

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
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 IN OPPOSITION TO
MOTION TO COMPEL AND MODIFY
PHASE ONE SCHEDULING ORDER**

vs.

3M Company,

Defendant.

INTRODUCTION

Plaintiffs never proposed to 3M what appears to be their core request to the Court, namely that the remaining pre-class certification deadlines be adjusted by a handful of months. Factual mischaracterizations aside, this is the most disappointing aspect of Plaintiffs' Motion to Compel. Had Plaintiffs proposed an extension, it is likely that the parties could have offered a joint proposal and avoided this Motion. Plaintiffs, however, prefer to disparage 3M's substantial efforts to satisfy their mammoth and burdensome discovery requests to gain a tactical advantage and to disguise their own inactivity over the last several months. Plaintiffs cannot, in all fairness, ask for what ultimately amounts to hundreds of thousands (if not more) of pages of documents and data and then complain about the time it takes to collect, review, and produce that material. Other than a reasonable extension to the schedule, Plaintiffs' Motion should be denied.

FACTUAL BACKGROUND

Clearly, 3M and Plaintiffs have markedly different views of the facts and circumstances preceding this Motion. 3M will not waste the Court's time setting out all these differences.

Some basic facts, however, must be settled to equip the Court to decide the issues before it.

I. PLAINTIFFS SERVED OVER-BROAD DISCOVERY AND MOVED TO ADD NAMED PLAINTIFFS ON THE LAST POSSIBLE DAY.

The parties agree that a reasonable amendment to the schedule is in order. They disagree on the reason for the amendment. The record, however, makes plain that Plaintiffs' own actions in this case underlie the needed extension.

First, Plaintiffs served monstrously overbroad discovery and accompanied it with overbroad instructions and definitions. Plaintiffs demanded, for example, that 3M locate, compile, and preserve "each and all" documents and data concerning every personnel decision made since 2001, with continuing demands for supplemental production, in five broad categories (performance appraisal, training, promotion, compensation, and termination). *See generally*, e.g., Plaintiffs' Second Set of Document Production Requests (attached as Ex. A to accompanying Affidavit of Michael Iwan Regarding Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion to Compel and Modify Phase One Scheduling Order in Support of Motion to Compel and Modify Phase One Schedule ("Iwan Aff.")). Plaintiffs' demands encompass decisions affecting tens of thousands of employees and required 3M to scour through millions of pages of material gathered from throughout the company. At the same time, Plaintiffs requested that they not be inundated with marginally relevant material, a request which 3M endeavored to honor, since 3M indisputably has the right to safeguard its privileges and to prevent discovery from turning into an unwarranted fishing expedition. 3M therefore developed a comprehensive process to identify the relevant documents, conduct a privilege review, and prepare privilege logs.

Second, by waiting until the very last day to add additional Named Plaintiffs, Plaintiffs injected the equivalent of four, single-plaintiff cases into an already compressed discovery period.¹ Plaintiffs, however, fail even to acknowledge this new development as a factor affecting discovery and warranting a need for additional time. They prefer instead to style their request as attributable to 3M alone and even suggest a punitive element to their proposed relief. Such relief is not justified and not helpful to preparing this case for a timely hearing on class certification.

It is defendants' burden in these kinds of cases to endure taxing document discovery. Plaintiffs will never face reciprocal demands, but complain about the pace, volume, format, and order of materials produced and proffer indignation when such materials, organized and maintained to further the running of a business, do not happen to coincide neatly with their discovery requests. 3M trusts the Court will reject Plaintiffs' effort, in this case, to blame 3M for the natural consequences of Plaintiffs' unrestrained discovery requests, unrealistic production demands, delayed addition of new parties and more recent focus on other matters. This matter can be resolved with a sensibly revised calendar, but should not penalize 3M for its diligent efforts to respond to discovery.

II. 3M PROMPTLY PROVIDED VOLUMES OF WORKFORCE DATA IN RESPONSE TO PLAINTIFFS' FIRST SET OF DISCOVERY.

Plaintiffs' Memorandum picks up the story in the middle of discovery and thus omits mention of the fact that 3M has spent, to date, thousands of hours separately compiling and

¹ Plaintiffs stated as early as May 2005 their intent to add as a plaintiff a salaried non-exempt employee, but failed to do so until the last minute. *See* Memorandum of Law in Support of Plaintiffs' Motion to Compel at 18 (May 23, 2005). Curiously, this newly named plaintiff, Ms. Sterrett, was never identified on Plaintiffs' voluminous lists of those persons they claim are clients or in possession of relevant information. This clearly casts doubt on the veracity and reliability of Plaintiffs' own disclosures, which clearly are short of complete. Moreover, Plaintiffs' introduction of a salaried non-exempt employee as a Named Plaintiff brings to the fore a multitude of previously hypothetical questions regarding whether a class properly defined under Minn. R. Civ. P. 23 can include members with divergent, if not antagonistic, interests, such as non-exempt and exempt employees and supervisors and those supervised by them.

producing 1.31 GB of employee data from its human resources information system databases in response to Plaintiffs' First Set of Interrogatories and Document Production Requests, and that 3M has agreed to update this data as more becomes available. *See* Iwan Aff. ¶ 2; Affidavit of Kathie L. Karls ¶¶ 3, 8-12 (attached as Ex. B to Iwan Aff.). Plaintiffs have raised no complaints about the volume, pace, format, or order of 3M's production of data in response to these requests. Thus, Plaintiffs' suggestion that 3M is intentionally delaying its production of other documents and information in order to prejudice Plaintiffs is plainly inconsistent with the vast amounts of data already compiled and produced, at great effort and expense to 3M.

III. 3M HAS SHOWN SIMILAR DILIGENCE RESPONDING TO PLAINTIFFS' ADDITIONAL DEMANDS FOR UNENDING DOCUMENT DISCOVERY.

A. Plaintiffs' 94 Additional Document Requests Implicate The Records Of Virtually Every Employment Decision Made With Respect To Minnesota-Based, Salaried Employees Over The Last Five Years.

Plaintiffs' Motion involves Plaintiffs' Second Set of Document Production Requests, which includes 94 (not including subparts) wide-ranging requests on topics including "Organizational Documents," "Black Belt and Master Black Belt Training," "ALDP Training," "Age Discrimination in General," "Performance Appraisal Process," "Compensation," "Advancement," "Job Elimination Program," "Qualifications of Employees," "Named Plaintiff Documents," and "Other." *See generally* Plaintiffs' Second Set of Document Production Requests (attached as Ex. A to Iwan Aff.). These requests are preceded by a lengthy set of "Instructions and Definitions," which confirm that Plaintiffs seek virtually every document regarding any employment decision made about Minnesota-based, salaried employees at 3M over not less than five years.²

² At least 80 (of 94) document requests bear the designation "(MN Sal.)," which purportedly requires the production of "all documents concerning salaried employees both in and outside Minnesota or both salaried and hourly Minnesota employees"). *See* Plaintiffs' Second Set of Document Production Requests at 2-6 (attached as Ex. A to Iwan Aff.). "Document" itself is

