

STATE OF MINNESOTA
COUNTY OF RAMSEY

EMPLOYMENT
DISTRICT COURT
SECOND JUDICIAL DISTRICT

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

Plaintiffs,

vs.

3M Company,

Defendant.

Court File No. 62-C4-04-012239

[T. Warner]

**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' MOTION TO
COMPEL PRODUCTION OF 3M'S
DOCUMENT DESTRUCTION AND
RETENTION POLICIES AND FOR A
DOCUMENT PRESERVATION ORDER**

[Class Action]

INTRODUCTION

The Federal Judicial Center and the American Bar Association recommend that the parties meet early during complex litigation to confer about the steps to be taken to preserve evidence. Plaintiffs requested such a meeting; 3M rebuffed them. Plaintiffs then attempted through document production requests to discover the measures that 3M has adopted to ensure the preservation of evidence. 3M objected and refused to produce most of the requested documents. Finally, plaintiffs received an anonymous letter from a current mid-level employee at 3M stating facts that, if true, indicate that 3M may not have adopted adequate measures to preserve evidence.

3M's actions leave plaintiffs with little recourse but to ask the Court to enter two orders. First, the Court should compel 3M to produce its document destruction and retention policies pursuant to Minn. R. Civ. P. 37.01(b). Second, the Court should enter an order pursuant to Minn. R. Civ. P. 16.05 and 26.06 requiring the parties to preserve potentially relevant paper and

electronic documents, files and records and to meet and confer to reach agreement on terms of a document preservation order for purposes of discovery and trial.

PROCEDURAL HISTORY AND COMPLIANCE WITH RULE 115.10

3M was first put on notice of class-wide claims of age discrimination in May 2004, when plaintiff Clifford Whitaker filed a charge with the Equal Employment Opportunity Commission (cross-filed with the Minnesota Department of Human Rights) alleging class-wide discrimination in training opportunities, promotions, performance appraisals, compensation and terminations. (Affidavit of Susan M. Coler in Support of Plaintiffs' Motion to Compel Production of 3M's Document Destruction and Retention Policies and for a Document Preservation Order, Ex. 1.)¹ The filing of a charge by plaintiff Michael Mucci in September 2004 again put 3M on notice of class-wide claims of age discrimination. (*Id.*, Ex. 2.)

The two plaintiffs commenced this litigation December 21, 2004, asserting class-wide claims of age discrimination in each of the areas identified in their charges. About two weeks later, on January 6, 2005, plaintiffs' counsel faxed 3M's counsel a letter requesting a meeting "to address the issue of preservation of information – particularly electronically stored information – that will or may be subject to discovery in this action" in an effort to "avert subsequent disagreements or litigation regarding the availability of information or its destruction or spoliation." (Ex. 3.) The letter also identified the issues in the litigation and the type of information likely to be requested in discovery and advised that "[t]o the extent 3M has not previously instituted measures to preserve documents and data relating to these issues, we urge it

¹ All of the exhibits cited in this memorandum are attached to the Affidavit of Susan M. Coler in Support of Plaintiffs' Motion to Compel Production of 3M's Document Destruction and Retention Policies and for a Document Preservation Order. These exhibits shall be referenced simply as "Ex. ___."

to do so at once, including appropriate suspension of transfers of data to formats that may not easily be accessed or searched and of data deletion or over-writing mechanisms.” (*Id.*)

3M’s counsel replied in a January 11, 2005 letter. (Ex. 4.) 3M refused to meet with plaintiffs’ counsel, stating only that “we are comfortable that 3M has taken and continues to take the necessary steps to preserve documents and databases in this matter.” (*Id.*)

Plaintiffs’ second set of requests for production of documents asked 3M to produce its general document retention policies, and documents identifying the measures taken to preserve documents relevant to the litigation since the filing of Whitaker’s charge in May 2004. (Ex. 5 at 51-52, Req. Nos. 95-96.) 3M’s response stated that it would produce general document retention policies “post-dating May 2004,” but objected to producing such policies in effect *prior* to May 2004 on the basis of relevancy. (*Id.*) Further, 3M objected to producing any document retention measures taken to preserve documents potentially relevant to the litigation on the basis of attorney-client privilege and the attorney work product doctrine. (*Id.*)

3M also refused to produce documents in response to various other requests, claiming that plaintiffs needed to state more specifically the types of documents requested. For example, 3M refused to produce any documents relating to the Management Team Review (“MTR”) process, in which performance appraisals and training and promotion decisions are made, instructing plaintiffs to “narrow or refine” their requests. (Ex. 5 at 25, Req. No. 49).

Plaintiffs wrote 3M’s counsel a letter dated May 6, 2005, identifying what plaintiffs believe are the fallacies in 3M’s position concerning production of its document retention and destruction policies. (Ex. 6.) Plaintiffs advised 3M that they would seek relief from this Court in the absence of prompt production and identification of the requested documents. (*Id.* at 11-12.).

In response to 3M's objections to other requests based on the alleged need for greater specificity, plaintiffs expressed a willingness to refine those requests, but indicated that "3M's response does not provide adequate information regarding the existence, format and types of documents associated with the MTR process – both hard copy and electronic – to permit plaintiffs to evaluate the scope of discoverable information, the necessity or feasibility of fashioning effective, narrower requests or the adequacy of any production made." (*Id.* at 8.) Plaintiffs also repeated their requests that 3M produce information on its documents and files, and meet with plaintiffs to address the need for information to guide efficient discovery requests. (*Id.* at 5, 7.) A meeting to discuss document preservation and other discovery issues is scheduled for May 24, 2005. (Coler Aff., ¶ 2.)

Notwithstanding statements by 3M's counsel that they are "comfortable" with 3M's document preservation efforts, plaintiffs' counsel received an anonymous communication from a person identifying himself as a 3M employee, "Joe 3M," that makes plaintiffs' counsel uncomfortable. (Ex. 7.) This letter suggests that instructions regarding the retention of documents relevant to this litigation may not have been provided to managers until January 7, 2005, the day after plaintiffs' counsel faxed the letter requesting a meeting. (*Id.*) Moreover, the anonymous letter states that, at least in his department, no instructions about document retention were communicated to three levels of supervisors (defined by the author as "grade 11 or higher") below his manager. (*Id.*) On this basis, the author suggested that "months of information has no doubt already been deleted." (*Id.*)

Finally, as of the filing of plaintiffs' motion, 3M has produced no document destruction or retention policies and no privilege log identifying any related documents as to which a claim of privilege might be asserted. (Coler Aff., ¶ 2.)

ARGUMENT

I. THE COURT SHOULD ORDER 3M TO PRODUCE ITS DOCUMENT DESTRUCTION AND RETENTION POLICIES

A. Requests and Responses

The relevant requests in plaintiffs' second set of document production requests provide:

REQUEST NO. 95: All documents concerning 3M's electronic and paper document destruction and document retention policies, practices, procedures and guidelines. (MN Sal.) (Policy)²

OBJECTIONS: 3M further objects to Request No. 95 to the extent that it is, at least on its face, undefined in temporal scope. Non-privileged, responsive documents and [sic] pre-dating May 2004 would not be relevant to the subject matter involved in the pending action, pursuant to Minn. R. Civ. 26.02(a). 3M also objects to this Request insofar as the request for all documents concerning "document retention policies, practices, procedures and guidelines" is vague and ambiguous, and as such is overly broad and unduly burdensome. 3M also reasserts its previously stated privilege objection.

RESPONSE: Subject to, and without waiving and without limitation to, these objections and the foregoing General Objections, 3M states that non-privileged, responsive document retention guidelines applicable to human resources documents and generally applicable to salaried, exempt employees in Minnesota and post-dating May 2004, will be produced. See also Response to Request No. 96 (below).

REQUEST NO. 96: All documents concerning measures adopted by 3M since the filing of Cliff Whitaker's charge in 2004 to ensure that documents potentially relevant to this case have been preserved and not been destroyed. (MN Sal.) (Policy)

OBJECTIONS: 3M further objects to Request No. 96 on the grounds that it seeks information that is protected by either an attorney-client or a work-product privilege.

RESPONSE: Subject to, and without waiving and without limitation to, these objections and the foregoing General Objections, 3M states that it has taken reasonable measures to assure the retention of documents consistent with its obligations under the Minnesota Rules of Civil Procedure and controlling decisional law. The details of such measures are protected from disclosure by the attorney-client privilege and work product

² The instructions to the document requests explain that the notation "(MN Sal.)" limits the request to documents relating to salaried employees employed in Minnesota and "(Policy)" limits the request to policy documents, rather than those relating to any individual employees.

doctrine; although, 3M would agree to disclose such details to the Court on an *ex parte*, *in camera* basis in order to substantiate the reasonableness of its document preservation efforts.

(Ex. 5 at 51-52.)

B. Bases for Motion to Compel

3M's expressed intention to produce only general document destruction and retention policies in effect after May 2004 is inadequate. All of 3M's document destruction and retention policies are discoverable.

The scope of discovery under Minnesota law is identical to that under federal law. The Minnesota rule states, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter ... including the existence, description, nature, custody, condition and location of any ... documents." Minn. R. Civ. P. 26.02. The federal rule has a few stylistic differences, but is substantively identical. Fed. R. Civ. P. 26(b)(1). Numerous courts have held under federal law that document retention policies are discoverable. *See Nike, Inc. v. Brandmania.com, Inc.*, 2002 U.S. Dist. LEXIS 20355, at *32 (E.D. Pa., Oct. 7, 2002) ("Document retention policies ... discoverable."); *Board of Educ. v. Admiral Heating & Ventilating, Inc.*, 104 F.R.D. 23, 28 n.8 (N.D. Ill. 1984) (interrogatory requesting document retention and destruction policy "an entirely reasonable question, particularly in the early stages of discovery"); *Professional Adjusting Sys. of Am., Inc. v. General Adjustment Bureau, Inc.*, 373 F. Supp. 1225, 1229 (S.D.N.Y. 1974) (interrogatory asking defendant "to state its document retention policy and to identify documents which reflect such policy ... will be helpful in the planning of discovery and ... is a proper request in the first wave of discovery. It should be answered."). Nothing about this case justifies any deviation from this outcome.

1. Pre-May 2004 Policies

3M's policies in effect prior to May 2004 are relevant and will lead to the discovery of admissible evidence. In other responses to plaintiffs' discovery requests, 3M has stated its intention to produce pre-2004 documents, including documents back to 2001, and in some cases 1998. (Ex. 5 at 2, Gen. Obj. D.) 3M's objection to the relevancy of pre-2004 document retention policies is inconsistent with its decision to produce pre-2004 documents. The document retention policies prior to May 2004 will inform effective and efficient discovery by providing information on the existence, form and format of documents created during the liability period, both when created and currently. They also will assist plaintiffs in assessing whether responses to discovery requests include all relevant documents and are complete and accurate. Thus, production of such policies will help the parties avoid cycles of requests and responses in a blind search for information.

The document destruction and retention policies in effect prior to 3M's notice of the class-wide charges of age discrimination are also relevant to determine whether 3M took appropriate steps to preserve documents once on notice of those claims. See *E*Trade Secs. LLC v. Deutsche Bank AG*, 2005 U.S. Dist. LEXIS 3021, at *14 (D. Minn. Feb. 17, 2005) ("The obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation."); accord *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003). A failure to preserve evidence can result in sanctions, including the exclusion of evidence, even in the absence of bad faith. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 118-19 (Minn. 1995) (affirming exclusion of expert evidence as sanction for inadvertent spoliation of evidence, resulting in summary judgment); *E*Trade Secs. LLC*, 2005 U.S. Dist. LEXIS 3021, at *14-*15 (citing *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112

(8th Cir. 1988)). Information regarding document destruction and preservation is not only relevant to discovery, but trial and the integrity of the litigation process.

The anonymous "Joe 3M" letter suggests the possibility that 3M took no or inadequate steps to preserve documents until the day following receipt of plaintiffs' January 6, 2005, letter. All document preservation policies should be produced: plaintiffs and the Court should not be left to speculate on information provided in anonymous communications.

2. Policies to Preserve Documents Potentially Relevant to this Litigation

The same reasoning applies with even greater force to documents reflecting 3M policies, guidelines or measures adopted to preserve or dispose of documents potentially relevant to the very claims presented in this litigation. Indeed, 3M does not object to plaintiffs' request 96 based on relevance, but on attorney-client privilege and the work product doctrine.

The policies or measures 3M has taken with respect to these documents are discoverable, not privileged. Adoption and dissemination of these measures may have followed communications with or from 3M's counsel, but 3M cannot refuse to produce the policies because it first sought or received legal advice on the subject. Granted, any confidential communications from 3M to its counsel about the need for or interpretation of the policies may be privileged. Similarly, any confidential analyses of the terms of an appropriate policy performed by 3M's counsel may be protected by the work product doctrine. By contrast, however, the policies or measures that 3M now is taking to destroy or preserve documents potentially relevant to the litigation, and the means used to preserve them, including whether in original or some altered form, format or medium, are not protected information. Indeed, it is difficult to conceive how any policy disseminated broadly enough to be effective would have the cloak of confidentiality necessary for the privilege or work product doctrine to apply. If 3M's

policies are privileged merely because they may contain input from the company's lawyers, many if not most of the policies at issue in this case, not just the document preservation policy, may be protected.³

Recommended best practices suggest that 3M should be providing and discussing this information with plaintiffs at an early point in the litigation so that agreements may be reached at the pretrial conference, rather than withholding this information or claiming that it is privileged. See Amendments to ABA Civil Discovery Standards (August 2004) <http://www.abanet.org/litigation/taskforces/electronic/home.html>, at Standard 31 (recommending that "the parties should confer about ... potentially responsive data that exist ... [d]ata retention policies applicable to potentially responsive data [and] [p]reservation of potentially responsive data, specifically addressing ... preservation of data generated subsequent to the filing of the claim [and] data otherwise customarily subject to destruction in ordinary course"); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 40.25 (2004) (proposing sample interim document preservation order requiring the parties to meet and confer to reach agreement on a document preservation order).

³ To the extent that 3M wishes to claim privilege as to communications with or from counsel on the adoption of these measures, those documents must be identified in a privilege log, see *Rambus, Inc. v. Inline Techs. AG*, 222 F.R.D. 264, 270 (E.D. Va. 2004) (documents relating to document retention and destruction policies claimed as privileged to be identified in "very fulsome" and "specific" privilege log), so that the claim may be tested through the same process as any other such claim, including if necessary *in camera* review by the Court to assess the validity of the claim or whether they reveal evidence of spoliation. See *id.* at 287-88.

II. THE COURT SHOULD ENTER AN INTERIM ORDER CONCERNING THE PRESERVATION OF DOCUMENTS TO PREVENT THE LOSS OF POTENTIALLY RELEVANT EVIDENCE AND TO MANAGE THE DISCOVERY PROCESS

This Court's entry of an order directing the parties to preserve documents that may be relevant to the issues in the litigation is an appropriate means of efficiently managing discovery and the litigation. The Manual for Complex Litigation, Fourth, § 11.12 observes: "Complex litigation usually involves the production and handling of voluminous documents. Efficient management during discovery and trial requires planning and attention to the documentary phase of the litigation by the attorneys and the judge from the outset." The Manual, therefore, recommends that a court consider entering a document preservation order *sua sponte* at the outset of the case, even before the initial conference of the parties. *Id.* at §§ 11.12, 11.442; *see id.* at § 40.25 (form of interim order).

The primary purpose of such an order is to direct the parties to meet and confer in an effort to reach agreement on the terms of an order that will preserve relevant evidence, make discovery more efficient and avoid abuse, controversy and expense. Given the need to tailor a document preservation order to best serve those purposes while avoiding unnecessary disruption, the Manual identifies issues the parties should discuss, including issues relating to the existence and operation of computers and computer networks in the routine course of business that may alter or destroy existing data and the existence and accessibility of archival and non-archival computer system backups. *Id.* at § 11.442.⁴

⁴ The Manual's Sample Order, at § 40.25, 2. Subjects for Consideration, provides as follows:

The parties should attempt to reach agreement on all issues regarding the preservation of documents, data, and tangible things. These issues include, but are not necessarily limited to:

Contrary to 3M's withholding of information and its suggestion of *ex parte, in camera* review by the Court, participation and information from all parties is necessary to frame an appropriate document preservation order. "Such an order requires the parties to define the scope of contemplated discovery as narrowly as possible, identify the particular computers or network servers affected, and agree on a method for data preservation, such as creating an image of the hard drive or duplicating particular data on removable media, thereby minimizing cost and intrusiveness and the downtime of the computers involved." *Id.* The resulting order will make discovery more efficient and economical, for example, by providing for production of information in computer-readable and -searchable formats, and reducing the burdens of identifying responsive documents by facilitating more efficient searches of electronically stored information. *See id.* at § 11.446 (Discovery of Computerized Data). The Court may adjust such an order to better manage discovery as issues become more clearly defined.

Plaintiffs have attempted to secure adequate document preservation measures without the intervention of the Court. 3M rejected plaintiffs' request to meet and confer to reach agreement

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- (a) the extent of the preservation obligation, identifying the types of material to be preserved, the subject matter, time frame, the authors and addressees, and key words to be used in identifying responsive materials;
 - (b) the identification of persons responsible for carrying out preservation obligations on behalf of each party;
 - (c) the form and method of providing notice of the duty to preserve to persons identified as custodians of documents, data, and tangible things;
 - (d) mechanisms for monitoring, certifying, or auditing custodian compliance with preservation obligations;
 - (e) whether preservation will require suspending or modifying any routine business processes or procedures, with special attention to document management programs and the recycling of computer data storage media;
 - (f) the methods to preserve any volatile but potentially discoverable material, such as voicemail, active data in databases, or electronic messages;
 - (g) the anticipated costs of preservation and ways to reduce or share these costs; and
 - (h) a mechanism to review and modify the preservation obligation as discovery proceeds, eliminating or adding particular categories of documents, data, and tangible things.


on these matters. 3M refused to produce documents regarding such measures in response to discovery requests. 3M's suggestion of *ex parte, in camera* judicial review evidences a determination to resort to extreme measures to withhold from plaintiffs information regarding the existence or destruction of documents. At the same time, 3M responds to plaintiffs' other discovery requests by suggesting that they must more specifically state the types of documents they seek, or the means by which searches of electronic documents are to be made. Meanwhile, "Joe 3M" suggests to plaintiffs that relevant information is being lost daily. Because 3M has "stonewalled" every effort of plaintiffs to secure information on document preservation, it falls to this Court to establish the means for the preservation of documents and for the efficient conduct of discovery and trial in this litigation.

CONCLUSION

Plaintiffs respectfully request that this Court (a) enter plaintiffs' proposed order compelling production of 3M's document destruction and preservation policies, and (b) enter the accompanying interim order directing the preservation of all potentially relevant documents pending a final order and directing the parties to meet and confer on the terms of a document preservation order.

DATED: May 23, 2005

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ACKNOWLEDGMENT

Plaintiffs, by their attorneys, acknowledge that costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties pursuant to Minn. Stat. §549.211.

Dated: May 23, 2005


Susan M. Coler