

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

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Clifford L. Whitaker and Michael V. Mucci,  
on behalf of themselves and all others  
similarly situated,

Court File No.: C4-04-12239

Plaintiffs,

v.

ORDER

3M Company,

Defendant.

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The above-entitled matter came on for hearing on June 10, 2005 before the Honorable Teresa R. Warner, District Court Judge, at Ramsey County Courthouse, pursuant to Defendant's Motion to Dismiss and Strike, Plaintiffs' Motion to Compel Discovery and Plaintiffs' Motion to Compel Production of 3M's document destruction and retention policies and for a document preservation order.

Susan M. Coler, Esq., Sprenger and Lang, PLLC, 310 Fourth Avenue, South, Suite 600, Minneapolis, MN, 55415, Thomas Henderson, Esq. and Michael Lieder, Esq., 1614 Twentieth St., N.W., Washington D.C. 20009, Thomas Osborne, Esq., AARP Foundation Litigation, 601 E Street, N.W., Washington D.C. 20049, appeared representing the Plaintiffs.

Thomas W. Tinkham, Esq., Douglas R. Christensen, Esq., Holly S. A. Eng, Esq., Dorsey and Whitney, LLP, Suite 1500, 50 South Sixth Street, Minneapolis, MN 55402-1498, appeared representing the Defendant.

Based on all of the files, records, and proceedings herein:

**IT IS HEREBY ORDERED** that:

1. Defendant, 3M Company's Motion to Dismiss and Strike is **DENIED**.
2. Plaintiffs' Motion to Compel Discovery of non-exempt salaried employee information is **GRANTED**.
3. Plaintiffs' Motion to Compel Discovery of employee release information is **DENIED**.
4. Plaintiffs' Motion to Compel Production of 3M's Document Destruction and Retention Policies and for a Document Preservation Order is **GRANTED**.
5. That the attached Memorandum is incorporated herein and made part of this Order and constitutes the Court's Findings of Fact and Conclusions of Law to the extent required by Rule 52.01 of the Minnesota Rules of Civil Procedure.

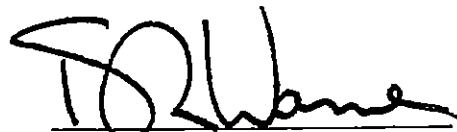
**THERE IS NO JUST REASON FOR DELAY**

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

By the Court:

Date:

July 7, 2005



Teresa R. Warner  
Ramsey County District Court Judge

## MEMORANDUM

This case involves an allegation by Plaintiffs, Clifford Whitaker and Michael Mucci that Defendant, 3M Company has engaged in discriminatory and unlawful employment practices in violation of the Minnesota Human Rights Act (MHRA), Minnesota Statute §363A.08, subd. 2. Plaintiffs seek to bring this suit as a class action. Defendant, 3M brings a Motion to Dismiss under Minn.R.Civ.P 12.02(e) and a Motion to Strike under Minn.R.Civ.P. 12.06. Plaintiffs bring a Motion to Compel Discovery and a Motion to Compel Production of 3M's document destruction and retention policies and for a document preservation order.

### **A. Defendant's Motion to Dismiss and Strike**

Defendant, 3M asserts that Plaintiffs intend to claim that a "continuing violations" theory may breathe life into some time-barred claims based on employment decisions made by 3M managers well outside the one-year limitation period provided in the MHRA. 3M seeks a ruling that the continuing violations theory does not apply to the types of claims asserted in this matter, which 3M alleges are discrete employment decisions. 3M then seeks to strike all allegations in the Complaint about employment decisions occurring outside the applicable limitations period.

Plaintiffs argue that their allegations, if proven, are sufficient to make the continuing violation doctrine available, but that the applicability of the continuing violation doctrine should properly be determined upon a factual record, either at trial or on a motion for summary judgment.

In cases involving dismissal for failure to state a claim upon which relief can be granted pursuant to Rule 12.02(e), the question before the Court is whether the complaint sets forth a legally sufficient claim for relief. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn.2003).

A claim is sufficient against a motion to dismiss based on Rule 12.02 if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded. To state it another way, under this rule a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded. *Northern States Power Company v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (Minn.1963).

A court's review of a motion to dismiss for failure to state a claim upon which relief can be granted accepts the facts alleged in the complaint as true and construes all reasonable inferences in favor of the nonmoving party. *Nelson v. Productive Alternatives, Inc.*, 696 N.W.2d 841, 846 (Minn.App.2005)

The MHRA provides that a claim of an unfair discriminatory practice must be brought as a civil action pursuant to section 363A.33, subdivision 1...within one year after the occurrence of the practice. *Minn. Stat. §363A.28, subd. 3.*

Defendant, 3M argues that the one year statute of limitations applies to all of plaintiffs' claims and that the continuing violations doctrine does not provide plaintiffs with a valid exception to the statute. 3M relies on *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002), in which the Supreme Court held that "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire" constitute separate employment decisions that are independently actionable, but only to the extent that they are made the subject of a charge of discrimination or lawsuit before the end of the limitations period running from the date these discrete acts occurred. *Morgan*, at 113-14.

Defendant, 3M contends that *Morgan* and subsequent federal cases have flatly rejected application of a continuing violations theory to the kinds of discrete employment decisions about which the Plaintiffs complain in this case. 3M relies on a trio of 8<sup>th</sup> Circuit cases; *Tademe v. St. Cloud State University*, 328 F.3d 982, (8<sup>th</sup> Cir.2003) (holding that, even in the face of an assertion of a “pattern-or-practice of discrimination, *Morgan* makes clear that the failure to promote, refusal to hire, and termination are generally considered separate violation” not amenable to a continuing violation exception to the statute of limitations); *Burkett v. Glickman*, 327 F.3d 658, (8<sup>th</sup> Cir.2003) (declining to apply continuing violations exception to link multiple, separate failure to promote claims); and *Mems v. City of St. Paul, Department of Fire and Safety Services*, 327 F.3d 771, (8<sup>th</sup> Cir.2003) (declining to apply continuing violations exception to a series of discrete employment acts pursuant to *Morgan* and noting the lack of Minnesota case law on the issue) and a Minnesota Federal District Court Case, *Bradley v. Am. Home Prods. Corp.*, 2002 WL 31317393, (D.Minn.2002) (finding allegations concerning failure to promote, assignment of undesirable territory, and denial of transfer requests all to be discrete acts not subject to a continuing violations exception to the statute of limitations because each such act “should have triggered plaintiff’s awareness, and thereby her duty, to assert her legal rights”) to support this contention.

Defendant, 3M argues that the Plaintiffs cannot escape *Morgan*’s holding regarding any now time-barred employment decisions merely by claiming that such earlier decisions were sufficiently similar to those made within the limitations period to form part of a “continuing violation.” 3M asserts that Plaintiffs have not alleged sufficient facts in their complaint to establish a continuing violation.

