

STATE OF MINNESOTA  
COUNTY OF RAMSEY

EMPLOYMENT  
DISTRICT COURT  
SECOND JUDICIAL DISTRICT

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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 MOTION TO JOIN FOUR**  
) **ADDITIONAL PLAINTIFFS AND**  
) **AMEND COMPLAINT**

) [Class Action]

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**INTRODUCTION**

This Court's June 14, 2005 Phase One Scheduling Order sets January 3, 2006 as the deadline for "joining any additional parties . . . whether by amendment or third party practice." Coler Aff., Ex. 1.<sup>1</sup> Within the timeframe of this Order, four additional former and current 3M salaried employees seek joinder as named plaintiffs and plaintiffs seek to amend the First Amended Complaint to incorporate the facts relevant to the added plaintiffs and make other minor changes. Plaintiffs' proposed Second Amended Complaint, redlined to show changes from the First Amended Complaint, is attached as Exhibit 2. A clean, non-redlined version is attached to the proposed Order. Plaintiffs respectfully ask the Court to grant this Motion to Join Four Additional Plaintiffs and Amend Complaint because it is timely under the scheduling order

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<sup>1</sup> All exhibits are attached to the Affidavit of Susan M. Coler in Support of Motion to Join Four Additional Plaintiffs and Amend Complaint ("Coler Aff.") and shall be referenced hereafter as "Ex. \_\_\_."

and meets the criteria for joining additional parties and amending a complaint under Minn. R. Civ. P. 20.01 and 15.01 respectively.<sup>2</sup>

### RELEVANT FACTS AND PROCEDURAL POSTURE

The four persons for whom joinder as additional plaintiffs and amendment of the First Amended Complaint are sought are Robert W. Coats, Rosemary J. Sterrett, Mark D. Swanson, and Thomas R. Bulen. Each of these persons falls within the class definition alleged in the First Amended Complaint by original plaintiffs Clifford L. Whitaker and Michael V. Mucci. Each is a former or current 3M salaried employee who is over forty-five years of age and worked in Minnesota during the liability period in a salaried position below the level of director or salary grade 18. Coler Aff. at ¶ 3. Each claims that 3M has engaged in a pattern or practice of age discrimination that has damaged their careers. Ex. 2 at ¶¶ 1, 5-8. As did the original plaintiffs, the additional plaintiffs claim that 3M discriminated against them and against other salaried employees over the age of 45 throughout the State of Minnesota

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.

*Id.* and *passim*. Each of the additional plaintiffs is represented by plaintiffs’ counsel in this case, Sprenger & Lang PLLC. Coler Aff. at ¶ 3.

As alleged in the proposed Second Amended Complaint:

5. Robert W. Coats (“Coats”) is a 60-year-old individual (born May 27, 1945) residing in St. Paul, Minnesota, who was employed by 3M from 1969

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<sup>2</sup> Pursuant to Minn. Gen. R. Prac. 115.10, plaintiffs have proposed that defendant 3M Company stipulate to the joinder of the four additional plaintiffs and amendment of the Complaint. Coler Aff. at ¶ 2. If the defendant agrees, plaintiffs will submit the stipulation and withdraw this motion. *Id.*

through 2004, most recently in Ramsey County, Minnesota. Coats was in sales, training and management at 3M, achieving the position of Global Marketing Manager in the Industrial Tape and Specialties division in 1996. Throughout his career he typically received good evaluations. In 1999, 3M moved him from a management to sales position. Since 2001, his career at 3M has been damaged as a result of 3M's discrimination. Despite consistent exemplary performance, 3M among other things has delayed providing Coats Green Belt training, demoted him two job grades, failed to consider him for positions appropriate to his experience and performance, rated him lower than appropriate on performance reviews, and gave him a smaller percentage salary increase than younger sales people in his department. Because of this treatment and its adverse effect on his career, Coats retired from 3M in January 2005.

6. Rosemary J. Sterrett ("Sterrett") is a 57-year-old individual (born February 11, 1948), residing in Inver Grove Heights and employed by 3M in Ramsey County. Sterrett began working for 3M in 1982 and currently is a Data Administration Coordinator in the Medical division. She typically has received good reviews. Since 2001, Sterrett's career at 3M has been damaged as a result of 3M's age discrimination, including 3M giving her an unfair performance review for her work in 2004, unfairly putting her on an Informal Performance Correction Plan and telling her that her job was in jeopardy if she did not succeed in completing the plan, and giving her smaller percentage salary increases.

7. Mark D. Swanson ("Swanson") is a 54-year-old individual (born June 9, 1951) residing in River Falls, Wisconsin and employed by 3M in Ramsey County, Minnesota. He began working for 3M in 1980, initially as a facilities analyst. After completing an MBA program in Marketing in 1993, Swanson moved into marketing at 3M. He has worked in the Medical division since 1995, achieving the position of Global Market Development Manager. Since 2001, his career at 3M has been damaged as a result of 3M's discrimination, including unfair performance evaluations, being placed on corrective action plans, and a recent demotion of two job grade levels from management to an administrative position.

8. Thomas R. Bulen ("Bulen") is a 54-year-old individual (born June 23, 1951), residing in White Bear Lake, Minnesota and employed by 3M in Ramsey County, Minnesota. Bulen began working for 3M in 1985 as an Advanced Technical Service Engineer in the Medical business. 3M promoted him to Senior Technical Service Engineer in 1996 and he had a track record of receiving good evaluations. Since 2001, his career at 3M has been damaged as a result of 3M's discrimination, including 3M's unfair review of his performance in 2002 and failure to promote him.

Ex. 2. at ¶¶ 5-8.

On June 14, 2005, the Court entered its Phase One Scheduling Order, which states:

4. The deadline for joining any additional parties including third party defendants, whether by amendment or third party practice, is **January 3, 2006.**

Ex. 1 at ¶ 4. The parties currently are engaging in phase one discovery, but the deadline for completion of that phase does not occur until May 26, 2006. *Id.* at ¶ 7.

## ARGUMENT

### I. **JOINDER OF COATS, STERRETT, SWANSON, AND BULEN AS PLAINTIFFS IS APPROPRIATE UNDER MINN. R. CIV. P. 20.01**

Pursuant to Minn. R. Civ. P. 20.01:

All persons may join in one action as plaintiffs if they assert any right to relief, jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of fact or law common to all these persons will arise in the action.

The decision to grant permissive joinder is left to the discretion of the Court. *Benson-Moosbrugger v. Day*, 2002 Minn. App. Lexis 830, at \*14-15 (Minn. Ct. App. July 16, 2002) (unpublished; Ex. 3). *See also* Minn. R. Civ. P. 21 ("Parties may be dropped or added by order of the court on motion of any party or upon the court's own initiative at any stage of the action and on such terms as are just.").

Here, the four additional plaintiffs – Robert W. Coats, Rosemary J. Sterrett, Mark D. Swanson, and Thomas R. Bulen – for whom joinder is sought, all assert rights to relief on behalf of themselves and others similarly situated. In the proposed Second Amended Complaint, they allege, as did the original plaintiffs Whitaker and Mucci, that their employer 3M Company has engaged in a pattern or practice of age discrimination against them in violation of the Minnesota Human Rights Act, Minn. Stat. § 363A, *et seq.* ("MHRA"). Ex. 2 at ¶ 1. As did Whitaker and Mucci, the additional plaintiffs claim that 3M's discriminatory policies or practices with respect to performance evaluation, training, promotions, pay and terminations, represent a pattern or

practice of intentional and willful denial to them and class members of their right to equal employment opportunity in violation of the MHRA. *See id.* at ¶ 91. They further allege that 3M's treatment had a discriminatory disparate impact on themselves and the class and that punitive damages are warranted. *See id.* at ¶¶ 92-93.

Joinder of the four additional plaintiffs therefore is proper because they assert claims for relief under the MHRA with respect to and arising out of the same pattern or practice of discrimination by their employer, 3M, as alleged by Whitaker and Mucci. This pattern or practice of discrimination constitutes "the same transaction, occurrence, or series of transactions or occurrences" required by Rule 20.01.

The most significant among many common questions of fact and law that arise in the action is whether 3M in fact engaged in a pattern or practice of age discrimination as alleged. Other common questions of fact and law that arise in the action are set forth in the proposed Second Amended Complaint. *See id.* at ¶ 84.<sup>3</sup> Accordingly the requirements of Minn. R. Civ. P. 20.01 are met, making it appropriate and just to grant this motion for joinder of four additional plaintiffs. Defendant did not object to the joinder of plaintiffs Whitaker and Mucci in the original Complaint and the First Amended Complaint. It has no basis on which to object to the joinder of Coats, Sterrett, Swanson and Bulen as plaintiffs in the Second Amended Complaint.

## **II. AMENDMENT OF THE FIRST AMENDED COMPLAINT TO ADD THE FOUR ADDITIONAL PLAINTIFFS IS APPROPRIATE UNDER MINN. R. CIV. P. 15.01**

The language of Rule 15.01 of the Minnesota Rules of Civil Procedure provides that leave to amend shall be freely given:

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<sup>3</sup> The issue of whether common questions of law or fact exist for purposes of joinder is similar to the commonality question under Minn. R. Civ. P. 23. Plaintiffs, however, do not intend by this motion prematurely to ask the Court to make a Rule 23 commonality determination.

A party may amend a pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Whether to permit a plaintiff to amend pleadings “is a matter resting largely in the discretion of the court.” *Willmar Gas Co. v. Duininck*, 58 N.W.2d 197, 199 (Minn. 1953). Parties seeking to amend “must move with reasonable diligence.” *Id.* The general rule is that “amendments are to be allowed unless a party would be prejudiced as a result.” *Fore v. Crop Hail Management*, 270 N.W.2d 13, 14 (Minn. 1978). The party claiming unfair prejudice has the burden of proving it. *Brendsel v. Wright*, 221 N.W.2d 695, 697 (Minn. 1974). Further, the amendment must serve a “legal purpose,” that is, it must not be futile. *Lumbermen’s Underwriting Alliance v. Tifco, Inc.*, 465 N.W.2d 580, 584 (Minn. Ct. App. 1991) (amendment properly denied when it “would serve no legal purpose”).

The primary proposed amendments to the First Amended Complaint are as follows: the addition of new paragraphs adding facts relevant to the four proposed plaintiffs, Ex. 2, ¶¶ 5-8, 21-24, 61-63, and 81; modifications of the caption and already-existing paragraphs to reflect the addition of the four new plaintiffs, *id.* at ¶¶ 18, 58, 70; and the moving, modification and expansion of prior ¶¶ 31-32 from the First Amended Complaint to better convey the training issues with respect to all plaintiffs, *id.* at ¶¶ 42-45. None of the circumstances warranting denial of a motion to amend apply here. Plaintiffs’ motion is timely, results in no unfair prejudice to the defendant, and is not futile.

The Phase One Scheduling Order sets January 3, 2006 as the deadline for moving to amend to add parties. This motion therefore is timely in the context of the Court-approved litigation schedule, leaving no basis for any claim of lack of reasonable diligence or unfair prejudice. Moreover, 3M has immediate and ready access to all its employee files regarding

these plaintiffs and five months remain in this first phase of discovery. This allows sufficient time for any pre-certification discovery desired with respect to these plaintiffs.

The addition of these plaintiffs would not be futile. Coats, Sterrett, Swanson and Bulen are former and current 3M employees who claim they experienced discrimination through the same discriminatory systems, policies and procedures identified by original plaintiffs Whitaker and Mucci. 3M did not file a motion to dismiss based on Whitaker and Mucci's claims, and similarly cannot do so in conjunction with the claims made by Coats, Sterrett, Swanson and Bulen. These claims "serve a legal purpose" and thereby eliminate futility as a basis on which to deny plaintiffs' motion to amend.

By seeking to become named plaintiffs, Coats, Sterrett, Swanson and Bulen have shown their desire to prosecute their individual claims of discrimination against 3M. By bringing their claims on behalf of themselves and others similarly situated, they also have shown their willingness to serve as class representatives. Among other reasons, plaintiffs seek to amend the First Amended Complaint to prosecute the claims of these individual plaintiffs and to add depth to the plaintiff "bench," so-to-speak, by moderately increasing the number and diversity of potential class representatives. Addition of Coats, Sterrett, Swanson and Bulen as plaintiffs adds persons in management, technical and sales positions, at varying job grade levels and in business units and divisions other than those of Whitaker and Mucci. In at least one prior Court submission, defendant has made remarks challenging the adequacy of Whitaker and Mucci as potential class representatives. Plaintiffs vigorously dispute such remarks. Nonetheless, 3M cannot now claim unfair prejudice when the plaintiffs seek leave within the Court-designated time period to amend the First Amended Complaint to add to the "bench" of potential class representatives.


Besides adding and modifying paragraphs related to the proposed additional plaintiffs, the redlined Second Amended Complaint shows a limited number of other minor changes. These changes update and correct facts, *see* Ex. 2 at ¶¶ 2-4, 31, 60, 80, 84, and correct spelling, formatting, and paragraph numbering. Minn. R. Civ. P. 15.01 provides that leave to make such modifications should be freely given.

### CONCLUSION

For all of the above reasons, plaintiffs respectfully request the Court to grant their Motion to Join Four Additional Plaintiffs and Amend Complaint.

DATED: January 3, 2006

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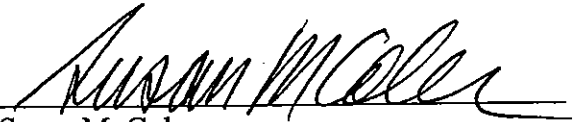
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ACKNOWLEDGMENT

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: January 3, 2006

  
Susan M. Coler