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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1731

Howard Norsetter,
Appellant,

vs.

Minnesota Twins, LLC,
Respondent.

Filed August 24, 2020
Affirmed in part, reversed in part, and remanded
Ross, Judge

Hennepin County District Court
File No. 27-CV-18-17629

Steven E. Uhr, Bloomington, Minnesota (for appellant)

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Considered and decided by Slieter, Presiding Judge; Ross, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Talent scout Howard Norsetter sued the Minnesota Twins alleging age discrimination after the ball club eliminated his scouting position in Australia and did not consider him for open scouting positions in the United States. The district court granted the Twins' motion for summary judgment, reasoning that the club had a legitimate, nondiscriminatory reason for terminating Norsetter and that Norsetter could not show that

the reason was a pretext for age discrimination. Norsetter argues on appeal that the district court abused its discretion by limiting discovery and that it misapplied the law when it granted the Twins summary judgment. We affirm in part and reverse in part the district court's discovery decisions and remand for further discovery, and we therefore reverse summary judgment.

FACTS

Howard Norsetter, a United States citizen who has maintained permanent residence in Australia since 1984, began working as a scout for Minnesota Twins LLC, in 1990. The Twins employed Norsetter through a series of renewed, one-year contracts. The Twins last renewed his contract in September 2016 for a term to expire on December 31, 2017. Its decision not to renew is at the heart of this litigation.

Norsetter's scouting duties included evaluating athletes and making recommendations on whether the team should sign them. He developed relationships with players, parents, coaches, and agents, and he established contacts worldwide. He scouted in Australia and also regularly traveled to different countries to evaluate athletes, including Japan, Korea, Taiwan, South Africa, and all over Europe. From 2006 until the team discharged him in 2017, Norsetter also served as the team's minor-league international supervisor. In that post, he continued his scouting duties and supervised employees in different parts of the world.

In September 2017, some of the Twins' upper-level managers met to discuss changing the team's international scouting strategy. The meetings included the Twins' general manager Thaddeus Levine, executive vice president Derek Falvey, and director of

player personnel Michael Radcliff. Levine had sent an email to most members of the group in August 2017 discussing the Twins' "Scouting Philosophy" and "Scouting Personnel" for the following year. Levine's email revealed that he wanted to reduce the Twins' presence in the Australia scouting market and increase the team's effort in Latin America. The email listed Norsetter and three other international scouts as "[e]mployees with whom we recommend parting ways." Radcliff, who was also Norsetter's direct supervisor, emailed in response advocating against discharging Norsetter. He said he believed that they should discuss a "different application of [Norsetter's] skill set," which "would probably need to include [a] move."

Radcliff informed Norsetter that it was uncertain whether his contract would be renewed. Norsetter told Radcliff he wanted to remain with the Twins. He said that he was willing to take a substantial pay cut and limit his efforts to Australia alone. After Radcliff explained that the Twins did not want to focus on Australia, Norsetter said that he would be willing to relocate to the United States and to hold any other position with the Twins. When the managers met in September 2017, Radcliff advocated for keeping Norsetter, but he could not persuade the others. The Twins informed Norsetter that the organization would not renew his contract. Its notification letter indicated that the Twins had made a "business decision" to eliminate Norsetter's position of minor-league international supervisor. It did not consider Norsetter for other scouting positions.

After the organization discharged Norsetter, it hired eight new scouts in autumn 2017 for scouting positions within the United States. These domestic scouts were mostly

in their 30s and 40s, but two were at least 45 years old. Norsetter was 59 years old when the Twins terminated his employment.

Norsetter sued the Twins, alleging that the organization discriminated against him on the basis of age in violation of the Minnesota Human Rights Act. His civil complaint alleged that the Twins' decisions to discharge him and not to consider him for other positions were motivated by his age and that the Twins' explanation for his dismissal was a pretext for discrimination. The district court appointed a special master to hear and decide all discovery matters.

The Twins moved for summary judgment, arguing that the undisputed facts established that the Twins' choice to discharge Norsetter was a legitimate business decision not motivated by his age. The district court granted the Twins' motion and ordered the lawsuit dismissed. It determined that Norsetter made a prima facie case of age discrimination but that the Twins had given a legitimate, nondiscriminatory reason for terminating Norsetter and that Norsetter failed to show that the reason was a pretext for discrimination.

Norsetter appeals.

D E C I S I O N

Norsetter challenges the district court's summary-judgment decision. He maintains that the district court improperly limited his discovery and that, despite the improper limits, he presented evidence sufficient to survive summary judgment. We affirm some of the district court's discovery decisions but reverse others, therefore reversing summary judgment and remanding the case to the district court to permit further discovery. Once

that discovery is complete, the parties will be in a better position to decide whether to pursue summary judgment. We offer no opinion on the merits of the district court's summary-judgment decision.

The Twins' interrogatory answers complied with rule 33.01(d).

Norsetter argues that some of the Twins' interrogatory answers do not comply with Minnesota Rule of Civil Procedure 33.01(d) because they do not contain the proper declaration language. The district court rejected this argument. The issue requires us to interpret a rule of civil procedure, a task we undertake de novo. *See State v. Lugo*, 887 N.W.2d 476, 482 (Minn. 2016).

Norsetter argues that the Twins' interrogatory answers were deficient under the controlling rule of civil procedure because they failed to include language stating that the respondent declared under perjury that everything stated in the interrogatory answer is true. Norsetter misunderstands the rule:

> Answers to interrogatories shall be stated fully in writing and shall be signed under oath or penalty of perjury by the party served . . . .
>
> All answers signed under penalty of perjury must have the signature affixed immediately below a declaration using substantially the following language: "I declare under penalty of perjury that everything I have stated in this document is true and correct."

Minn. R. Civ. P. 33.01(d). The rule expressly authorizes answers that are *either* "signed under oath *or* penalty of perjury," not that are signed under oath *and* penalty of perjury. *Id.* (emphasis added). Apparent from the rule's plain language, only answers signed under penalty of perjury require the supposedly missing declaration language. This makes sense

as there is no need to include the declaration language for an oath because, by definition, an oath has the legal effect of subjecting a person to the penalty of perjury for false statements. *Black's Law Dictionary* 1239 (10th ed. 2014) (defining oath). The Twins' interrogatory answers were signed under oath because they were notarized. Every notary public has the power to administer oaths, Minn. Stat. § 359.04 (2018), and an oath may be administered in writing by including the language, "Subscribed and sworn to before me," Minn. Stat. § 358.09 (2018). The Twins' answers were notarized and included this language. Norsetter fails to show that the Twins' interrogatory answers were legally deficient or that the district court improperly considered them for summary judgment.

Norsetter forfeited any right to challenge the appointment of the special master by failing to object on the record.

Norsetter argues that the district court erred by appointing a special master to address discovery matters. The district court appointed the special master "to hear and rule on all discovery issues." A district court may appoint a special master for limited purposes, including to "address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge." Minn. R. Civ. P. 53.01(a)(3). We review the appointment of a special master for an abuse of discretion. *See Brickner v. One Land Dev. Co.*, 742 N.W.2d 706, 712 (Minn. App. 2007) (determining that the district court made "appropriate use of the skills of a special master"), *review denied* (Minn. Mar. 18, 2008).

Norsetter forfeited his right to challenge the appointment of the special master because he participated in the proceedings before the special master without objection. "A party may not consent to a legal proceeding by participating in it and later challenge the

validity of the procedure." *N. States Power Co. v. Gas Servs., Inc.*, 690 N.W.2d 362, 366 (Minn. App. 2004); *see also Bohles v. Boland*, 47 N.W. 155, 155 (Minn. 1890) (holding that a party's appearance before a referee amounts to consent to use of the referee). The district court's March 25, 2019 order appointing the special master indicates that the parties had agreed to the appointment during a March 6 telephone conference. Norsetter maintained at oral argument on appeal that he objected to the appointment during the phone conference, but the record does not contain a transcript or summary of the phone conference and reveals no objection at any time. As they say, if it's not in the record, it didn't happen. By failing to object, Norsetter implicitly consented to the use of the special master to decide all discovery issues, and he cannot challenge that appointment on appeal.

The district court correctly determined that Norsetter could not serve a subpoena* duces tecum *on the MLB by personally serving the Twins.

Norsetter argues that the district court improperly denied his motion to compel Major League Baseball (the MLB) to comply with a subpoena *duces tecum*. Norsetter served a subpoena in April 2019, demanding that the MLB produce documents relating to potential age discrimination among other MLB clubs. But rather than serve the MLB, Norsetter served the subpoena "on the Minnesota Twins, LLC, a member and agent of Major League Baseball." After counsel for the Twins informed the MLB about the service, a representative of the MLB commissioner wrote to Norsetter's counsel saying that neither the Twins nor the organization's representatives were agents of the MLB and that, therefore, the MLB had not been served process. Norsetter still did not serve the MLB, and he instead moved the district court to compel the MLB to comply with the subpoena. The

special master determined that Norsetter's attempted service was ineffectual because service on the Twins was not effective service on the MLB.

Norsetter argues on appeal that the district court should have compelled the MLB to comply based on the rules of civil procedure. A subpoena that commands production of documents "must be served on the subject of the subpoena." Minn. R. Civ. P. 45.02(a). We interpret and review the application of the rules of civil procedure de novo. *In re Skyline Materials, Ltd.*, 835 N.W.2d 472, 474 (Minn. 2013). Our review leads us to affirm the district court's decision denying Norsetter's motion to compel.

Consistent with how the parties describe the arrangement, we have previously described the MLB as an unincorporated association consisting of 30 baseball teams, including the Twins as a member. *Metro. Sports Facilities Comm'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 218 (Minn. App. 2002), *review denied* (Minn. Feb. 4, 2002). Rule 45 does not address how to serve a subpoena on an unincorporated association. Norsetter argues that, because a summons may be served on a partnership or association by delivering a copy to a member of the partnership or association, *see* Minn. R. Civ. P. 4.03(b), by the same method a party may serve an association with a subpoena. But the rules do not say so. The rules for service of a summons and service of a subpoena are indeed parallel in some respects, such as indicating who may do the serving. *See Lewis v. Contracting Nw., Inc.*, 413 N.W.2d 154, 156 (Minn. App. 1987) (observing that both a summons and a subpoena may be served by any nonparty age 18 or older). But they plainly differ as to the person upon whom service must be made. Rule 45.02(a) requires that subpoenas be served specifically "on the subject of the subpoena," while rule 4 does not use that limiting

language. It instead contemplates service of a summons on an individual, on a partnership or association, on the state, or on a corporation. Minn. R. Civ. P. 4.03(a)–(e). We construe rule 45.02(a) as indicating that a party must serve a subpoena *duces tecum* directly on the person or entity who must comply with the subpoena, not on one of its agents or members. This literal construction is most practical here, because any of the documents Norsetter sought would most logically be maintained by the MLB and other teams within the league, not the Twins. Because Norsetter did not serve the subpoena *duces tecum* on the MLB—the subject of the subpoena—the district court properly denied his motion to compel the MLB to comply.

The district court improperly granted a blanket protective order preventing Norsetter from deposing three Twins officers.

Norsetter challenges the district court's granting of a protective order preventing him from deposing three Twins officers. Norsetter sought to depose Twins owner Bill Pohlad, owner and executive chairperson Jim Pohlad, and president and CEO Dave St. Peter. The Twins sought to prevent Norsetter from deposing any of these officers, arguing that they deserve special protection because they are senior executives lacking firsthand knowledge of the Twins' employment practices generally or Norsetter's employment specifically. The district court provisionally granted the Twins' motion for a protective order "until less burdensome avenues of obtaining information relevant to [Norsetter's] termination have been exhausted, and evidence exists that the deponents have information regarding [Norsetter's] termination." The special master later determined that Norsetter

had not met that burden. This court reviews a district court's decision granting or denying a protective order for an abuse of discretion. *In re Paul W. Abbott Co.*, 767 N.W.2d 14, 18 (Minn. 2009).

Regarding discovery, the district court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Minn. R. Civ. P. 26.03(a). The district court has "broad discretion to fashion protective orders and to order discovery only on specified terms and conditions." *Erickson v. MacArthur*, 414 N.W.2d 406, 409 (Minn. 1987). The Twins organization argues that the protective order was proper because district courts commonly give special consideration to prevent the depositions of high-level corporate officers. The parties cite no Minnesota precedent adopting that approach, but at least in unpublished orders, the federal district court in Minnesota seems to have recognized it. *See Bombardier Recreational Prods., Inc. v. Arctic Cat, Inc.*, No. 12-cv-2706, 2014 WL 5685463, at *2 (D. Minn. Sept. 24, 2014) ("[C]ourts are wary of allowing parties to depose high-level executives where the deposing party fails to establish that the executive has some unique knowledge relevant and critical to the case at hand."); *Cardenas v. Prudential Ins. Co. of Am.*, No. Civ. 99-1421, 2003 WL 21293757, at *2 (D. Minn. May 16, 2003) (denying party's motion to compel the depositions of top executives because the party could not show that the executives "possess[ed] any information that could not be obtained from lower level employees or other sources"). But even in so recognizing the approach, the court appreciated that, under the federal rules, "a party seeking to prevent a deposition carries a heavy burden" and that

"it is very unusual for a court to prohibit the taking of a deposition altogether absent extraordinary circumstances." *Bombardier*, 2014 WL 5685463, at *3 (quotation omitted).

We begin with the limitation embodied in the state rule, which is that the district court may prevent a deposition to protect a person specifically from "annoyance, embarrassment, oppression, or undue burden or expense." Minn. R. Civ. P. 26.03(a). The rule does not suggest any general elite-executive protection or indicate that a protective order for an organization's "high-ranking" individuals can rest on anything less than what must be shown to justify a protective order for anyone else. And even in the face of the broad discretion we afford the district court on this matter, *see Erickson*, 414 N.W.2d at 409, we do not believe that the Twins have made a showing for the blanket protection afforded here.

It appears that the individuals might have information relevant to the lawsuit. Norsetter sought to depose the officers to obtain information about several of the issues, including the Twins' reasons for discharging him and not considering him for other scouting positions, changes in the Twins' scouting strategy, and the Twins' general policies on discrimination and training. They are only one level above the other high-level managers—executive vice president Derek Falvey and general manager Thaddeus Levine—who say they made the decision to discharge Norsetter and to shift the Twins' international scouting strategy. Given that developing scouting strategy for an MLB team is presumably one of its major business decisions, and given the close proximity between the three intended deponents and the alleged decision-makers here, any of the three might reasonably have information relevant to Norsetter's allegations. Broadly preventing

Norsetter from deposing them on the notion that they were too far up and removed from the litigation issues appears unsupported on relevancy grounds.

Under these circumstances, the Twins have not persuasively explained why it was proper for the district court to place the burden on Norsetter to make some additional showing that the officers had relevant information not available elsewhere. On balance against the likely relevance of their testimony, we also see nothing in the record supporting the implied premise that deposing any of them would result unreasonably in their annoyance, embarrassment, oppression, or undue burden or expense. The Twins cite no evidence and offer no compelling argument leading us to suppose that deposing the three officers would have resulted in any of these improper effects. And for his part, Norsetter offered to allay even the theoretical concerns by limiting the depositions to one hour each. The district court abused its discretion by generally prohibiting the depositions altogether. We reverse the district court's grant of the protective order barring the depositions of Bill Pohlad, Jim Pohlad, and Dave St. Peter, and we remand for further discovery. On remand, the district court must permit the depositions but may, in its discretion, impose limits that balance any rule 26.03(a) concerns against Norsetter's right to discover relevant evidence.

The district court erred by denying Norsetter's request to compel discovery of all emails between him, Falvey, and Levine.

Norsetter argues that the district court erred by denying his request to compel discovery for additional emails between him, Falvey, and Levine. We review the district court's decision regarding discovery requests for an abuse of discretion. *Connolly v. Comm'r of Pub. Safety*, 373 N.W.2d 352, 354 (Minn. App. 1985). Norsetter requested that

the Twins disclose "[a]ll emails between Norsetter [and] Falvey and between Norsetter and Levine." The Twins declined to produce all the emails but instead produced emails resulting from a limited search applying the following search parameters: any variation of Norsetter's name (Howard or Howie or Norsetter) combined with a term related to termination (eliminat* or terminat* or renew*). The special master rejected Norsetter's request to search for additional emails, finding that it would be "disproportionate."

Notwithstanding the district court's broad discretion in discovery disputes, *see id.*, we reverse the district court's decision allowing the Twins to limit their disclosure. A party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Minn. R. Civ. P. 26.02(b). Falvey and Levine made the decision to terminate Norsetter, and they were at the center of the Twins' alleged change in international scouting philosophy that led to the elimination of Norsetter's position. Emails between either of them and Norsetter might be highly relevant to the claims or defenses. The Twins do not explain why only emails that contain "eliminate," "terminate," or "renew" would produce relevant evidence. It is not difficult to imagine myriad other terms that might also lead to relevant evidence. And the Twins do not argue that emails broadened to Norsetter's request would be cumulative or that the information could be obtained from other sources. *See* Minn. R. Civ. P. 26.02(b)(3)(i) (allowing the district court to limit discovery that is "unreasonably cumulative or duplicative").

We conclude that the district court abused its discretion by allowing the Twins to limit discovery of emails in the manner that occurred here. We therefore reverse and

remand for the district court to compel discovery of all emails between Norsetter and Falvey, and between Norsetter and Levine.

The district court erred by denying Norsetter's request to compel production of the eight domestic scouts' resumes.

Norsetter argues finally that the district court improperly denied his request to compel the Twins to produce the resumes of the eight domestic scouts who were hired in the fall of 2017. Norsetter requested the resumes of scouts hired since the beginning of 2016 that the Twins believed were more qualified than he was. The special master denied the request because the Twins had not hired an international scout since Norsetter was terminated in September 2017, implying that the information sought was not relevant because the scouts hired in 2017 were domestic scouts. On appeal, Norsetter contends that the district court should have compelled the Twins to produce the resumes of the eight domestic scouts hired in 2017.

The scouts' resumes directly bear on Norsetter's claims. To make a prima facie case of age discrimination—and therefore survive summary judgment—Norsetter had to show, among other things, that he was denied employment opportunities and that those opportunities remained open or were given to other people with his qualifications. *See Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 323–24 (Minn. 1995). Norsetter presented evidence that the Twins knew he was willing to relocate to the United States, that he sought any open position with the organization, and that he was willing to take a pay cut to continue. The Twins therefore knew that he was a candidate for any of the open scouting positions. Norsetter attempted to meet his burden regarding relative qualifications

and age by showing that he was qualified for open scouting positions and that the Twins did not consider him for those spots, instead hiring others who were considerably younger than he was. The resumes of those hires would obviously bear on the issue. The Twins implicitly admit the relevance of this evidence. They do so by arguing on appeal that Norsetter's failure to present evidence that the Twins filled the domestic scouting positions with younger and less qualified scouts requires us to hold that he cannot survive summary judgment. We reverse the district court's decision and instruct that, on remand, the district court must compel the Twins to produce the resumes of the domestic scouts hired after Norsetter indicated his desire to continue his employment with the Twins.

Conclusion

We reverse in part the district court's discovery determinations, and we remand for further discovery. We clarify that our remand is narrow, limited to instructing the district court to reopen discovery only on those matters leading to our reversal. Because being improperly denied discovery may have prevented Norsetter from obtaining evidence on issues bearing on the district court's summary-judgment analysis, we reverse summary judgment as premature without addressing the merits. After the parties conduct additional discovery on remand, either party may decide anew whether to seek summary judgment.

Affirmed in part, reversed in part, and remanded.