T), alleging AT&T improperly classified him as an exempt employee and thus violated state labor laws by failing to pay him overtime and provide him with the requisite meal and rest periods. AT&T successfully moved for summary judgment on all claims based on facts

showing Padilla fell within the administrative employee exemption set forth in IWC Wage Order No. 4-2001. (See Cal. Code Regs., tit. 8, § 11040 et seq.)¹

Padilla appeals, contending the court made improper inferences from his deposition testimony and resumes. These contentions are without merit, and we affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Padilla began working for AT&T's predecessor in 1981. For the next 25 years, he worked continuously for the company, except he served in the military from December 2002 through about December 2003. In June 2006, Padilla voluntarily left AT&T, and began working as a deputy attorney general in Arizona.²

About two years after he left AT&T, Padilla sued AT&T, alleging he was improperly misclassified as an exempt employee. Padilla alleged six causes of action: (1) unpaid overtime (Lab. Code,³ § 1194); (2) failure to provide requisite meal period breaks (§§ 226, 226.7, 512); (3) failure to provide rest breaks (§ 226.7); (4) off-the-clock violations (§§ 216, 1194); (5) conversion of his unpaid wages; and (6) unfair competition (Bus. & Prof. Code, § 17200).

AT&T moved for summary judgment, arguing that Padilla's own admissions regarding his job duties established he was an "administrative" employee who was

¹ Further references to the California Code of Regulations are to title 8 of this code.

² Padilla obtained his law degree in 2000 while working at AT&T. He also has a master's degree in business administration and is a California licensed real estate agent.

³ All further statutory references are to the Labor Code unless otherwise specified.

exempt from these wage and hour laws as a matter of law, and therefore each cause of action was without merit. In support AT&T relied on Padilla's deposition testimony and exhibits discussed at the deposition, including two of Padilla's resumes. AT&T also submitted several samples of Padilla's written work product.

These submissions established that during the relevant time Padilla worked in a small unit within AT&T's information technology group.⁴ Padilla reported to Doug Shimansky, who was the Senior Technical Director, responsible for various technical services related to "voice" technology for employees. Padilla had the title of "Senior Technical Team Leader."

Padilla testified at his deposition that during 2004 through 2006 he spent about 80 percent of his working time researching issues and preparing written reports in response to Shimansky's requests, and that these reports were later sent to upper management. Padilla said he spent the remaining 20 percent of his time performing such tasks as developing corporate wireless policies for AT&T employees, negotiating contracts with vendors, ranking his team members for annual reviews, leading team meetings, and problem solving when employees reported problems with wireless technology. During the last year of his employment, Padilla also spent substantial time on activities related to AT&T's merger with SBC Communications, which included working with other employees in attempting to establish uniform policies and procedures pertaining to employee voice and wireless communications. Shimansky would provide overall

⁴ It was undisputed the relevant time period was 2004 through 2006 because Padilla left AT&T in 2006 and did not file his complaint until 2008.

objectives for various merger issues, and Padilla would then work independently to achieve those objectives. Although Padilla described performing supervisory functions, including reviewing and editing work of other managers, conducting meetings, and ranking the managers, he denied these managers reported directly to him or that he acted in a supervisory capacity.

AT&T also submitted two resumes prepared by Padilla in which Padilla described job responsibilities that were generally consistent with this deposition testimony. The first resume is dated March 2006, and the second resume was prepared three months later in June 2006. At his deposition, Padilla indicated the resumes were generally accurate in describing his job responsibilities, but in response to specific questioning he denied he performed two of the tasks identified on his *second* resume during the relevant times.

Based on the submitted evidence, AT&T argued the undisputed facts showed Padilla was an administrative employee exempt from the wage and hour laws. (See Cal. Code Regs., § 11040, subd. 1(A)(2).) In response, Padilla argued that AT&T failed to meet its burden to establish that he "customarily and regularly exercise[d] discretion and independent judgment," one of the required elements to show exempt administrative employee status under state law. (See Cal. Code Regs., § 11040, subd. 1(A)(2)(b).) Padilla asserted there were triable issues of fact on this issue because a reasonable inference from his deposition testimony was that he "was involved in the routine and unimportant" and was engaged primarily in "grunt level work." Padilla said his deposition testimony showed he had no opportunity or ability to exercise discretion

because "Shimansky retained all decision-making authority," and he (Padilla) acted "merely [as] an information conduit, not a decision-maker."

After reviewing the submissions and conducting a hearing, the court granted summary judgment. The court found AT&T met its burden to show that as "a matter of law [Padilla] is subject to the administrative exemption" and therefore Padilla could not recover on any of his causes of action, each of which was based on his allegation that he was a nonexempt employee. The court also found Padilla did not meet his burden to show the existence of disputed issues of material fact. The court stated Padilla's "opposition is insufficient because it essentially is conclusory, argumentative, or based on conjecture and speculation." The court noted that Padilla could not "dispute his own deposition testimony to raise a triable issue of fact," and Padilla's "conclusory assertions that his duties were 'grunt work' or 'routine and unimportant' do not raise a triable issue of fact."

DISCUSSION

I. *Review Standard*

Summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if [the party] carries [this] burden of production, [the party] causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . ." (*Aguilar v.*

Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850.) Although the burden of production shifts, the moving party always bears the burden of persuasion. (*Ibid.*)

We review the trial court's decision de novo, considering all of the evidence offered in connection with the motion. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 499; *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) In doing so, we apply the same three-step analysis required of the trial court. (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1431.) After identifying the issues framed by the pleadings, we determine whether the moving party has established facts justifying judgment in its favor. If the moving party has carried its initial burden, we then decide whether the opposing party has demonstrated the existence of a triable, material fact issue. (*Id.* at p. 1432.) We strictly construe the moving party's evidence and liberally construe the opposing party's evidence without weighing the evidence or conflicting inferences. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 856; Code Civ. Proc., § 437c, subd. (c).) "The trial judge's stated reason for granting summary judgment is not binding on us because we review its ruling, not its rationale." [Citation.]" (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1009 (*United Parcel Service*)).

II. Governing Law

California law governing wages, hours, and working conditions is contained in section 1171 et seq. and the wage orders promulgated by the Industrial Welfare Commission (IWC). (See *United Parcel Service*, *supra*, 190 Cal.App.4th at p. 1009; *Combs v. Skyriver Communications, Inc.* (2008) 159 Cal.App.4th 1242, 1253 (*Combs*)). The Fair Labor Standards Act of 1938 (FLSA) is the federal counterpart. "Both state and

federal wage and hour laws reflect the strong public policy favoring protection of workers' general welfare and 'society's interest in a stable job market.' [Citations.]" (*United Parcel Service, supra*, 190 Cal.App.4th at p. 1009.)

Under these laws, a California worker is statutorily entitled to overtime compensation and meal and rest breaks, unless the worker is properly classified as an exempt employee. (See §§ 510, 515, subd. (a); *United Parcel Service, supra*, 190 Cal.App.4th at p. 1010.) Wage Order No. 4-2001 exempts " 'persons employed in *administrative*, executive, or professional capacities.' " (*Combs, supra*, 159 Cal.App.4th at pp. 1253-1254, quoting Cal. Code Regs., § 11040, subd. 1(A).) "[U]nder California law, [these] exemptions . . . are narrowly construed." (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794; *Combs, supra*, 159 Cal.App.4th at p. 1254.) "They are applied only to those employees ' "plainly and [unmistakably] within their terms and spirit." ' [Citations.]" (*United Parcel Service, supra*, 190 Cal.App.4th at p. 1010.) "Moreover, the assertions of an exemption . . . is . . . an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez, supra*, 20 Cal.4th at pp. 794-795; accord *Combs, supra*, 159 Cal.App.4th at p. 1254.)

In this case, AT&T claimed Padilla was exempt because he was employed in an "administrative" capacity. Wage Order No. 4-2001 contains a detailed definition of an "administrative" employee, and requires an employer to show numerous statutory

elements to establish the exemption.⁵ (Cal. Code Regs., § 11040, subd. 1(A)(2); *Combs, supra*, 159 Cal.App.4th at p. 1254.) As he did below, Padilla argues that AT&T did not meet its burden only with respect to the second element of the administrative exemption test, i.e., that he "customarily and regularly exercise[d] discretion and independent judgment" in performing the job. (Cal. Code Regs., § 11040, subd. 1(A)(2)(b).)

The determination whether an employer satisfies this second element requires a court to examine the actual job duties performed by that employee. (Cal. Code Regs., § 11040, subd. 1(A)(2)(f); see *United Parcel Service, supra*, 190 Cal.App.4th at pp. 1014-1015.) "The work actually performed by the employee . . . must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered" (Cal. Code Regs., § 11040, subd. 1(A)(2)(f).) "No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt — the regulations identify job duties not job titles." (*United Parcel Service, supra*, at p. 1015; see *Ramirez v. Yosemite Water Co., supra*, 20 Cal.4th at pp. 800-801.)

⁵ As applicable here, these elements are: (1) the employee performs "office or non-manual work directly related to [the employer's] management policies or general business operations . . ."; (2) the employee "customarily and regularly exercises discretion and independent judgment"; (3) the employee "performs under only general supervision work along specialized or technical lines requiring special training experience or knowledge" or the employee "executes under only general supervision special assignments and tasks"; (4) the employee is primarily engaged in duties that meet the test of exemption; and (5) the employee's monthly salary must be equivalent to no less than two times the state minimum wage for full-time employment. (Cal. Code Regs., § 11040, subd. 1(A)(2).)

To assist in distinguishing between exempt and nonexempt work, the IWC expressly incorporated into the state regulations the federal regulations in existence as of October 1, 2000. (Cal. Code Regs., § 11040, subd. 1(A)(2)(f); see 29 C.F.R. §§ 541.201-205, 541.207-208, 541.210, 541.215.)⁶ These federal regulations contain extensive discussion of the "exercise of discretion and independent judgment" element. (See 29 C.F.R. § 541.207; see *Combs, supra*, 159 Cal.App.4th at pp. 1254-1255.) The regulations define the "discretion and independent judgment" phrase to mean "the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term . . . implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance." (29 C.F.R. § 541.207(a).) Under this definition, an employee who performs skills requiring the application of specific procedures is not exempt even if the skills require technical expertise; whereas an employee is exempt if he or she acts independently to reach conclusions without conforming those decisions to specific, established standards. (See 29 C.F.R. § 541.207(c).)

The federal regulations additionally state the "discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence." (29 C.F.R. § 541.207(d)(1).) Under this rule, "the term 'discretion and independent judgment,' . . . does not apply to the kinds of decisions

⁶ All citations to the federal regulations refer to the regulations existing in 2000, which was the version incorporated into the state regulations by Wage Order No. 4-2001.

normally made by clerical and similar types of employees," but the phrase "does apply to the kinds of decisions normally made by persons who formulate or participate in the formulation of policy *within their spheres of responsibility*" even if the decisions are not made by someone with absolute authority to direct the company's operations. (29 C.F.R. § 541.207(d)(2), italics added.) "The term 'discretion and independent judgment' . . . does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review. *The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action.*" (29 C.F.R. § 541.207(e)(1), italics added.)

III. *Analysis*

Padilla contends the court erred in granting summary judgment because AT&T did not meet its burden to show he exercised discretion and independent judgment in performing his job duties and/or that he raised a triable issue of fact on this issue. For the reasons explained below, we reject these contentions.

A. *Padilla's Primary Work Duties Show Discretion and Independent Judgment*

In moving for summary judgment, AT&T relied on Padilla's deposition testimony that during the relevant times (2004-2006) he spent the vast majority of his time (80 percent) responding to Shimansky's requests for information and written analysis of various AT&T business and technology issues. These requests came from AT&T vice-presidents and other "upper management" to Shimansky, who would then delegate the work to Padilla. In response to these requests, Padilla would independently research the

topic, gather the relevant information from various sources, analyze the information, and draft responsive written reports and recommendations. According to Padilla, Shimansky would then transmit these reports to senior AT&T management. Additionally, Padilla would sometimes be involved in phone conferences with Shimansky and senior level management during which Padilla would discuss his findings and analysis in the reports.

Padilla characterized his role during the relevant time period as "a wheelhouse," in which Shimansky "would contact me with hot items that he needed responses on," and Padilla would work independently to respond to those inquiries. Padilla said his main job responsibility was to "make Doug [Shimansky] look good." He explained: "Basically, Doug knew he could give me any project, any special request that he was receiving where he had to have a response out from his team. [¶] He would pull me in, ask me to do research, draft documents, whatever the response might be, and get that to him within the deadline. And what I drafted, he sent on [to upper management]"

AT&T proffered several examples of Padilla's written reports/memoranda as exhibits to the summary judgment materials. These documents concerned various issues pertaining to AT&T employee voice/phone technology, and also involved broader business issues such as a cost-benefit analysis of the use of permanent media production personnel in various states. The documents contain extensive analysis and recommendations. Although they were not addressed specifically to senior management, Padilla acknowledged Shimansky generally sent his reports to upper management.

This evidence shows that Padilla was involved in tasks requiring him to exercise discretion and independent judgment more than 80 percent of his time. The reports

prepared by Padilla were not "fill in the blank" type documents typical of the work of a nonexempt bookkeeper or clerical employee. Rather, they reflect independent thinking and analysis. Padilla was required to use his judgment in deciding the sources from which to obtain the information, determine which facts were relevant, analyze the facts based on his training and knowledge of the subject areas, and recommend a course of action. Padilla had the authority to formulate responses to wide-ranging inquiries about business policies and direction, and did not merely apply " 'well-established techniques, procedures or specific standards described in manuals or other sources.' " (*Combs, supra*, 159 Cal.App.4th at p. 1257, quoting 29 C.F.R. § 541.202(e).)

The summary judgment record was undisputed that Padilla was an experienced, analytical, and self-directed employee who worked as a problem solver on numerous independent projects and who made contributions to the company through his judgment and analysis. This is the type of work performed by an exempt employee. (See *Combs, supra*, 159 Cal.App.4th at pp. 1266-1267 [employee responsible primarily for troubleshooting network issues for Internet service provider met test of discretion and independent judgment].)

Padilla does not direct us to any evidence contradicting his own deposition testimony, nor could he create a triable issue of fact by later attempting to disavow the testimony. (See *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1120 [party cannot evade summary judgment by submitting declaration contradicting his own prior deposition testimony].) Instead, he argues AT&T did not meet its burden to show "discretion and independent judgment" because it "fail[ed] to point to a single decision

Padilla made" However, this is not the standard for determining whether Padilla was an exempt employee. AT&T was entitled to rely on Padilla's detailed description of his own job responsibilities, and examples of this work, to support its argument that Padilla exercised discretion and independent judgment in performing the work.

Padilla additionally argues the evidence of his report preparation shows he "was merely an information conduit, not a decision-maker," and that he "could not bind AT&T." However, discretion and independent judgment "does not necessarily imply that the decisions made by the employee must have a finality that goes with unlimited authority and a complete absence of review." (29 C.F.R. § 541.207(e)(1).) The evidence showed that Padilla was responsible for making numerous discretionary decisions on a daily basis with little or no direct supervision. Padilla was a decision maker within his area of authority and his responsibilities were not limited to merely transferring factual information to his superiors.

Padilla additionally argues that AT&T failed to show his work substantially affected AT&T's business. To establish the administrative exemption, the employer must show the employee's discretion and independent judgment were exercised with respect to "matters of significance." (*Combs, supra*, 159 Cal.App.4th at p. 1266.) This means that the employee's decisions and exercise of judgment "must be relevant to something consequential and not merely trivial." (*United Parcel Service, supra*, 190 Cal.App.4th at p. 1024.) In this case, Padilla admitted that he regularly engaged in analysis and problem solving on matters important to upper management involving employee use of communication devices. Padilla's own statements and writings make clear that he was

regularly called upon to exercise his discretion and judgment on matters of consequence to the company.

B. Additional Job Responsibilities Show Discretion and Independent Judgment

Padilla devotes much of his appellate briefs to challenging whether his *other* tasks reflect the exercise of discretion and independent judgment on matters of significance. However, even if there was merit to any of these arguments, they would not change our conclusion that Padilla was properly classified as an exempt employee. Padilla admitted that 80 percent of his time was spent on responding to requests for information and analysis from upper management, and we have concluded that these tasks required the exercise of discretion and independent judgment. An employee is exempt if he or she is "primarily engaged in duties" that meet the administrative exemption test. (Cal. Code Regs., § 11040, subd. 1(A)(2)(f).) "The term 'primarily' as used in [the California regulations] is defined to mean 'more than one-half the employee's work time.' (Cal. Code Regs., § 11040, subd. 2(N).)" (*Combs, supra*, 159 Cal.App.4th at p. 1254.)

Moreover, even assuming we are required to examine Padilla's additional work tasks, we agree with the trial court they overwhelmingly demonstrate that Padilla customarily exercised discretion and independent judgment regarding significant business matters.

First, Padilla testified that during the last year of his employment he spent a substantial portion of his time on "merger activities" resulting from the merger between SBC Communications and AT&T. These activities involved discussions and recommendations regarding the types of voice technology to be used by the merged

company. Padilla said that during this period Shimansky would identify an objective and a timeline for accomplishing that objective. Padilla would then work without direct supervision with the other product managers to achieve this objective and manage project timelines. He was also responsible for scheduling the project manager meetings and determining who should attend. Padilla stated that during those meetings, if a manager "ran into an obstacle that was going to be time consuming for them . . . then I would take that obstacle as a to do for myself and I would then go and work that issue."

Padilla also discussed his responsibilities regarding cost-savings analysis with respect to voice and phone technology. He said he would independently analyze cell phone usage by employees, contact the various departments to determine whether the monthly charges were justified, implement a plan to discontinue a particular service, track the savings, and then report to Shimansky regarding the results of these activities.

Padilla also testified that he had a role in developing corporate wireless policies, primarily concerning employee use of voice technology (which included "cellular, paging, BlackBerry" and other similar products). Padilla said he worked on developing these policies and amendments to these policies, which were then approved by management personnel "a level or two beyond [Shimansky]." Once this approval was obtained, the policy would be disseminated to employees throughout the company.

Padilla also stated he was substantially involved in negotiating vendor contracts pertaining to AT&T employee voice/telephone products. He would meet "either in-person or on the phone, with the representative from the vendor[s]," which included Cingular and SBC Paging. He said that during these meetings "we would take things

from the ground up, understand what their product line was going to be for the next year or two years, understand and try to negotiate the best per minute rate charges that employees could use with particular types of products that they were going to offer for us." He stated that he and the other managers would perform the "grunt-level work of drafting, creating, and identifying the areas for the contract and would check that off with [Shimansky] through the course of this process" This negotiation and drafting process frequently "took several months" Thereafter, Shimansky would send the negotiated contract to "his bosses" for approval. Although these negotiations were frequently with "companies that were owned either partially or perhaps wholly by AT&T," Padilla said there were "very strong . . . lines of division" between the AT&T companies.

Padilla also stated he would regularly communicate with other employees regarding service and product satisfaction. In this regard, Padilla said: "I would take phone calls, e-mails from internal users who had issues, and I would take the problem and work to resolve it."

Padilla's descriptions of these job responsibilities make clear that he customarily exercised discretion and independent judgment with respect to matters of significance. The essence of this testimony was that he spent much of his day negotiating with internal and external customers, problem solving, directing other workers, and making recommendations and decisions on matters of significance to the company. Padilla did not present any evidence creating a triable issue of material fact on these matters. Instead, he argued, as he does on appeal, that all of this work can reasonably be

characterized as merely clerical-type " 'information gathering' " and " 'grunt-level work.' " However, to successfully oppose a summary judgment motion based on inferences from the record, "those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork." (*Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161.) Padilla's suggested inferences are not reasonable.

C. Padilla's Resumes Do Not Establish Trial Court Error

Padilla also devotes significant portions of his appellate briefs to challenging AT&T's assertions made in the proceedings below pertaining to his resumes, and the trial court's references to one of his resumes in its order granting summary judgment.

However, these arguments are unhelpful because the trial court's reasons for granting summary judgment are not binding on this court. Under the applicable *novo* review standard, we review the court's ruling and not its rationale. (See *United Parcel Service, supra*, 190 Cal.App.4th at p. 1009.)

In any event, we find no error in the court's reliance on Padilla's resumes in determining the nature of Padilla's work with AT&T during the relevant times. (See *Combs, supra*, 159 Cal.App.4th at pp. 1264-1265 [resume prepared by an employee relevant to establish the type of work performed by the employee].)

In his March 2006 resume, Padilla identified himself as the "Team Leader for Network Technical Managers who manage vendors that provide Cellular, Data, Blackberry and Paging services to all SBC employees." The resume states that Padilla's responsibilities "include": (1) "daily interaction with individual managers to insure that

various wireless tools are available to employees who have a business need"; (2) "[p]erform cost-savings analysis for recovery of corporate assets such as outside plant, voice mailboxes, cellular phones, data devices, and pagers"; (3) "[p]lan and design new wireless product web interfaces"; (4) "[o]versee the preparation and presentation of vendor report cards"; (5) "develop corporate wireless policies"; (6) "negotiate vendor contracts"; and (7) "[i]nterface directly with internal customers over issues related to service and product satisfaction." The resume also stated that Padilla's "[c]ollateral duties" included "the development and presentation of business reports, facilitation of group meetings, and the coordination of team planning conferences."

These job descriptions were consistent with Padilla's testimony and fully support our conclusion that Padilla customarily exercised discretion and independent judgment in performing his job duties. His counsel admitted as much at the summary judgment hearing, stating this "resume shows the level of discretion and independent judgment required [to] meet the administrative exemption [test]." Padilla's counsel argued, however, as he does here, that it is improper to rely on this resume because the identified responsibilities referred to Padilla's work before 2003 and/or the resumes pertained to Padilla's jobs with other employers. These arguments are factually unsupported. As reflected on the resume document, the identified job responsibilities refer to Padilla's work at AT&T or its corporate predecessor. There is no conflicting evidence on this point. Further, Padilla made clear in his deposition that these responsibilities pertained to his work during the relevant time period (2004 through 2006).

In the second resume prepared in June 2006, Padilla identified several job responsibilities/accomplishments while working at AT&T: (1) "Successfully prioritized and managed numerous time-sensitive projects"; (2) "Developed and mentored management and non-management personnel"; (3) "Negotiated multi-million dollar vendor contracts"; (4) "Administered multi-million dollar expense budgets"; (5) "Created and presented corporate business plans"; and (6) "Skilled at public speaking."

In his deposition testimony, Padilla denied that he performed at least two of the tasks identified on this resume during the relevant time period, including "mentoring" other employees and administering expense budgets. However, there is no evidence the court placed any weight on these descriptions to reach its conclusions. Similarly, we do not rely on these descriptions to reach our conclusions that the undisputed record shows that Padilla exercised discretion and independent judgment in performing his job duties. The fact that the record contains conflicting evidence as to whether Padilla mentored employees or administered expense budgets did not preclude summary judgment. A litigant may not avoid summary judgment by attempting to generate disputes on facts that are not necessary to resolving the legal claim at issue. (See *Banks v. Dominican College* (1995) 35 Cal.App.4th 1545, 1551.) "'The presence of a factual dispute will not defeat a motion for summary judgment unless the fact in issue is a material one.' [Citations.]" (*Ibid.*)

Finally, to the extent that Padilla relies on Shimansky's deposition testimony to support his arguments, this reliance is misplaced. First, Shimansky's deposition transcript is not part of the appellate record. Padilla never served and filed the requisite notice

under California Rules of Court, rule 8.224, or made any attempt to transmit the lodged exhibit to this court. Instead, in describing Shimansky's testimony he cites only to his attorney's assertions in the court below. We thus disregard Padilla's reference to Shimansky's deposition testimony.

Moreover, even if we were to assume Padilla's description of Shimansky's deposition testimony was accurate and supported by materials in the appellate record, the description of the testimony does not create a triable issue of fact. Padilla states that Shimansky testified that AT&T had " 'contract managers' " and attorneys who "put the contracts together." However, this testimony does not negate the evidence showing that 80 percent of Padilla's time was spent preparing written analysis reports in response to specified inquiries from Shimansky. The fact that some of Padilla's contract negotiations were overseen by attorneys and contract managers does not show the court erred in granting summary judgment.

DISPOSITION

Judgment affirmed. Appellant to pay respondent's costs on appeal.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.