

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]

**REPLY MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS' MOTION
TO COMPEL SELECTED RACE AND
GENDER DOCUMENTS**

[Class Action]

INTRODUCTION

The Court should grant Plaintiffs' Motion to Compel Selected Race and Gender Documents because the document requests are relevant and appropriately tailored to the issues in this case. 3M's arguments to the contrary mischaracterize the materials requested and plaintiffs' purpose in seeking the documents. 3M then asks the Court to rely on dissimilar cases to deny the discovery and to hold that absence of multiple cases "on all fours" is dispositive of this motion. 3M finally insists that plaintiffs must prove, *before* receiving discovery, the very facts for which discovery is sought. The Court should grant plaintiffs' motion and order 3M to produce the selected race and gender documents.

ARGUMENT

I. PLAINTIFFS' REQUESTS FOR SELECTED RACE AND GENDER DOCUMENTS ARE RELEVANT AND APPROPRIATELY TAILORED

Each of the seven requests at issue, reproduced at Appendix A to plaintiffs' initial memorandum in support of this motion, seeks documents concerning analyses of the age, race and gender distribution of employees affected by one or more of the policies and procedures at

issue in this case. Plaintiffs seek the limited set of race and gender documents responsive to these requests to discover whether 3M responded to race and gender disparities resulting from application of its policies and procedures, but did not act to correct age disparities. Plaintiffs agree with 3M's responsive memorandum at page 2 that race and gender are "characteristics not at issue in this lawsuit." What is at issue in this case is 3M's conduct, and plaintiffs are entitled to discover whether that conduct differed when 3M faced race and gender disparities as compared to age disparities.¹

This evidence is reasonably calculated to prove intentional age discrimination. If the differential conduct is proven, 3M's failure to respond to age disparities while responding to race and gender disparities provides a basis for inferring a pattern or practice of class-wide intentional discrimination against older employees. Such evidence would further show that 3M acted with deliberate disregard of employees' rights to a workplace free of age discrimination. In other words, 3M knew what it was supposed to do when faced with disparities in the impact of its policies and procedures on members of a protected class. Its failure to correct disparities in relation to older employees thereby provides a basis for a class-wide claim for punitive damages.

3M mischaracterizes the nature of plaintiffs' requests as a "fishing expedition" focused on the potential expansion of this case to include other protected classes. Plaintiffs have never articulated expansion of the case to other protected groups as a purpose of the discovery and, indeed, would face case-threatening conflict issues if it did. *See, e.g., Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 810-11 & n.13 (5th Cir. 1982) (citing eight cases in support of proposition

¹ In footnote 2, 3M argues that plaintiffs' requests create a slippery slope leading to requests for discovery related to other protected groups besides those sought here. The argument is unfounded because every discovery request must be evaluated on a case-by-case basis and in each instance the moving party must provide a reasonable basis for the discovery requested. Plaintiffs have done so here. The Court should reject 3M's scare tactics as just that.

that, because of potential conflicts, black female may not represent black males in class action when she claims that employer discriminates against both female and black employees). Moreover, plaintiffs agreed that 3M need not produce employee data referencing gender or age, and they do not seek any other types of documents referencing the gender or age of employees, including employee complaints of gender or race discrimination. Plaintiffs have limited their requests to 3M's analyses of the impact of specific personnel practices on protected groups by race and gender as well as age. These narrowed requests and clear statement of purpose belie any "fishing expedition" tag.

In *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 77 (2d Cir. 2004), *vacated and remanded on other grounds*, __U.S.__, 125 S. Ct. 1731 (2005), the trial court allowed the plaintiff to submit evidence at trial of an employer's differential treatment of women and racial minorities as compared to older employees in an age discrimination case. *Id.* at 64. 3M wrongly accuses plaintiffs of stretching *Meacham* "well past its actual meaning." Memorandum of Law in Opposition to Plaintiffs' Motion to Compel Selected Race and Gender Documents ("Def's Mem.") at 7. 3M's own language contradicts this argument. 3M states, and plaintiffs agree, that the *Meacham* court mentions the "race and gender guidelines, because they provided the context for the 'similar analysis' that the employer was supposed to have done relating to age." Def's Mem. at 8 n.3. But then, 3M misses the point that, *because* the race and gender guidelines provide context for the similar analysis that the employer was supposed to have done relating to age, the race and gender guidelines are relevant to the age discrimination claim. More specifically, the *Meacham* court held that the jury had sufficient proof to find willful discrimination because the employer failed to use the 4/5 test for age discrimination that it used to test for race and gender discrimination. *Meacham*, 381 F.3d at 64, 77.

Similarly, the race and gender analyses requested in this case are relevant because they provide context for 3M's decisions regarding policies that showed adverse impact against older workers: like the plaintiffs in *Meacham*, plaintiffs here intend to show a company-wide intention to discriminate against older workers based on the fact that 3M knew that it had certain obligations with respect to protected classes and made a conscious decision not to fulfill some of those obligations (to older employees) while making an effort to fulfill others (to women and racial minorities).² Courts have found evidence of negative differential treatment of one group as compared to others relevant to proving discrimination at least as far back as 1977 when the United States Supreme Court acknowledged that "[p]roof of discriminatory motive . . . can . . . be inferred from the mere fact of differences in treatment." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). See also *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 442 n.12 (Minn. 1983) (quoting *Teamsters*).

3M has failed to show how plaintiffs' explanation of the relevance of this evidence fails the test of Minn. R. Evid. 401, requiring merely a showing of "any tendency" to make a material fact more or less probable than it would be without the evidence.

II. 3M ASKS THE COURT TO FOLLOW INAPPLICABLE CASES

Unable effectively to challenge plaintiffs' relevance explanation, 3M cites a series of cases where courts denied discovery relating to other protected classes. These cases are not authoritative and do not provide guidance to the Court. In none of those cases did plaintiff limit

²3M asks the Court to ignore *Meacham* because it was not a decision about discovery. This, too, misses the point, which is that the court found the comparative evidence relevant and admissible at trial and the appellate court cited to that evidence as the basis of a willfulness finding. If a particular type of evidence is relevant and admissible at trial in *Meacham*, then plaintiffs should be allowed to discover that same type of evidence in this case where the facts support the same legal theory.

the discovery in the manner it is here, and in none of those cases did the plaintiff apparently make a relevance argument focused on the *employer's* response to disparities as plaintiffs make here. Finally, none of these cases involved class allegations where the plaintiffs' task is to prove a pattern and practice of conduct by the employer.

For example, 3M expends an entire paragraph on *Finch v. Hercules, Inc.*, 149 F.R.D. 60 (D. Del. 1993), where the only available information in the opinion is that plaintiff sought evidence of "instances of race or gender discrimination." *Id.* at 63 n.3. Without more, the court found no "logical connection" between those instances and instances of age discrimination. *Id.* Plaintiffs here have sought analyses of the impact of 3M's policies and have shown a logical connection between 3M's conduct in responding to race and gender disparities and its conduct in responding to age disparities, thereby establishing relevance relating to a pattern and practice of discrimination. *See also General Ins. Co. v. EEOC*, 491 F.2d 133, 136 (9th Cir. 1974) (citing no rationale for the request for evidence going to other forms of discrimination); *Mitchell v. Nat'l R.R. Passenger Corp.*, 208 F.R.D. 455, 460 (D.D.C. 2002) (requiring the same bases of discrimination where plaintiff sought to prove that a particular decisionmaker acted with similar discriminatory animus on other occasions); *Gheesling v. Chater*, 162 F.R.D. 649, 651 (D. Kan 1995) (same); *Lyoach v. Anheuser-Busch Cos.*, 164 F.R.D. 62, 69 (E.D. Mo. 1995) (citing no rationale for the request for race statistics in a gender and age case); *Prouty v. Nat'l R.R. Passenger Corp.*, 99 F.R.D. 545, 546 (D.D.C. 1983) (rejecting rationale that lack of race statistics will distort age analysis). Accordingly, none of these cases is applicable because none of them articulates the same type of request or a similar rationale to that offered here.

3M repeatedly states that plaintiffs have failed to cite cases that would authorize the discovery requested. Plaintiffs disagree and assert that the cases cited in their moving and reply

briefs stand for the propositions asserted and that those propositions authorize the requested discovery. Even if that were not so, 3M's argument is not dispositive. Moving parties are not *required* to provide authority directly on point to succeed in their motion. If that were so, courts would never be able to decide issues of first impression in favor of the moving party.

III. 3M ASSERTS FACTUAL REQUIREMENTS THAT ARE INCONSISTENT WITH THE PURPOSE OF DISCOVERY AND THE TYPES OF PROOF AVAILABLE IN DISCRIMINATION CASES

In their memorandum, plaintiffs have articulated facts that support the factual and legal theory on which their discovery requests are focused. For example, they assert that the OWBPA lists seen to date show such disproportionate age disparities that 3M had to know its job elimination programs negatively impacted older employees. Plaintiffs assert that 3M touts its attention to diversity issues, including a comment on its website that shows that the company paid attention to race and gender when selecting employees for Six Sigma training. 3M criticizes plaintiffs' use of these facts as not conclusive of the factual and legal theories proffered. However, plaintiffs did not offer the facts to prove their ultimate claims. Rather they offer these types of fact because they support plaintiffs' request for discovery about race and gender analyses to compare with the company's response to age disparities.

3M further claims that plaintiffs' discovery requests are irrelevant absent conclusive proof that 3M believed there were any age disparities. Def's Mem. at 3. It further argues that if plaintiffs can prove such belief then the comparative evidence is unnecessary. *Id.* This type of argument turns the purpose of discovery on its head because it requires plaintiffs to prove *before discovery* the very facts for which discovery is sought. It further ignores the reality that some facts, such as discriminatory motive, may be proved by inference from other facts. The Court

should reject out of hand 3M's efforts to impose on plaintiffs a duty to prove elements of their claims as a prerequisite to discovery.


The Court also should reject out of hand 3M's offering of its corporate equal opportunity and harassment policies as a basis for denial of the requested discovery. Such statements do not disprove discrimination and do not undercut plaintiffs' rationale for seeking the selected race and gender documents at issue here. To be entitled to discovery, plaintiffs do not have to disprove 3M's corporate policies, they merely need to show that the discovery requested is reasonably calculated to lead to admissible evidence. Plaintiffs have done so.

CONCLUSION

For the above reasons, plaintiffs respectfully request the Court to grant their Motion to Compel Selected Race and Gender Documents.

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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.

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