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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

GERALD R. ZIMMERER,

Plaintiff and Appellant,

v.

NETGEAR, INC.,

Defendant and Respondent.

H036718

(Santa Clara County

Super. Ct. No. CV142142)

Plaintiff Gerald R. Zimmerer was 50 years old when he was discharged from employment by defendant Netgear, Inc. Plaintiff sued alleging that he was wrongfully discharged on account of his age. Judgment was entered upon a jury verdict in favor of defendant. On appeal plaintiff claims that he was deprived of a fair trial because the defense exercised its peremptory challenges to unfairly exclude older jurors. Plaintiff also argues that the trial court erred in rejecting his special instruction, which would have told the jury that it could consider the setting of an unattainable performance goal as “an effort to set up an employee for failure.” We reject both arguments and affirm.

**I. FACTS**

Plaintiff began working for defendant in November 2005 as a sales representative. His annual review for 2006 rated him a level 4 out of 5, which meant that he “consistently exceed[ed] expected high level of performance.” In the spring of 2007, plaintiff’s manager, Jason Turk, reassigned plaintiff to the position of account manager. At his mid-year evaluation for 2007 plaintiff was again rated 4 out of 5, having attained

nearly 100 percent of his quotas for the first quarter and 90 percent in the second. But plaintiff did not meet his minimum performance metrics for the fourth quarter of 2007, and for all of 2007, plaintiff had the second lowest performance, as measured by his quota attainment, of anyone on his team. Other measurements of performance also showed a decline from the past. Turk rated him a 2 out of 5 for the year, which meant that plaintiff “requires improvement.”

Plaintiff did better for the first quarter of 2008 but he dropped down again in the second quarter. Plaintiff asked to be reassigned and Turk agreed. Effective August 1, 2008, plaintiff became a business development manager. When plaintiff failed to meet his performance goals in that position, Turk spoke with plaintiff about his future. Turk either told plaintiff to resign or he gave plaintiff the choice of resigning or accepting a performance improvement plan. In December 2008, plaintiff told Turk he did not intend to leave.

Turk promptly put plaintiff on a performance improvement plan. The plan required plaintiff to achieve, within three weeks, 100 percent on each performance standard. The following facts were undisputed:

- No member of the sales team was ever given such a harsh improvement plan;
- Every other member of the sales team was under 40 years of age;
- Turk had known, at least since June 2007, that plaintiff was over 40 years old;
- Turk interviewed a prospective replacement for plaintiff’s position before plaintiff completed the plan;
- Plaintiff failed to achieve 100 percent and was terminated, leaving no one over 40 on the sales team.

## **II. PROCEDURAL BACKGROUND**

Plaintiff's complaint, filed May 11, 2009, claimed age discrimination and retaliation in violation of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.), wrongful termination in violation of public policy, and intentional infliction of emotional distress. In pretrial discussions, plaintiff requested a special instruction that would have read: "It is permissible for you to view the imposition of an unattainable goal as evidence of pretext because a jury may reasonably view such an unattainable goal or production quota as an effort to set up an employee for failure." The court refused to give the instruction.

Jury selection commenced on January 5, 2011. Defendant exercised its peremptory challenges to excuse four jurors, two of whom were over 40. When the defense attempted to exercise its fifth peremptory challenge of another juror who was over the age of 40, plaintiff's counsel objected, arguing that defendant was impermissibly targeting older jurors. The trial court held a hearing outside the presence of the prospective jurors, allowing defense counsel to explain his reasoning. The trial court overruled plaintiff's objection. The jury that was empanelled included nine jurors under 40 and three who were older.

Following the evidentiary phase, the parties discussed instructions and the special verdict form with the trial court. Plaintiff again requested a special instruction on unattainable goals, offering to modify the requested instruction to read: "[A]n unattainable goal or production quota may be viewed as an effort to set up an employee for failure." The court denied the request. The court did agree to give defendant's special instruction, which read: "If non-discriminatory, Netgear's business reasons for terminating Mr. Zimmerer's employment need not necessarily have been wise or correct. The issue is simply whether Netgear acted with an illegal motive to discriminate against Mr. Zimmerer based on his age."

The jury received instructions from the court and heard the argument of counsel. After less than two hours of deliberations, the jury returned a verdict, answering “no” to the first question on the special verdict form: “Did plaintiff Gerald R. Zimmerer prove by a preponderance of the evidence that defendant Netgear, Inc., wrongfully terminated him based upon his age?” A poll of the jury poll revealed that the vote had been 11 to one in favor of the defense.

Judgment was entered January 27, 2011. Plaintiff filed a notice of intention to move for new trial on February 1, 2011, citing error of law and abuse of discretion in the trial court’s refusing the “unattainable goal” instruction. In order to show prejudice from the latter instructional error, plaintiff submitted a declaration from one of the jurors in which the juror declared that, had he heard the proffered instruction, he would have found in favor of plaintiff, and he believes the other jurors would have as well. Defendant objected to the declaration on the ground that it was inadmissible under Evidence Code section 1150 or as speculation. The trial court denied the new trial motion without ruling upon the admissibility of the juror declaration, concluding that refusal of the instruction was not an error of law. This timely appeal followed.

### **III. DISCUSSION**

#### *A. The Peremptory Challenges*

Plaintiff argues that he was denied his right to fair trial and equal protection of the law (U.S. Const., 14th Amend.; Cal. Const. art. I, § 7) because defendant intentionally used its peremptory challenges to eliminate older jurors who might have been receptive to plaintiff’s age-discrimination claim. In the criminal context, a prosecutor who uses the peremptory challenge process to exclude jurors solely upon the basis of race or membership in other cognizable class infringes the defendant’s constitutional right to a jury drawn from a representative cross-section of the community (Cal. Const. art. I, § 16; U.S. Const., 6th Amend.; *People v. Wheeler* (1978) 22 Cal.3d 258, 272) and to equal protection of the law (*Batson v. Kentucky* (1986) 476 U.S. 79, 96 (*Batson*)). The same

rule applies in civil cases. (*Holley v. J & S Sweeping Co.* (1983) 143 Cal.App.3d 588, 590.)

If a party believes the opponent is using peremptory challenges to strike jurors on the ground of group bias alone, the objecting party must make a prima facie case of such discrimination by showing that the persons excluded are members of a cognizable group (*People v. Turner* (1994) 8 Cal.4th 137, 164) and that the circumstances raise an inference that the challenges were discriminatorily motivated (*Batson, supra*, 476 U.S. at p. 96). Once the objecting party has established a prima facie case, the burden shifts to the opponent to articulate a lawful basis for the peremptory challenges. (*Id.* at p. 97.) The justification need not support a challenge for cause. Any genuine and neutral reason will suffice. “A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citations.] Nevertheless, although a prosecutor may rely on any number of bases to select jurors, a legitimate reason is one that does not deny equal protection.” (*People v. Lenix* (2008) 44 Cal.4th 602, 613.)

It is up to the trial judge to decide whether the objecting party has proven purposeful discrimination. (*People v. Arias* (1996) 13 Cal.4th 92, 98.) We review the trial court’s acceptance of the explanation by the party seeking to justify the exclusion with great restraint. (*Ibid.*) “If the trial court makes a ‘sincere and reasoned effort’ to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis. Such an approach would undermine the trial court’s credibility determinations and would discount ‘the variety of [subjective] factors and considerations,’ including ‘prospective jurors’ body language or manner of answering questions,’ which legitimately inform a trial lawyer’s decision to exercise peremptory challenges.” (*People v. Montiel* (1993) 5 Cal.4th 877, 909.)

In the present case, the defense first challenged Juror Palacios, who was 25 years old. The second challenge was to Juror McKinley who was 71. Third, the defense excused 55-year-old Juror Lockhart. And fourth, 25-year-old Juror Horwege was excused. For its fifth challenge, the defense excused Juror Altamirano who was 49. At that point, plaintiff's counsel objected, arguing that defendant's peremptory challenges were intended to exclude older persons from the jury. The trial court held a hearing in chambers. The defense had by then exercised peremptory challenge of five jurors, three of whom, Jurors McKinley, Lockhart, and Altamirano, were over the age of 40. Defense counsel explained that he struck McKinley because that juror "we felt was someone that was not a strong personality. [¶] I have a system and I have a three-prong test. I weighted her a 3 out of 3, meaning in favor of the fact that she is not likely to be a fair and unbiased juror. For those reasons, I struck her. [¶] There are other reasons. I don't remember them. The consensus among my clients and co-counsel were that she would be a poor juror for us. Her age was never considered."

As to Juror Altamirano, counsel explained, "My concern was that his partner is a Psychologist and he may be enamored by the medical records, by any kind of psychological testimony. [¶] [Plaintiff's counsel] is going to elicit from Dr. Kim if Mr. Zimmerer doesn't win this case, he is going to kill himself. [¶] I also have to admit that I have a bias against special education teachers. My mother is one. I don't think she would be a good juror in that case."

Counsel believed that Juror Lockhart was "a very weak personality. I thought she might be maybe plaintiff oriented. When I asked her questions, several times she didn't answer very loudly. [¶] I didn't think she would be a good juror. I have to say that was the same reason I had struck a 20 something year-old. [Juror] Horwege presented in this age range, but I thought she was very quiet and not a leader and perhaps might vote in favor of the Plaintiff."

The trial court noted that the defense attorneys have notions “about people having an ailing heart for the plaintiff.” The court did not believe such notions run afoul of any legal authority. As to Juror Altamirano, the trial court stated, “[W]hen he said his age, it came as a surprise to me. I actually had him pegged about ten years younger. He dressed in a youthful fashion. [¶] I don’t believe that there is a perception on the part of the Defense Counsel that this was a potential Plaintiff’s juror because he is 49 years old or 41 years old or anywhere in between.” The court then denied the motion.

When the parties returned to the jury selection process, Juror Altamirano was excused and replaced by Juror Giordano who was 63 years old. Plaintiff exercised one of his peremptory challenges and excused Juror Giordano. The final 12 jurors included three over the age of 40. The nine others ranged in age from 21 to 38.

We shall assume, without deciding, that persons over the age of 40 comprise a “cognizable group.” Because the trial court solicited an explanation for the three peremptory challenges, we may infer that the court found that plaintiff had made out a prima facie case. (*People v. Arias, supra*, 13 Cal.4th at p. 135.) Consequently our review is of the trial court’s assessment of defense counsel’s explanation. Plaintiff argues, in effect, that defense counsel’s explanation for excusing the three older jurors is not believable. We are bound to defer to the trial court on that point. The trial court was present and heard the jurors’ responses to voir dire and counsel’s explanation in chambers. Counsel explained that he thought one of the jurors was not a strong personality; another did not answer loudly. The printed transcript affords no opportunity for this court to decide whether the juror’s responses were, in fact, forceful or loud. We are bound to defer to the trial court’s conclusion, which was, evidently, that the jurors displayed the characteristics counsel described and that counsel was sincere in his concern. We also reject plaintiff’s contention that counsel’s reason for rejecting Juror Altamirano for being a teacher must have been fabricated because defendant did not excuse two younger jurors who were also teachers. The juror’s being a teacher was only

part of the reason the defense offered for excusing this juror. The defense was also concerned that, due to his relationship to a psychologist, the juror might be swayed by expert testimony that plaintiff was suicidal.

Plaintiff also argues that the trial court's comment about one juror's youthful appearance "applied the wrong standard." The court's observation was just that, an observation. As the court found, defense counsel have certain beliefs about who might or might not be plaintiff-oriented based upon factors other than their membership in the group to which a plaintiff belongs. The trial court believed that defendant's attorneys were sincerely relying upon those beliefs in challenging the jurors who happened to be over 40. Counsel's explanation is not implausible nor is it conclusively refuted by any circumstances apparent in the record. The record shows that the trial court made a "sincere and reasoned effort" to evaluate the justifications defense counsel offered. That evaluation is entitled to deference on appeal.

*B. The Jury Instructions*

Plaintiff next argues that the trial court erred in rejecting the special instructions he requested. The proffered instruction took two forms. The first was: "It is permissible for you to view the imposition of an unattainable goal as evidence of pretext because a jury may reasonably view such an unattainable goal or production quota as an effort to set up an employee for failure." The second was: "[A]n unattainable goal or production quota may be viewed as an effort to set up an employee for failure." Both versions are improperly argumentative.

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) On the other hand, the " 'court is not required to give every instruction offered by a litigant nor is a party entitled to have the substance

of instructions given by the court repeated in different language.’ ” (*Harland v. State of California* (1977) 75 Cal.App.3d 475, 486.) Rather, “the duty of the court is fully discharged if the instructions given by the court embrace all the points of the law arising in the case.” (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 335.) We view the record in favor of the contention that a refused instruction was warranted. (See, e.g., *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 655.)

Plaintiff’s proposed instructions list one specific item of evidence and would have advised the jury, in effect, that it may view it as evidence of defendant’s improper motive. The instruction invites the jury to draw inferences in plaintiff’s favor from evidence submitted in support of a disputed question of fact. Such an invitation “properly belongs not in instructions, but in the arguments of counsel to the jury.” (*People v. Wright* (1988) 45 Cal.3d 1126, 1135.) As the *Wright* court explained, an instruction that selects certain facts and incorporates them into instructions containing a correct principle of law tends to suggest that the court giving the instruction views the evidence in favor of the party who offered the instruction. A proper instruction should contain “ ‘a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue.’ ” (*Ibid.*, quoting *People v. McNamara* (1892) 94 Cal. 509, 513.)

In *People v. Ledesma* (2006) 39 Cal.4th 641, 720, the Supreme Court held that it was not error to refuse an instruction “that directed the jury to consider, for the purpose of determining whether there was reasonable doubt as to defendant’s guilt, evidence that another person had the motive or opportunity to commit the crime.” By way of explanation, the court noted: “An instruction that directs the jury to ‘ “consider” ’ certain evidence is properly refused as argumentative. [Citation.] ‘In a proper instruction, “[w]hat is pinpointed is not specific evidence as such, but the *theory* of the [party’s] case.’ ” ” (*Ibid.*) In short, the effect of certain facts on identified theories is best left to

argument by counsel and cross-examination of witnesses. (*People v. Roberts* (1992) 2 Cal.4th 271, 314.)

Plaintiff's theory of the case was that defendant wanted a young sales force and discharged plaintiff because he was too old. Plaintiff had no direct evidence that his termination was due to his age. He had to rely upon inferences to support the claim that defendant had a discriminatory motive. The trial court instructed the jury in the elements of an age-discrimination claim, correctly explaining motive. The court also correctly instructed the jury in the concept of indirect evidence, noting: "As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind."

Plaintiff attempted to prove defendant's improper motive by showing that plaintiff was treated differently, and more harshly, than the younger employees. In his argument to the jury, plaintiff's counsel ably described the evidence and elaborated upon the reasonable inference plaintiff wanted the jury to draw from each piece. Counsel highlighted Turk's imposition of the unattainable goal as one of the facts in support of plaintiff's theory of the case. But the argument had no place in the jury instructions. The ultimate effect of the evidence was up to the jury to decide without prompting by the trial court.

Plaintiff cites *Willnerd v. First Nat. Nebraska, Inc.* (8th Cir. 2009) 558 F.3d 770, 779, in support of the proffered instructions. *Willnerd* reversed a summary judgment for the employer, concluding that evidence of the employer's imposing an unattainable goal raised a triable issue of fact. (See also, *Denesha v. Farmers Ins. Exchange* (8th Cir. 1998) 161 F.3d 491, 499 [holding the imposition of unattainable production goals on an employee was evidence supporting a jury's finding of discrimination].) There is nothing in either of these cases suggesting that the instructions under review here are proper. We do not doubt that a jury could reasonably infer discriminatory intent from evidence that the employer made performance benchmarks unattainable. The point is that other

reasonable inferences might also be drawn from the evidence. It is improper for the trial court to single out just one and highlight it for the jury in the instructions. The proffered instruction was argument and was properly rejected.

Plaintiff urges our consideration of the juror declaration stating that, had the trial court given the instruction as requested, he would have found that plaintiff had been wrongfully terminated and he believes that the other jurors would have as well. Even if it were admissible as evidence, it is relevant only to the question of prejudice. Since the trial court correctly refused the instruction, we need not consider either the admissibility or the import of the juror's statement.

**IV. DISPOSITION**

The judgment is affirmed.

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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Elia, J.