

**STATE OF MINNESOTA  
IN SUPREME COURT**

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Clifford L. Whitaker et al., on behalf of themselves  
and all others similarly situated,

Respondents

vs.

3M Company,

Petitioner

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**PETITION FOR PARTIAL REVIEW  
OF DECISION OF COURT OF APPEALS**

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Appellate Court Case No. A08-0816

Date of Filing of Court of Appeals Decision: April 28, 2009

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**SPRENGER & LANG, PLLC**

Susan M. Coler (#217621)  
310 Fourth Avenue, So.  
Minneapolis, MN 55415  
Telephone: (612) 871-8910

Michael D. Lieder  
1400 Eye Street N.W., Suite 500  
Washington, D.C. 20005  
Telephone: (202) 265-8010

**Attorneys for Respondents**

**DORSEY & WHITNEY LLP**

Thomas Tinkham (#110176)  
Paul B. Klaas (#56327)  
Holly S.A. Eng (#238028)  
Ryan E. Mick (#311960)  
Suite 1500, 50 South Sixth Street  
Minneapolis, MN 55402-1498  
Telephone: (612) 340-2886

**Attorneys for Petitioner 3M Company**

Petitioner 3M Company ("3M") requests partial review of the above-entitled decision of the Court of Appeals on the following grounds:

**I. Statement of the Legal Issue**

*Having correctly determined that putative class plaintiffs must establish the Rule 23 elements by a preponderance of the evidence, was the Court of Appeals required to remand, even where the evidence shows that Respondents' "class evidence" in this age discrimination case cannot satisfy the Rule 23 elements of commonality and predominance as a matter of law?*

In accord with the overwhelming weight of persuasive federal precedent, the Court of Appeals correctly held that putative class plaintiffs must prove, by a preponderance of the evidence, that the Rule 23 requirements are met, and that courts must resolve the factual disputes relevant to the class-certification requirements, including disputes among expert witnesses. PA.12-13. 3M does not seek review of these aspects of the Court of Appeals' decision.

Having adopted the correct legal standard, however, the Court of Appeals, as "an error correcting court," deferred application of the correct Rule 23 standards to the evidence before it and remanded the case for further proceedings. PA.16 at n.1. 3M respectfully urges this Court to do what the Court of Appeals did not do. The class evidence was fully developed and is in the record. That evidence is and always will be insufficient to satisfy the Rule 23 commonality and predominance requirements as a matter of law. By taking up this appeal, this Court will not usurp the role of trial court, but will answer an important, unresolved question and will resolve an issue of statewide impact, which is likely to recur.

**II. Statement of Rule 117 Criteria**

Further review of this issue satisfies two of the four criteria under Minn. R. Civ. App. P. 117, subd. 2. How the Rule 23 evidentiary standard should be applied to the parties' evidence in this age discrimination case is an important question upon which this Court should rule. See Minn. R. Civ. App. P. 117, subd. 2(a). Because orders under Rule 23 normally are not appealable, issues concerning class certification generally evade review. Indeed, it has been 23 years since this Court spoke substantively on any issue relating to class certification. During that period, class actions have become a significant practice in the district courts, but with little guidance. Class lawsuits invariably require a significant

investment of time and resources by parties and the Courts. This case has been ongoing for nearly four and a half years, has cost tens of millions of dollars, and has occupied innumerable hours of court time. This Court can rule now, and as a matter of law, on whether Respondents' "class evidence" of age discrimination will ever satisfy the Rule 23 elements. This is particularly true with respect to the jurisprudence of age discrimination class actions, an area as yet undeveloped in Minnesota and elsewhere. The Respondents maintain that the class elements can be satisfied by means of evidence that lacks a baseline and compares employees who are not similarly situated in their career timelines. 3M maintains that such evidence fails as a matter of law. Thus this case presents the question of whether the *universal, but non-discriminatory*, dynamics of age (*i.e.*, declining promotion rates and slower salary increases) can legally suffice to "bridge the gap" between an individual claim of age discrimination and the existence of a class of similarly situated employees. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157-58 (1982).

By answering this question, this Court can provide important guidance to litigants and the district courts regarding the nature of the "rigorous analysis" required for Rule 23 motions, and particularly in age discrimination class actions. *See* Minn. R. Civ. App. P. 117, subd. 2(d)(1). Such guidance will have statewide impact. *See* Minn. R. Civ. App. P. 117, subd. 2(d)(2). Absent that guidance, questions regarding application of the preponderance of the evidence standard in putative age class actions are likely to recur, particularly given the aging "baby boomer" generation, as the universal dynamics of age affect more workers in the coming years. *See* Minn. R. Civ. App. P. 117, subd. 2(d)(3).

### **III. Statement of the Case**

Respondents initiated this putative class action against 3M in 2004, claiming that 3M has engaged in a pattern and practice of age discrimination in employment in violation of the Minnesota Human Rights Act since 2001. *See* Minn. Stat. § 363A.08, subd. 2. In November 2007, Respondents moved for certification of a class of Minnesota salaried exempt employees over the age of 46. Statistical evidence in such a case is often required to "bridge the gap" between individual claims of discrimination and the existence of a class of similarly situated employees. PA.14. For this purpose, Respondents relied on the opinion of statistician, Dr. Janet R. Thornton, who described alleged statistical "disparities" in

performance appraisals, training selections, promotions, compensation, and terminations (collectively, “outcomes”) between employees under the age of 46 and those 46 and older. PA.3. Dr. Thornton assumed that, in the absence of discrimination, there should be no differences in outcomes between older and younger employees in the same job grade, and that any differences, therefore, were evidence of age bias. PA.187, 191. Dr. Thornton never considered all of 3M’s performance appraisals in her analyses, assuming, without evidence, that those appraisals were “tainted” because they reflected “disparities” between older and younger employees. PA.4, 67, 140, 193.

3M presented un rebutted evidence showing that Respondents could not demonstrate a shared experience of discrimination because most putative class members experienced overwhelmingly *favorable* outcomes. The same “disparities” observed by Dr. Thornton have been present at 3M since at least 1975 and have resulted in a workforce in which older workers occupy the vast majority of 3M’s senior positions (more than 81% of 3M’s director and officer level positions and more than 92% of the 105 highest “Executive Conference” positions); make most of the employment decisions; and earn much more compensation, on average, than comparable younger workers. PA.44, 98, 100-02, 202.

3M also pointed out the fundamental flaw in Respondents’ class evidence: Because age is not an immutable characteristic like race or gender, differences between older and younger workers like those alleged by Respondents *are expected* in any workplace *in the absence of discrimination*. PA.86-94, 128, 39. Respondents’ and 3M’s experts all agree on this key point. PA.39, 64, 150, 152-54, 180, 184. It is well established that, absent discrimination, promotions generally occur more frequently earlier in an employee’s career, rather than later. Further, employees develop and advance at different rates, and the “best” employees are promoted more quickly. Over time, the “best” employees are promoted out of any given job grade, leaving more slowly progressing workers to compete against the “best” incoming workers as they, in turn, rise through the ranks. PA.118, 175-78. *See, e.g., Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 958-59 (8th Cir. 2001) (“[B]ecause successful employees tend to be promoted, low performers at any level will tend to be older than others at the same level.”). Rates of compensation growth also slow for older employees as their total compensation grows over time. PA.39, 109-11, 165,

180, 182, 184, 208-10, 226. Thus, older workers generally receive smaller “percentage” raises than when they were younger, although they earn more total compensation than younger workers. *See, e.g., Tagatz v. Marquette University*, 861 F.2d 1040, 1045 (7th Cir. 1988) (“[S]alaries tend to rise rapidly in the early stages of their career and to reach a plateau....The phenomenon of diminishing returns to years of experience is well documented.”). Because such differences are expected, they cannot justify class treatment under Rule 23: Unless these expected, non-discriminatory differences are accounted for, such “disparities” do not suggest that a plaintiff’s personal age discrimination claim is common to or typical of any other employees’ experiences.

The district court granted Respondents’ class motion, apparently holding that they had made a sufficient *prima facie* showing of evidence to establish evidence of common questions of discrimination. PA.25. The court never addressed the shortcomings in Respondents’ evidence or considered 3M’s evidence. Instead, it deferred to the “merits” phase any consideration of such evidence. PA.26.

The Court of Appeals granted 3M’s petition for discretionary review of the district court’s class certification order on June 26, 2008, and issued its decision on April 28, 2009. It held that putative class plaintiffs must prove, by a preponderance of the evidence, that the certification requirements of the rule are met, and that district courts must resolve factual disputes relevant to class-certification requirements, including disputes among experts. The Court of Appeals reversed the district court’s class certification order and remanded the case for further proceedings.

#### **IV. Statement Regarding Why Review Should Be Granted**

Although the Court of Appeals set forth the correct legal standard under Rule 23, it declined to apply that standard to the evidence, citing its role as an error-correcting court. PA.16 at n.1. The complete record before the Court of Appeals, however, demonstrated that Respondents could not satisfy the Rule 23 elements. Clearly, the Court of Appeals – and now this Court – may and should apply the Rule 23 standards and dispose of Respondents’ class motion. *See, e.g., In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) (“[R]emand is not appropriate because the Plaintiffs’ own allegations and evidence demonstrate that the Rule 23 requirement of [predominance] cannot be met

under the standards as we have explicated them.”). It is important for the development of Minnesota’s class action jurisprudence, particularly in age cases, that district courts receive this Court’s guidance concerning the application of the preponderance of the evidence standard to the requirements of commonality and predominance.


Respondents’ statistical model ignored the changes all employees naturally experience over their careers. Such an analysis, which merely assumes that employment outcomes should be consistent for “older” and “younger” employees in each employment level, at any given point in time, is fundamentally flawed. Differences in outcomes are expected in the absence of discrimination. Absent a baseline of expected, non-discriminatory differences, the mere fact of observed “disparities” cannot link a plaintiff’s personal claim to a putative class of similarly situated employees. That is, such differences cannot be considered evidence of a shared experience of discrimination among “older” employees. There is no dispute that Respondents did not provide a baseline of expected differences in this case. Further, where older employees occupy the vast majority of senior positions and are paid higher salaries by *any* measure, a putative class made up of those employees cannot share a common experience of discrimination. Such evidence cannot satisfy the commonality and predominance requirements by a preponderance of the evidence, as a matter of law. This case would allow this Court to provide guidance that statistics simply assuming no differences between younger and older employees in employment performance are inadequate to “bridge the gap” between individual age discrimination claims and putative class claims.

**V. Conclusion**

The petition for partial review should be granted for the reasons stated herein.

Dated: May 28, 2008

Respectfully submitted,  
DORSEY & WHITNEY LLP

  
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Thomas Tinkham (#110176)  
Paul B. Klaas (#56327)  
Holly S.A. Eng (#238028)  
Ryan E. Mick (#311960)

**Attorneys for Petitioner 3M Company**