

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Employment

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

Court File No. C4-04-12239

Plaintiffs,

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

v.

3M Company,

Defendant.

INTRODUCTION

As has been shown in documents previously filed with the Court in this matter, defendant 3M Company ("3M") has met its obligations to respond fully and in good faith to the Named Plaintiffs' reasonable discovery requests relating to the *age* discrimination claims asserted in the Complaint. The Named Plaintiffs' Motion to Compel Selected Race and Gender Documents ("Motion") represents their latest effort to extend discovery in this *age* discrimination case to protected classes unrelated to age – a prototypical and improper "fishing expedition." The Named Plaintiffs' counsel may wish to explore whether it can bring another case against 3M on the basis of race or gender, but that is not the proper subject of discovery in this matter.

The Named Plaintiffs, however, ignore the overwhelming authority prohibiting this kind of overbroad fishing expedition. Because the Named Plaintiffs could offer no authority that would allow this type of discovery, they have substantially stretched available case law and ignored the fact that 3M has produced, or agreed to produce, all documents which actually relate to their claims of age discrimination. Because the documents and data requested have no

conceivable relevance to the claims raised in their Complaint, their Motion is simply unfounded, and 3M respectfully requests the Court deny it, so that this lawsuit properly remains focused on the age discrimination claims they have alleged.

BACKGROUND

The background of this case has been set forth in various different motions already before this Court. The discovery requests at issue in this Motion are those that request information and documents relating to the race and gender of 3M employees – characteristics not at issue in this lawsuit. See Ex. 1 to Affidavit of Susan M. Coler in Support of Plaintiffs’ Motion to Compel Selected Race and Gender Documents (“Coler Aff.”). Consistently, 3M has properly objected to producing this information as it has no relevance to the Named Plaintiffs’ age discrimination claims. The parties have had extensive discussions surrounding these issues in an attempt to resolve them without the intervention of the Court, but to no avail.

ARGUMENT

It is undisputed that the Complaint (as well as the recently proposed Amended Complaint) contains only claims relating to alleged age discrimination in 3M’s employment policies and procedures. However, the Named Plaintiffs contend that documents and data relating to race and gender statistics are somehow relevant to the claims they have brought. The Named Plaintiffs have ignored the fundamental principle that discovery requests must be “tailored to the issues involved in the particular case.” See Robbins v. Camden City Bd. of Educ., 105 F.R.D. 49, 55 (D.N.J. 1985) (denying access to information regarding sex discrimination and whether plaintiff met height or weight requirements for the job where plaintiff’s complaint only alleged discrimination on the basis of race and age). Because the Named Plaintiffs know (and countless courts have held) that race and gender information cannot be used to show an intent to discriminate on the basis of age, the Named Plaintiffs have resorted

to arguing the negative implication that any attention 3M documented (and, indeed, is required by law to document) about the race and gender of its employees necessarily came at the expense of attention to similar age issues. See Pls.' Mem. Supp. Mot. Compel Race & Gender Docs. at 1. The Named Plaintiffs' speculations are circular and logically flawed for a number of reasons.

First, the Named Plaintiffs' argument assumes to be true the very things they must prove – that age disparities existed, that 3M conducted analyses that revealed these disparities or failed to do so, and that 3M did nothing about such disparities.¹ The Named Plaintiffs have no proof that 3M believed there were any such disparities. Absent such proof, the Named Plaintiffs' discovery requests are certainly irrelevant. Moreover, if the Named Plaintiffs could prove these elements, they will have established their intentional age discrimination claim regardless of statistics on race and gender. If they cannot prove that 3M was aware of illegal age disparities, they will fail to prove intentionality and no evidence regarding race or gender will make a difference. This requested evidence has no relevance in this case.

Second, the Named Plaintiffs ignore the fact that, *inter alia*, federal affirmative action compliance requirements with which 3M, a government contractor, must comply, require 3M to document ongoing monitoring and analysis of race and gender issues in its workforce. There is no similar requirement regarding age. See, e.g., Executive Order 11246 (providing nondiscrimination guidelines for federal contractors with an emphasis on race and gender equity); 41 C.F.R. §§ 60-2.1, et seq. (setting forth requirement that federal contractors do

¹ The Named Plaintiffs point to one 3M job elimination scenario, contending that the age distribution of employees selected for job elimination is proof of 3M's corporate age bias. See Pls.' Mem. at 5-6. The meaning of this single job elimination situation is not at issue in this motion, and it reflects the reality that decisions such as job eliminations are too decentralized to be the proper subject of a class claim. Most importantly, though, the Named Plaintiffs' rank speculation about what 3M would have done if the decision had produced a similar distribution according to gender or race reveals that they cannot offer a single *fact* to justify their grossly broad discovery requests for race and gender documents and data.

statistical analysis only on race and gender aspects of workforce). Consequently, the existence of race and gender documentation would be neither surprising nor probative of any issue going to alleged age discrimination. Finally, the Named Plaintiffs ignore the overwhelming weight of authority establishing that information relating to characteristics not at issue in the present action are simply not relevant for any purpose. The Named Plaintiffs were unable to cite a single case holding otherwise, so instead they have resorted to stretching holdings and citing cases which procedurally and substantively are not applicable.

I. EVEN UNDER LIBERAL DISCOVERY STANDARDS, THE NAMED PLAINTIFFS' DISCOVERY REQUESTS ARE OVERBROAD AND IRRELEVANT.

The Named Plaintiffs do not, and cannot, cite any decision authorizing this kind of fishing expedition. This absence of authority is no surprise. The threshold requirement of discoverability is whether the information sought is “relevant to the subject matter involved in the pending litigation.” See Onwuka v. Federal Express Corp., 178 F.R.D. 508, 515 (D. Minn. 1997) (internal quotations omitted). Courts uniformly require a party seeking discovery to make “[s]ome threshold showing of relevance . . . before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.” See Hofer v. Mack Trucks, Inc., 981 F.2d 377, 382 (8th Cir. 1992); see also Carlson Companies, Inc. v. Sperry & Hutchinson Co., 374 F. Supp. 1080, 1089 (D. Minn. 1974) (noting that parties are not entitled to “roam in the shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivable become so”).

For reasons solidly anchored in plain logic and common sense, courts dealing with employment discrimination claims routinely, if not universally, limit discovery to claims of the same type of discrimination alleged in the complaint, even while recognizing the liberal

discovery standards extolled by the Named Plaintiffs. See, e.g., Gen. Ins. Co. of Am. v. EEOC, 491 F.2d 133, 136 (9th Cir. 1974) (finding no abuse of discretion where a discovery request was held unduly broad because it “demanded evidence going to forms of discrimination not even charged or alleged”); Mitchell v. Nat’l R.R. Passenger Corp., 208 F.R.D. 455, 460 (D.D.C. 2002) (“[O]ther claims of discrimination against a defendant are discoverable if limited to the same form of discrimination”); Gheesling v. Charter, 162 F.R.D. 649, 651 (D. Kan. 1995) (in age discrimination case, limiting discovery to other age discrimination complaints only, because any other complaints would be irrelevant to plaintiff’s age discrimination suit); Lyoch v. Anheuser-Busch Co., 164 F.R.D. 62, 69 (E.D. Mo. 1995) (finding, in age and gender discrimination case, reports consisting of statistics based on race alone not discoverable); Prouty v. Nat’l R.R. Passenger Corp., 99 F.R.D. 545, 546 (D.D.C. 1983) (denying plaintiff access to information pertaining to the race of individuals hired by defendant where plaintiff only alleged age discrimination).

In Finch v. Hercules Inc., 149 F.R.D. 60, 61 (D. Del. 1993), for example, the plaintiff alleged that he had been terminated in violation of the Age Discrimination in Employment Act. He sought discovery relating to, among other things, other types of discrimination, namely race and gender. See id. at 63 n. 3. While recognizing that “[w]ith respect to the substance of discovery requests in discrimination cases, wide latitude has been granted,” the court, nonetheless, recognized that there are appropriate limitations on such discovery. See id. at 63. The Finch court, like so many others, explicitly found that “there is no logical connection between instances of age discrimination and instances of race or gender discrimination,” noting that “Plaintiff has correctly withdrawn his requests for information relevant to types of discrimination other than age.” See id. at 63 n. 3.

II. THE NAMED PLAINTIFFS' OWN CITED AUTHORITIES SIMPLY DO NOT SUPPORT THEIR OVERBROAD AND IRRELEVANT DISCOVERY REQUESTS.

Even a casual reading of the Named Plaintiffs' memorandum reveals that they offer no authority to support their discovery requests. Nor do they acknowledge the great weight of authority establishing that their request should be denied. See supra discussion at 4-5. Instead, they offer a series of unrelated citations, perhaps hoping that their mere presence will be persuasive. However, those authorities simply do not support permitting the Named Plaintiffs to cast the net they seek to cast. For example, the Named Plaintiffs cite to decisions on procedural rules unrelated to discovery and to decisions outside the employment area. See, e.g., Erickson v. Coast Catamaran Corp., 414 N.W.2d 180, 183 (Minn. 1987) (interpreting a rule of procedure relating to service of process, not discovery) (see Pls.' Mem. at 3); Boland v. Morrill, 132 N.W.2d 711 (Minn. 1965) (discussing the relevancy of an exhibit offered at trial in a non-employment case) (see Pls.' Mem. at 4).

The Named Plaintiffs also stretch the holdings of employment cases they do offer. In Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1099 (8th Cir. 1988), for example, the plaintiff alleged discrimination based on race and age. The trial court excluded evidence regarding incidents not involving the individual plaintiff that arguably may have tended to prove that race and age discrimination was prevalent at the defendant, reasoning that such generalized "workplace" evidence was not material in an individual disparate treatment case. See id. at 1103. The Eighth Circuit reversed, but not on the grounds that a plaintiff alleging one type of discrimination has a right to discovery regarding all other conceivable bases of discrimination, as the Named Plaintiffs suggest. See id. Rather, the Eighth Circuit simply recognized that evidence of other incidents of potential *race and age* discrimination was relevant, even in an individual case, where the individual was asserting claims of *race and age* discrimination. See id.

3M accepts that broad discovery may be had into the type of discrimination alleged in a lawsuit. For that reason, 3M has already agreed to produce much of the *age-related* information and data the Named Plaintiffs have requested. The Named Plaintiffs, however, stray far from the unremarkable holding in Estes, which deals with evidence regarding the same protected classes, and thus cannot support their contention that what 3M did or did not do with regard to monitoring race or gender issues can shed light on its perceptions regarding age bias.

As noted above, courts have routinely rejected efforts to extend discovery from one protected class to another. Despite this authority, the Named Plaintiffs have cited not a single case that actually supports their contention that how 3M responded to perceived disparities relating to gender and race is relevant to their claims of age discrimination.² The Named Plaintiffs cite Meacham v. Knolls Atomic Power Lab., 381 F.3d 56 (2d Cir. 2004), vacated and remanded on other grounds sub nom, KAPL, Inc. v. Meacham, ___ U.S. ___, 125 S. Ct. 1731 (2005), for such a proposition; however, a review of the actual holding in Meacham reveals that the Named Plaintiffs also have stretched that case well past its actual meaning.³

² The Named Plaintiffs' argument, taken to its logical end, would permit discovery into an employer's efforts (or lack thereof) to monitor the effects of its actions towards every class of employees protected under state and federal discrimination laws, such as veteran status, disability, national origin, sexual orientation, and religion. Such a result would significantly increase the burden on courts to manage discovery disputes and eviscerate the principle that all discovery should bear some relation to the claims in the lawsuit.

³ In Meacham, former employees alleged that they were impermissibly selected for participation in a reduction-in-force, in violation of state and federal age discrimination laws. See 881 F.2d at 61. Guidelines issued to managers making reduction decisions suggested that, in order to determine whether any adverse impact existed based on race and gender, the manager should follow the EEOC's "four-fifths" rule. See id. at 64. The instructions further stated, "[a] similar analysis should be performed to assure that we are not violating the Age Discrimination in Employment Act ('ADEA')." See id. However, the employer ultimately ignored its own guidelines and used an alternative (and less exacting) analysis to determine any adverse impact relating to age. See id. The jury found that the reduction-in-force did have a disparate impact on older workers and was willful. See id. The court upheld the jury's determination of willfulness, in particular, because the employer ignored its original guidelines and the method it chose instead to use to determine adverse impact was unreliable and did not comply with any approved methodology in that circuit. See id. at 77.

III. THE NAMED PLAINTIFFS' SUGGESTION THAT BY ALLUDING TO RACE AND GENDER ISSUES 3M HAS DISREGARDED ITS OBLIGATION TO TREAT EMPLOYEES FAIRLY WITHOUT REGARD TO AGE IS ILLOGICAL AND UNSUPPORTED BY THE FACTS.

The Named Plaintiffs also seem to contend that because 3M's stated commitment to the advancement of diversity, posted on their website, does not specifically include age, but does include race and gender, 3M does not recognize that it has an obligation to treat employees fairly based on age. See Pls.' Mem. at 5-6. Essentially, the Named Plaintiffs are trying to fault 3M for having and demonstrating a commitment to diversity, one which focuses on the nearly universal components of "diversity" as that term relates to protected classes under employment discrimination laws. Employers that show a commitment to diversity should not be subjected to the risk that their laudable efforts will result in virtually unlimited discovery in employment discrimination cases.⁴ This simply is neither a logical conclusion nor one that justifies the irrelevant documents the Named Plaintiffs request.

Finally, it is noteworthy that the Named Plaintiffs' selective reliance on 3M's diversity-related information ignores the Company's stated commitment to a workplace free of age discrimination. For example, The Named Plaintiffs ignore 3M's corporate Equal Opportunity Policy and Harassment Policy, each of which prohibits unequal treatment or harassment, respectively, on the basis of age. See Exs. A & B to the Affidavit of Michael Iwan Regarding Plaintiffs' Motion to Compel Selected Race and gender Documents.

On these facts, Meacham is simply inapposite. The court only mentioned 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. See id. at 64. Thereafter, the court's discussion focused exclusively on what the employer did to analyze the age impact of its decisions. Meacham, at most, is silent on whether, as part of discovery, the defendant was required to produce anything other than the guidelines document itself; there is no evidence that the race and gender analyses were ever produced (or even requested).

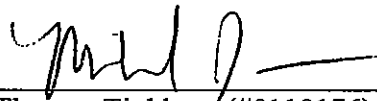
4 The Named Plaintiffs may state that their claims only involved age, but there is no reason to limit their arguments to an age claim.

CONCLUSION

The Named Plaintiffs have cited no cases which support their position. The information they request simply has no bearing on the issues raised in their complaint. Even the liberal standards of discovery are subject to reasonable limitations, and limiting discovery to the type of conduct alleged in a complaint has long been held to be an appropriate limitation. Therefore, 3M respectfully requests that the Court deny Plaintiffs' Motion to Compel Selected Race and Gender Documents.

Dated: July 5, 2005

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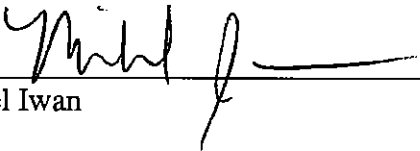
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