

A08-816

**STATE OF MINNESOTA
IN COURT OF APPEALS**

CLIFFORD L. WHITAKER et al.
on behalf of themselves
and all others similarly situated,

Plaintiffs/Respondents,

vs.

3M COMPANY,

Defendant/Appellant.

APPELLANT'S BRIEF

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LEGAL ISSUES

Issue 1: Does the plaintiffs' burden to establish the numerosity, commonality, typicality, and predominance requirements of Minnesota Rule of Civil Procedure 23 require proof by a preponderance of the evidence?

District Court Ruling: The District Court rejected the preponderance of the evidence standard in favor of an apparent *prima facie* evidence standard and certified a class based on allegations in the Complaint and Respondents' showing of evidence "sufficient to establish [class] evidence."

Authorities: In re Initial Pub. Offerings Sec. Litig. ("IPOS"), 471 F.3d 24 (2d Cir. 2006); In re Credit Suisse First Boston Corp. (Lantronix, Inc.) Analyst Sec. Litig., 2008 WL 512779 (S.D.N.Y. Feb. 26, 2008); In re Safety-Kleen Corp. Bondholders Litig., 2004 WL 3115870 (D.S.C. Nov. 1, 2004); Ilhardt v. A.O. Smith Corp., 168 F.R.D. 613 (S.D. Ohio 1996).

Issue 2: Does Minn. R. Civ. P. 23 require a district court to resolve evidentiary disputes and make specific findings that plaintiffs have carried their burden to prove the numerosity, commonality, typicality, and predominance requirements of Rule 23?

District Court Ruling: The District Court held that Respondents had made a showing of evidence "sufficient to establish [class] evidence," but declined to address and resolve 3M's challenge to the validity of Respondents' class evidence.

Authorities: In re New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6 (1st Cir. 2008); IPOS, 471 F.3d 24 (2d Cir. 2006); Blades v. Monsanto Co., 400 F.3d 562 (8th Cir. 2005); Szabo v. Bridgeport Machines, Inc., 249 F.3d 672 (7th Cir. 2001).

Issue 3: Did the District Court improperly certify the class based on allegations in the Complaint and “class” evidence that cannot satisfy the preponderance of the evidence standard in an age case, as a matter of law?

District Court Ruling: Although 3M demonstrated that Respondents’ statistics and other evidence were not common evidence of age discrimination, because the record showed that Respondents’ evidence was more likely the result of age-neutral decision making than of company-wide age discrimination, the District Court certified the class based on Respondents’ allegations and their *prima facie* showing of “class” evidence.

Authorities: Evers v. Alliant Techsystems, Inc., 241 F.3d 948 (8th Cir. 2001); Tagatz v. Marquette Univ., 861 F.2d 1040 (7th Cir. 1988); Cope v. McPherson, 594 F. Supp. 171 (D.D.C. 1984); Sandstad v. CB Richard Ellis, Inc., 2001 WL 611174 (N.D. Tex. June 4, 2001); Connolly & Peterson, *Use of Statistics in Equal Employment Opportunity Litigation* (2007); United States Department of Labor, Bureau of Labor Statistics, *Number of Jobs Held, Labor Market Activity, and Earnings Growth Among the Youngest Baby Boomers: Results from a Longitudinal Survey* (June 27, 2008).

STATEMENT OF THE CASE

Respondents claim that 3M engaged in a pattern and practice of age discrimination in promotions, compensation, training, and terminations against salaried exempt employees age 46 and older. After extensive class discovery and a hearing at which the parties' contentions and evidence concerning the class issues were presented, on April 11, 2008, the Ramsey County District Court (The Honorable Gregg E. Johnson) certified a class of salaried, exempt 3M employees ages 46 and over, many of whom are in managerial or decision making positions.¹ See Findings and Order Certifying Class and Appointing Class Counsel, April 11, 2008 ("April 11 Order") (A. 62-65).² On May 14, 2008, the District Court issued a 7-page Memorandum Opinion. See Memorandum of Law In Support of Order Certifying Class and Appointing Class Counsel ("May 14 Memorandum") (A. 66-72). On June 26, 2008, this Court granted 3M's Petition for Discretionary Review of the District Court's class certification order. This Court found that "the District Court's class certification order is questionable," and further observed that "this appeal raises important legal issues regarding the minimum quantum and nature of evidence necessary to support findings of commonality and other Rule 23

¹ The class is defined as "[a]ll persons who were age 46 or older when employed by 3M in Minnesota in a salaried exempt position below PS grade 180 at any time on or after May 10, 2003, and who did not sign a document on or about their last day of employment purporting to release claims arising out of their employment with 3M." April 11 Order.

² Appendix citations are referenced as "A. ____." Appendix to Appellant's Brief – Volume I has been submitted in redacted and unredacted versions which are identical in content and pagination, except for redactions to protect confidential information filed under seal in the District Court. Cases not published in a formal reporter also are included in the Appendix at A. 336-564.

