

STATE OF MINNESOTA  
COUNTY OF RAMSEY

EMPLOYMENT  
DISTRICT COURT  
SECOND JUDICIAL DISTRICT

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 SELECTED RACE AND  
GENDER DOCUMENTS**

[Class Action]

**INTRODUCTION**

In their Second Set of Document Production Requests plaintiffs requested, and defendant 3M Company objected to producing, documents concerning analyses of the impact of various 3M policies by race and gender. Plaintiffs seek these documents *not* to establish that 3M discriminates by race and gender and then to bootstrap an argument that they must also discriminate by age. Rather, plaintiffs seek the documents to examine how 3M *responded* to disparities, if they occurred, in the impact of 3M policies on race and gender. Plaintiffs believe that 3M took action when analyses showed disparities in the impact of its policies on protected groups by race and gender, but did not take similar action when analyses showed disparities in the impact of its policies on the protected group of older employees.

This evidence, which would be highly probative to proving intentional age discrimination as well as 3M's reckless disregard for the rights of older employees necessary for a class-wide claim for punitive damages, would be common to all class members. Accordingly, the document requests at issue are reasonably calculated to lead to the discovery of admissible evidence at the class certification stage and the Court should order 3M to produce the responsive documents.

## BACKGROUND<sup>1</sup>

At issue are Request Nos. 26, 35, 43, 50, 55, 63, and 89 from plaintiffs' Second Set of Document Production Requests. Appendix A, attached to this memorandum, sets forth the requests, as well as 3M's objections and responses. *See also* Affidavit of Susan M. Coler in Support of Plaintiffs' Motion to Compel Selected Race and Gender Documents ("Coler Aff."), Ex. 1.<sup>2</sup> Each of the requests pertain to one or more of the policies and procedures challenged in this lawsuit:

Request No. 26:	Black Belt, Master Black Belt
Request No. 35:	ALDP training
Request No. 43:	PMP training
Request No. 50:	overall or component Performance Appraisal ratings
Request No. 55:	compensation or change in compensation, or any element thereof
Request No. 63:	promotions
Request No. 89:	Performance Appraisal ratings, compensation, advancement, length of tenure, awards, or otherwise as impacting "success at 3M"

Appendix A. Each of the requests seeks documents concerning the impact of those policies and procedures on employees by age, race or gender. For example, Request No. 35 seeks "All documents concerning the age, race, or gender distribution of employees receiving ALDP training" and Request No. 63 seeks "All documents concerning the age, race, or gender distribution of employees receiving promotions." *Id.*

Each of the requests was followed by the word "(Policy)." *Id.* In the "Instructions and Definitions" included in plaintiffs' Second Set of Document Production Requests, plaintiffs instructed 3M to limit its response to such requests as follows:

---

<sup>1</sup> Plaintiffs provided an extensive statement of facts at pages 2 through 8 of the section titled "Background" in its Memorandum of Law in Support of Plaintiffs' Motion to Compel, filed on May 23, 2005. That statement provides an appropriate overall factual background for this motion as well. Rather than repeat the statement, plaintiffs incorporate it by reference.

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

Requests followed by “(Policy)” seek documents concerning 3M’s policies, practices, patterns of decision-making, or other matters of general application. They do not seek documents concerning only particular named individuals, except to the extent that such documents are encompassed within another document production request and except to the extent they concern a named plaintiff.

Ex. 2 at 6. 3M agreed to produce responsive documents relating to age, but refuses to produce documents pertaining to race or gender. It objects in each instance that “a request for information relating to ‘race or gender’ is not relevant, under Minn. R. Civ. P. 26.02(a), to this pending age-discrimination action.” Appendix A.

Pursuant to their obligations under Minn. Rule 115.10, the parties have conferred about this motion and have not resolved the matter. Coler Aff., ¶ 2. Should any resolution occur in the course of the briefing of the motion, plaintiffs will so inform the Court.

### ARGUMENT

#### **I. LIBERAL DISCOVERY STANDARD APPLIES TO THE REQUESTS AT ISSUE**

Minn. R. Civ. P. 26.02(a) establishes the scope of discovery in civil actions:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . . The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Such discovery rules warrant liberal construction. See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (directing “a broad and liberal treatment” of discovery rules); *Erickson v. Coast Catamaran Corp.*, 414 N.W.2d 180, 183 (Minn. 1987) (noting that rules ““should be liberally construed in the interests of justice””) (quoting *Love v. Anderson*, 61 N.W.2d 419, 421 (Minn. 1953)).

3M challenges the requested discovery on the grounds of relevance. Rule 401 of the Minnesota Rules of Evidence defines "relevant evidence" to mean "evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (Emphasis added.) In *Boland v. Morrill*, 132 N.W.2d 711 (Minn. 1965), the Minnesota Supreme Court further elaborated:

If the offered evidence permits an inference to be drawn that will justify a desired finding of fact, it is relevant. Reduced to simple terms, any evidence is relevant which logically tends to prove or disprove a material fact in issue.

*Id.* at 719. As with discovery rules, Minnesota practice also adopts a liberal approach to the evidentiary concept of relevancy. Minn. R. Evid. 401 (Committee Comment—1977).

A broad approach to discovery is particularly important in employment discrimination cases. As explained in *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988):

The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives. Judge Posner has explained:

defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it. . . . A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance . . . .

*Id.* at 1103 (citation omitted). See also *Potter v. Ernst & Young*, 622 N.W.2d 141, 145 (Minn. Ct. App. 2001) ("[D]iscriminatory intent ... [is] difficult to prove by direct evidence. Thus, an employee may demonstrate a causal connection 'by evidence of circumstances that justify an inference of [discriminatory] motive.'" (quoting *Dietrich v. Canadian Pac.*, 536 N.W.2d 319, 327 (Minn. 1995)); *Capellupo v. FMC Corp.*, 1988 U.S. Dist. LEXIS 3792, at \*18-19 (D. Minn. May 3, 1988) (noting that proof of intent in employment discrimination cases is "so vital and yet so difficult to obtain") (citation omitted).

Accordingly, plaintiffs have the burden of showing that the requested evidence either has “any tendency” to support the common issues raised by the claims of the plaintiffs and class members, or is reasonably calculated to lead to the discovery of such evidence. Plaintiffs easily meet this standard.

## **II. THE REQUESTED EVIDENCE IS RELEVANT TO THE COMMON ISSUES OF DISCRIMINATORY INTENT AND PUNITIVE DAMAGES**

As stated above, plaintiffs seek documents concerning the impact of 3M policies and procedures on employees by race and gender. Plaintiffs also sought documents concerning impact on employees by age, and 3M did not object to producing those documents. Plaintiffs seek race and gender documents to determine the kind of response 3M made to disparities, if they existed, involving protected classes other than age.

Plaintiffs are confident that 3M has made efforts to monitor the race, gender, and age distribution of persons selected in its personnel programs. On its website, it states, “Minority and female employees have been well represented in 3M’s ongoing Six Sigma training . . .” Ex. 3. It almost certainly similarly has tracked the makeup of persons selected for its ALDP program, for promotions, and for job eliminations. Indeed, as to job eliminations, it prepares lists showing the ages of persons selected and not selected as required by the federal Older Workers Benefits Protection Act (“OWBPA”), 29 U.S.C. § 626(d). *Coler Aff.*, ¶ 3; Ex. 4. In its responses to plaintiffs’ requests, 3M does not deny that responsive documents exist.

Plaintiffs also are confident that 3M’s response when its analyses showed potential adverse impact against women or racial minorities differed dramatically from its response when analyses showed adverse impact against older workers. For example, if 3M analyzed the OWBPA lists that it prepared, it would have found blatant age disparities. *Id.*, ¶ 4; Ex. 5. Nonetheless, 3M proceeded with those job eliminations. The comments on its website suggest that it would not have tolerated

situations, such as occurred with IT Infrastructure, in which all 11 persons selected in a job elimination process were women or racial minorities, although it obviously did so when all 11 were between the ages of 55 and 60. *Id.*, ¶¶ 3, 4; Exs. 4, 5.

From this differential conduct, a fact-finder could infer a specific company-wide intent to discriminate against older employees. *See Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 77 (2d Cir. 2004) (affirming jury verdict of willfulness where an employer had used the 80% test adopted by the EEOC to determine whether its decisions had an adverse impact on women and minorities, but had failed to use the 80% test to determine whether its decisions had an adverse impact on older employees and had failed to otherwise adequately monitor against subjective decisions adverse to older employees), *vacated and remanded on other grounds sub nom. KAPL, Inc. v. Meacham*, \_\_\_ U.S. \_\_\_, 125 S. Ct. 1731 (2005); *see generally International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (“Proof of discriminatory motive . . . can . . . be inferred from the mere fact of differences in treatment.”). Plaintiffs seek this discovery to establish the common question whether 3M systemically and intentionally discriminated against older employees.

3M’s response to race and gender disparities also is relevant to establishing the common question whether 3M is liable for a class-wide claim for punitive damages. Plaintiffs can prove that 3M acted systemically with “deliberate disregard” for the rights of older employees to be free of age discrimination through evidence that 3M knew how to respond to disparities involving other protected classes, and, in fact, made efforts to remedy race and gender disparities, but made no such efforts on behalf of older employees. *See Minn. Stat. § 549.20 subd. 1* (punitive damages are available when the “acts of the defendant show deliberate disregard for the rights or safety of others”).

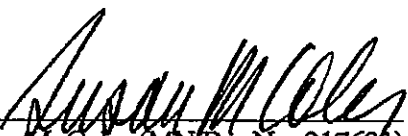
Plaintiffs seek 3M's own analyses of the impact of its decisions on its employees in terms of race and gender as well as age. 3M has not objected that production would be unduly onerous. The Court should grant plaintiffs' motion, particularly given the courts' mandate to apply discovery rules liberally and the low threshold needed to establish relevance. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 n.18 (1973) (plaintiff must be "given a full and fair opportunity to demonstrate by competent evidence" that reasons for action are discriminatory).

### CONCLUSION

For the above reasons, plaintiffs respectfully request the Court to grant their Motion to Compel Selected Race and Gender Documents and to order 3M to respond fully to Request Nos. 26, 35, 43, 50, 55, 63, and 89 from Plaintiffs' Second Set of Document Production Requests.

DATED: June 28, 2005

SPRENGER & LANG, PLLC

By:   
Susan M. Coler (MN Bar No. 217621)  
Mara R. Thompson (MN Bar No. 196125)  
310 Fourth Avenue, S., Suite 600  
Minneapolis, MN 55415  
(612) 871-8910  
(612) 871-9270 [facsimile]

Michael D. Lieder (DC Bar No. 444273)  
Thomas J. Henderson (DC Bar No. 476854)  
Mark Amadeo (DC Bar No. 479355)  
Eden Brown Gaines (GA Bar No. 282098)  
1400 Eye St., N.W., Suite 500  
Washington, D.C. 20005  
(202) 265-8010  
(202) 332-6652 [facsimile]

AARP FOUNDATION LITIGATION  
Thomas W. Osborne (DC Bar No. 428164)  
Daniel B. Kohrman (DC Bar No. 394064)  
Laurie A. McCann (DC Bar No. 461509)  
601 E Street, N.W.  
Washington, D. C. 20049

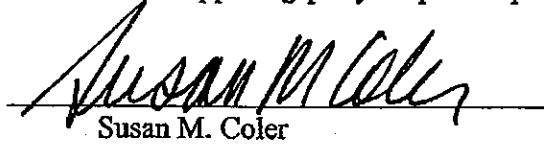
(202) 434-2060  
(202) 434-6424 [facsimile]

*Attorneys for Plaintiffs*

**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: June 28, 2005

  
Susan M. Coler

Appendix A

Excerpts from Defendant's Responses to Plaintiffs' Second Set of Document Production Requests

Request No.	Request	Objection	Response
26	All documents concerning the age, race, or gender distribution of BBs and MBBs. (MN Sal.) (Policy)	3M further objects to Request No. 26 on the grounds that a request for information relating to "race or gender" is not relevant, under Minn. R. Civ. P. 26.02(a), to this pending age-discrimination action. 3M also asserts its privilege objection, previously stated.	Subject to, and without waiving and without limitation to, these objections and the foregoing General Objections, 3M states that if non-privileged, responsive documents exist regarding the age distribution among MBBs and BBs who are or were salaried, exempt employees in Minnesota from January 1, 2001, to the present, they will be produced.
35	All documents concerning the age, race, or gender distribution of employees receiving ALDP training. (MN Sal.) (Policy)	3M further objects to Request No. 35 on the grounds that a request for information relating to "race or gender" is not relevant, under Minn. R. Civ. P. 26.02(a), to this pending age-discrimination action. 3M also asserts its privilege objection, previously stated.	Subject to, and without waiving and without limitation to, these objections and the foregoing General Objections, 3M states that if non-privileged, responsive documents exist regarding the age distribution of the ALDP I learning program participants who are or were salaried, exempt employees in Minnesota from January 1, 2001, to the present, they will be produced.
43	All documents concerning the age, race, or gender distribution of employees receiving PMAP training. (MN Sal.) (Policy)	3M further objects to Request No. 43 on the ground that "training" as applied to Pre-MAP is ambiguous, because Pre-MAP is an assessment and not a training program. 3M also objects to this Request on the grounds that a request for information relating to "race or gender" is not relevant, under Minn. R. Civ. P. 26.02(a), to this pending age-discrimination action. 3M also reasserts its privilege objection, previously stated.	Subject to, and without waiving and without limitation to, these objections and the foregoing General Objections, 3M states that if non-privileged, responsive documents exist regarding the age distribution of salaried, exempt employees who were participants in the Pre-MAP program in Minnesota from January 1, 2001, to the present, they will be produced.

Appendix A

Excerpts from Defendant's Responses to Plaintiffs' Second Set of Document Production Requests

Request No.	Request	Objection	Response
50	All documents concerning the distribution of overall or component Performance Appraisal ratings by age, race, or gender. (MN Sal.) (Policy)	3M further objects to Request No. 50 to the extent that it is, at least on its face, undefined in temporal scope. 3M also objects to this Request on the grounds that a request for information relating to "race or gender" is not relevant, under Minn. R. Civ. P. 26.02(a), to this pending age-discrimination action. 3M also reasserts its privilege objection, previously stated.	Subject to, and without waiving and without limitation to, these objections and the foregoing General Objections, 3M states that if non-privileged, responsive documents exist concerning the age distribution of performance appraisal ratings for salaried, exempt employees in Minnesota from January 1, 2001, to the present, they will be produced.
55	All documents concerning the distribution of compensation or change in compensation, or any element thereof, by age, race, or gender. (MN Sal.) (Policy)	3M further objects to Request No. 55 to the extent that it is, at least on its face, undefined in temporal scope. 3M also objects to this Request on the grounds that a request for information relating to "race or gender" is not relevant, under Minn. R. Civ. P. 26.02(a), to this pending age-discrimination action. 3M also objects to this Request on the grounds that the terms "distribution of compensation," "change in compensation," and "any element thereof" are ambiguous. 3M also reasserts its privilege objection, previously stated. 3M also objects to this Request insofar as it seeks information about salaried positions above Job Band L3. 3M will produce information for positions up through Job Band L3 only.	Subject to, and without waiving and without limitation to, these objections and the foregoing General Objections, 3M states that if non-privileged, responsive documents exist concerning the age distribution of compensation or changes in compensation, to the extent 3M is able to interpret these terms, for salaried, exempt employees in Minnesota from January 1, 2001, to the present, they will be produced.

Appendix A

Excerpts from Defendant's Responses to Plaintiffs' Second Set of Document Production Requests

Request No.	Request	Objection	Response
63	All documents concerning the age, race, or gender distribution of employees receiving promotions. (MN Sal.) (Policy)	3M further objects to Request No. 63 to the extent that it is, at least on its face, undefined in temporal scope. 3M also objects to this Request on the grounds that a request for information relating to "race or gender" is not relevant, under Minn. R. Civ. P. 26.02(a), to this pending age-discrimination action. 3M also reasserts its privilege objection, previously stated.	Subject to, and without waiving and without limitation to, these objections and the foregoing General Objections, 3M states that if non-privileged, responsive documents exist concerning the age distribution of salaried, exempt employees in Minnesota who were or are promoted from January 1, 2001, to the present, they will be produced.
89	All documents concerning analyses of the impact of age, race, or gender on success at 3M, whether measured in terms of Performance Appraisal ratings, compensation, advancement, length of tenure, awards, or otherwise. (MN Sal.) (Policy)	3M further objects to Request No. 89 to the extent that it is, at least on its face, undefined in temporal scope. 3M also objects to the Request on the grounds that a request for information relating to "race or gender" is not relevant, under Minn. R. Civ. P. 26.02(a), to this pending age-discrimination action. 3M also objects to this Request on the grounds that the terms "documents concerning analysis of the impact of age" and "success at 3M" are ambiguous. Such ambiguity renders this Request overly broad and unduly burdensome. 3M also objects to the Request insofar as it appears to seek individual documentation about individual employees (other than those concerning the Named Plaintiffs). Pursuant to the agreement between parties, 3M will produce only information and documentation that go, potentially, to Rule 23 issues. 3M also reasserts its privilege objection, previously stated.	Subject to, and without waiving and without limitation to, these objections and/or the foregoing General Objections, 3M states that it is unaware of the existence of any responsive documents - at least insofar as 3M understands this Request. This Response, however, is not intended to limit and/or preclude in any way an expert witness' analysis, or other witness testimony.