

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

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.

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.

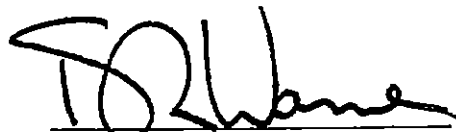
THERE IS NO JUST REASON FOR DELAY

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 8th Circuit cases; *Tademe v. St. Cloud State University*, 328 F.3d 982, (8th 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, (8th 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, (8th 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.

Plaintiffs do not dispute 3M's argument that discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire constitute separate employment decisions, and therefore are not subject to the continuing violations doctrine. Rather, Plaintiffs argue that 3M's conduct, as alleged in Plaintiffs' pleadings, constitutes an unlawful employment practice manifesting itself over time, not a series of discrete acts, such that it constitutes a discriminatory pattern or practice, making the continuing violations doctrine applicable.

Plaintiffs argue that an analysis of Minnesota law, as well as a correct interpretation of federal law, shows that the continuing violations doctrine is available as an exception to the one-year statute of limitations in the MHRA.

In employment discrimination cases, Minnesota courts have recognized that the doctrine of continuing violations – applicable in cases where the unlawful employment practice manifests itself over time, rather than as a series of discrete acts – provides an exception to the one-year statute of limitations in the MHRA. Under that doctrine, however, a plaintiff must show that at least one incident occurred within the limitations period. *Kalia v. St. Cloud State University*, 539 N.W.2d 828, 834 (Minn.App.1995) *citations and quotations omitted*.

Plaintiffs rely on three cases as pre-*Morgan* examples of Minnesota courts applying the continuing violations doctrine to allow claims that would otherwise be barred by the one-year statute of limitations. See *Sigurdson v. Isanti County*, 448 N.W.2d 62, 67-68 (Minn.1989) (remanding for a determination of damages arising from events occurring up to four years before filing of complaint); *Brotherhood of Railway & S.S. Clerks, etc. v. State*, 229 N.W.2d 3, 7, 12-13 (Minn.1975) (affirming job relief and

award of backpay arising from events occurring up to eight years before filing of petition, although limiting award for discriminatory pay claim to two years prior to filing of petition); *Kohn v. Minneapolis Fire Department*, 583 N.W.2d 7, 12, 15 (Minn.App.1998) (affirming award of backpay arising from events occurring up to three years before filing of petition, including trebling of award pursuant to Minn. Stat. § 363.29 subd. 4).

Since *Morgan*, Plaintiffs rely on a number of Federal court decisions that have ruled that pattern or practice claims are subject to the continuing violations doctrine. *Anderson v. Boeing Co.*, 222 F.R.D. 521 (N.D. Okla. 2004) (the court held that under *Morgan*, the continuing violations doctrine could apply in pattern or practice cases), *Svenningsen v. College of Staten Island*, 2003 WL 21143076 (E.D.N.Y. 2003), and *Campbell v. National Railroad Passenger Corp.*, 222 F.Supp.2d 8 (D.D.C. 2002), (court refused to dismiss claims as time-barred because plaintiffs had adequately alleged pattern or practice claims) and in a related context, *Wallace v. Chicago Housing Authority*, 321 F.Supp.2d 968 (N.D. Ill. 2004) (the court held that claims may be timely under the continuing-violations theory where the asserted claim necessarily arises from a pattern of unlawful conduct) as examples of federal court decisions, decided after *Morgan*, holding that the continuing violations doctrine could apply in pattern or practice cases.

Plaintiffs urge this court to not decide the issue of the applicability of the continuing violations doctrine on 3M's Motion to Dismiss. Plaintiffs argue that the allegations in the complaint are sufficient to survive a motion to dismiss pursuant to Minn.R.Civ.P 12.02(e). In support of their position that discovery should continue on this issue, Plaintiffs rely on *Sigurdson*, 448 N.W.2d at 67-68; *Brotherhood of Railway*, 229 N.W.2d at 12-13; and *Kohn*, 583 N.W.2d at 11-12, where the Minnesota courts

assessed the plaintiff's right to relief under the continuing violations doctrine on their pattern or practice claims only after trial and in light of the record evidence.

In ruling on 3M's Motion to Dismiss, the question this Court must address is whether Plaintiffs adequately plead a pattern and practice claim. In their pleadings, Plaintiffs allege that:

Since 2001, if not earlier, 3M has engaged in an interwoven set of personnel actions designed to elevate younger employees to the company's leadership and to remove employees over the age of 45 – perceived as less able or willing to accept and apply new business methodologies adopted by the company. 3M has effectuated this campaign through its performance appraisal system and ratings, its policy and practice of selection for intensive leadership training, and its promotion, pay, and termination policies, practices and decisions. As a result, 3M has engaged in a pattern or practice of discrimination against salaried employees over the age of 45 throughout the State of Minnesota, including the plaintiffs, by assigning them lower performance ratings, virtually shutting them out of intensive leadership training opportunities, denying them promotions, awarding them smaller pay increases and fewer stock options than their younger peers, and disproportionately terminating them from employment, including through "retirement" or "resignation" in response to threatened imminent involuntary termination. *Complaint, pg. 1-2*

On this Motion to Dismiss, in accordance with *Nelson*, 696 N.W.2d at 846, this Court accepts the facts plead by Plaintiffs as true, and finds that Plaintiffs have adequately alleged a pattern or practice claim. It is possible that Plaintiffs will be able to present facts, consistent with the pleading, in support of the relief demanded. If Plaintiffs adequately establish that a discriminatory pattern or practice exists, the continuing violations doctrine may be applicable. A determination of whether the continuing violations doctrine applies should appropriately be conducted upon a factual record. At this time, this Court is not holding that a discriminatory pattern or practice exists, or that the continuing violations doctrine applies, but only that the pleadings are sufficient to

survive Defendant, 3M Company's Motion to Dismiss pursuant to Minn.R.Civ.P. 12.02(e).

While this Court acknowledges its responsibility to assert control and manage this potentially difficult and protracted litigation under Minn.R.Civ.P. 16.01, dismissing Plaintiffs' claims without any discovery would be an inappropriate use of that responsibility at this early stage of the proceedings.

In denying Defendant, 3M's Motion to Dismiss, this Court holds that a determination of whether the continuing violations doctrine applies should be made post-discovery, upon a factual record. For this reason, 3M's Motion to Strike is also denied at this time.

B. Plaintiffs' Motion to Compel Discovery

Prior to this hearing the parties resolved a portion of their discovery dispute. The remaining issues to be ruled on at this time are Plaintiffs' request for 1) information about persons classified as non-exempt salaried employees; and 2) information about former employees who signed releases and about the process for obtaining releases.

Non-exempt salaried employees

Plaintiffs seek to compel discovery of information about persons classified as non-exempt salaried employees. Defendant, 3M has refused to produce this information on the grounds that the Plaintiffs may not serve as representatives of non-exempt employees. 3M asserts that neither of the two named Plaintiffs held salaried, non-exempt positions during the potential liability period, reasonable discovery period, or at any other time during their employment with 3M and for this reason neither Plaintiff has standing

to pursue claims on behalf of salaried, non-exempt employees. 3M cites numerous federal cases where Courts have held that exempt employees and non-exempt employees must each have separate class representatives. See generally, *Griffin v. Dugger*, 823 F.2d 1476, 1483 (11th Cir.1987), *Clayborne v. Omaha Public Power Dist.*, 211 F.R.D. 573 (D.Neb.2002), *Wakefield v. Monsanto Co.*, 120 F.R.D. 112 (E.D. Mo. 1988), *Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466 (S.D. Ohio 2001), *Droughn v. FMC Corp.*, 74 F.R.D. 639 (E.D. Pa. 1977), *Appelton v. Deloitte & Touche, LLP*, 168 F.R.D. 221 (M.D. Tenn. 1996), and *Cummisford v. General Mills, Inc.*, 1979 WL 3868 (Minn. Dist. Ct. 1979).

Plaintiffs argue that the cases cited by 3M do not hold that a non-exempt employee could never represent an exempt employee, but that in those cases the classes were not certified because the plaintiff failed to establish that the employer applied common policies or practices to non-exempt and exempt salaried employees alike. Plaintiffs assert that they are not required to prove this until the class certification hearing. Plaintiffs point out that every one of the cases cited by 3M in support of its opposition to this discovery was a post-discovery motion to certify a class, and that Plaintiffs should be allowed to conduct relevant discovery prior to proving that they are adequate class representatives.

Plaintiffs have alleged in their complaint that they seek to represent a class consisting of:

All persons employed by 3M in Minnesota in a salaried position below the level of director, or salary grade 18, who were 46 or older when employed by 3M at any time during the liability period as determined by the Court.

By definition this class may include both exempt and non-exempt salaried employees. At this early stage in these proceedings, Plaintiffs need not prove that they are adequate class representatives, only that the discovery they seek is relevant. The information sought by Plaintiffs pertains to potential members of the putative class, and is therefore relevant.

Plaintiffs' Motion to Compel Discovery of information about persons classified as non-exempt salaried employees is granted, and Defendant, 3M is ordered to produce the information sought by Plaintiffs pertaining to those persons, to the extent they fall within Plaintiffs' proposed class.

Employee Releases

Plaintiffs seek to compel discovery of information about former employees who signed releases and about the process for obtaining releases. Defendant, 3M has refused to produce this information on the grounds that the releases executed by departing employees and similar details about these employees' separations are highly individualized, document intensive information that is inappropriate at this stage of discovery which has been limited to issues of class-wide significance.

Plaintiffs argue that information about persons who signed releases goes toward the number and identity of persons within the proposed class, even though persons who signed releases will not be part of the class. Plaintiffs also argue that they need the information to identify potential witnesses with experiences similar to those of the plaintiffs and class members, and to support common issues or questions that will support class certification.

Defendant, 3M states that they have provided or agreed to provide copies of the releases used and the ERISA-governed Job Elimination Plans and Performance Management Severance Plans under which the vast majority of all of the releases during the relevant time were issued, and the identity of those individuals offered severance in exchange for a release pursuant to those plans, as well as electronic personnel data that would enable Plaintiffs to determine, with a high degree of certainty, the identities of those individuals who opted for the severance offer. 3M argues that whether the Plaintiffs have additional details regarding the identity of employees who signed releases and the individual terms under which such releases were obtained is irrelevant to any of the issues pending during Phase One of discovery.

The Joint Informational Statement signed by the parties on February 18, 2005, stated:

The parties agree that discovery in this case should be sequenced. In Phase One, which shall last through the Court's consideration of the class certification issues, discovery shall focus on (a) the class elements set forth in Rule 23, and (b) the merits of the individual claims of the named plaintiffs.

The employee release information that 3M has provided or agreed to provide is sufficient to comply with Plaintiffs' Phase One Rule 23 requests. Plaintiffs' Motion to Compel Discovery of additional information about former employees who signed releases and about the process for obtaining releases is denied.

C. Plaintiffs' Motion to Compel Production of 3M's Document Destruction and Retention Policies and for a Document Preservation Order

Plaintiffs' seek an Order compelling 3M to produce its document destruction and retention policies and request a Document Preservation Order. 3M argues that it has taken extensive and ongoing efforts to ensure preservation of all relevant evidence.

By all appearances, 3M has complied and is continuing to comply with its obligation to protect and preserve relevant evidence. To ensure that discovery continues in a productive manner, Plaintiffs' request for production of 3M's document destruction and retention policies and a Document Preservation Order is granted.

TRW