

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 AND MODIFY  
PHASE ONE SCHEDULING ORDER**

[Class Action]

**INTRODUCTION**

There comes a point where patience and accommodation no longer serve the judicial process. That point has arrived with regard to defendant 3M Company's failures to produce documents in response to Plaintiffs' Second Set of Document Production Requests.

Accordingly, plaintiffs respectfully ask the Court to grant its motion and

- compel 3M's production of all hard-copy documents by March 31, 2006;
- compel 3M's service of past due privilege and redaction logs within seven working days of its order, and production of privilege and redaction logs within two weeks of each subsequent production;
- compel production of electronic documents by February 28, 2006; and
- modify the Phase One Scheduling Order in a manner that minimizes the delay of the class certification hearing in this case.

3M's responses were due ten months ago, on March 21, 2005. Defendant has explained to the Court in prior filings that it has chosen to respond to document requests by producing documents collected from approximately 200 3M employees deemed most likely to have

responsive documents. Defendant represented in June 2005 that it anticipated completing its collection of those documents that same month.

Yet, despite plaintiffs' expressions of concern at the pace of discovery, seven months later, 3M has failed to produce *any* documents in electronic form and has produced only hard copy documents from fewer than half of the 200 targeted employees. 3M now speculates that it can complete production of hard-copy documents by the end of February. Plaintiffs ask the Court to order 3M to produce all documents existing only in hard copy by March 31, 2006, to assure production of those documents by a date certain, and to allow for expedited production of electronic documents, as requested below.

The parties agreed in May 2005 that privilege and redaction logs would be produced on a rolling basis, within a reasonable period after each production. To date, 3M produced only this month a single log for its first production on July 11, 2005. 3M stated it "expected" to provide logs for productions over the intervening months on January 20, 2006. January 20th has passed and 3M has failed to deliver. 3M has further stated that from here on it "expected" to produce privilege and redaction logs within two weeks of the underlying production. Plaintiffs seek an Order to assure that 3M meets those expectations, and promptly produces the long overdue logs.

Plaintiffs' discovery requests defined "document" as including electronic documents in their native format, and requested that 3M produce documents electronically if they existed in that format and only produce in hard copy documents not existing in electronic format. Despite plaintiffs' inquiries, 3M has failed to produce any documents in electronic format. Only recently plaintiffs have learned that defendant intended to produce very large electronic documents in hard copy rather than electronic form, to delay production of any electronic documents until after production of all hard-copy documents, and that defendant has excluded e-mail from the

electronic documents it has collected from its employees for production. In response to plaintiffs' request for production of certain electronic documents, defendant proposes to produce only non-e-mail electronic documents and through a process that would further delay production and limit plaintiffs to documents responsive to unspecified search terms. Plaintiffs seek an Order requiring 3M to produce all electronic documents, including the e-mails, of the 200 employees by February 28, 2006. 3M has the demonstrated capacity, and technology exists to facilitate electronic production well within this timeframe.

Finally, defendant's failure to timely respond to plaintiffs' discovery requests make it impossible for plaintiffs to complete discovery by the current deadline of May 26, 2006. This leaves plaintiffs with no choice but to seek a modification of the Phase One Scheduling Order. Plaintiffs seek a modified schedule that minimizes, as much as possible, the delay that defendant's failures to produce discovery have caused on the progress of this case toward class certification.

3M no doubt will attempt to excuse its failure timely to provide discovery and seek the Court's sympathy with complaints about the extent of plaintiffs' discovery requests and the time and cost it has expended in reviewing hundreds of thousands of hard-copy documents. But 3M deliberately has delayed the more efficient and economical production of electronic documents and instead chosen even to produce or prepare for production in hard-copy form documents that exist only in electronic form. By these tactics, 3M has not only needlessly made document production more difficult and delayed the progress of discovery, but unnecessarily has increased the time and expense of discovery to plaintiffs and itself. Substantial and complex litigation of this type is a routine fact of business for a corporation of 3M's size and its counsel, and 3M has the capacity, sophistication, technology and experience to perform efficient electronic production

of documents. Plaintiffs' efforts to secure prompt, efficient and economical discovery have been unavailing. Only the Court can ensure that 3M's wasteful practices are abandoned and that discovery is expeditiously completed.

In compliance with Rule 115.10, the parties have attempted to resolve their differences over these issues through telephone conferences and correspondence and plaintiffs will continue their efforts prior to the February 6, 2006 hearing. Affidavit of Susan M. Coler in Support of Motion to Compel and Modify Phase One Scheduling Order, ¶ 2. If any of these matters are resolved, the parties will notify the Court.

### **BACKGROUND**

This case commenced on December 21, 2004. Plaintiffs allege pattern or practice and disparate impact age discrimination claims on behalf of themselves and a class of approximately 7,000 current and former 3M employees, consisting of all persons who were 46 or older when employed by 3M in Minnesota in a salaried position below the level of director, or salary grade 18, at any time after May 10, 2003. Plaintiffs allege that since former CEO James McNerney arrived at 3M in 2001, if not earlier, the company has engaged in an interwoven set of personnel practices designed to benefit younger employees and to marginalize and then discard older employees. Plaintiffs further assert that the discrimination occurred with respect to performance evaluations, promotions, compensation, training and termination. *See Amended Complaint.*<sup>1</sup>

On February 17, 2005, plaintiffs served their Second Set of Document Production Requests on 3M. Coler Aff., Ex. 1.<sup>2</sup> As would be expected in this type of litigation, plaintiffs sought various types of documents that could indicate age bias in general. They further

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<sup>1</sup> The parties have stipulated to and the plaintiffs have filed a Second Amended Complaint adding four plaintiffs.

<sup>2</sup> All exhibits are attached to the Coler Affidavit and will be referenced hereafter as "Ex. \_\_\_."

