

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

CASE TYPE: Employment

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

Court File No. C4-04-12239
(The Honorable Gregg E. Johnson)

Plaintiffs,

vs.

3M Company,

Defendant.

**DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION**

Dated: October 23, 2007

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INTRODUCTION

Plaintiffs' evidence fails to establish the requirements of Rule 23 because it fails to make any showing that 3M's older workers, as a group, are treated adversely. Plaintiffs' evidence begs the question: What would the 3M workforce (or any other) look like in the absence of discrimination? This is a central, but totally unanswered, question at the heart of Plaintiffs' motion for class certification. Regardless what theories, statistics, and anecdotes they might offer, Plaintiffs' evidence simply is not evidence of class-wide age discrimination, as is required to carry their burden to establish the requirements of Minn. R. Civ. P. 23, unless it shows that the experiences of 3M's older workers – as a “class” – have been different than expected in a non-discriminatory environment. Whatever else some piece of evidence might suggest, unless it first addresses that fundamental question, it is not common or typical evidence of a centralized policy or practice of age discrimination. In their brief, however, Plaintiffs do not address this fundamental question because the answer is clear: *Nothing in 3M's workforce demographics suggests class-wide discrimination. On the contrary, the overwhelmingly positive group outcomes for 3M's older workers, which compare favorably to all available benchmarks, actually demonstrate that there is no class-wide discrimination.* For example:

- Older employees occupy the vast majority of senior positions in the company, and are much more highly represented in higher grades and director positions than their representation in the employee population as a whole;
- Older employees have higher salaries, earn more discretionary pay, and receive more stock options than younger, comparably situated employees;
- Older employees make most of the employment-related decisions, including performance evaluations, and developed and “own” most of the systems and processes that affect employment outcomes and that are challenged by Plaintiffs;
- Older workers increased as a percentage of the workforce and the average age of the 3M workforce rose during the putative class period.

Plaintiffs ignore these basic, undisputed facts because they demonstrate, at the most significant levels, the implausibility of their pattern and practice claim and the absence of any class evidence necessary to carry their burden under Rule 23.

Moreover, Plaintiffs rest their case on their assertion that former CEO James McNerney instituted top-down policies and practices based on age bias; however, the statistical evidence demonstrates no such “McNerney Effect.” 3M’s older employees did not fare worse during McNerney’s tenure. If anything, they fared better. In fact, they did better, on average, than older employees in the American workforce at large, both during and prior to the putative class period.

Plaintiffs focus much of their argument on 3M’s succession planning, but this misses the mark. Unless a company had no plans to continue as a going concern, one would expect it to search for “young leaders” and try to “identify talent earlier in careers,” and then devote resources to “develop and reward leadership talent” in order to “develop the best generation of leaders” possible to ensure the company’s future. That 3M made such investments does not support Plaintiffs’ contention that age discrimination was its standard operating practice. It simply shows that 3M is planning for the perpetuation of the Company far into the future.

Plaintiffs have no answer to these basic realities. Rather, they attempt to manufacture class evidence where none exists. They warp reasonable succession planning into allegations of age bias. They make the unbelievable suggestion that 3M’s supervisors and managers have no decision making authority, and that tens of thousands of promotion, training, compensation, and termination decisions are made by 3M’s top executives. They offer a misleading “snapshot” statistical analysis that creates an illusion of discrimination by omitting obviously relevant explanatory factors like performance, experience, and potential, and deliberately ignoring 3M’s highest achieving older employees. They disregard the fact that the programs and systems they attack were created by, and are managed and implemented by, other putative class members.

The result of Plaintiffs' machinations is a wholly arbitrary and unworkable "class" composed of alleged victims and victimizers, the vast majority of whom (according to Plaintiffs' own "shortfall" analyses) have no claims for discrimination. Because Plaintiffs have no evidence that age discrimination was 3M's company-wide practice, as they must to satisfy the requirements of Rule 23, 3M respectfully requests that the Court deny their motion for class certification.

ARGUMENT

A. Rule 23 Standard

A Minnesota court may not certify a class unless that class satisfies the requirements of Minn. R. Civ. P. 23. The Court must first find the existence of a precisely defined class. Irvin E. Schermer Trust v. Sun Equities Corp., 116 F.R.D. 332, 335 (D. Minn. 1987). Next, the putative class must satisfy all four mandatory requirements of Rule 23.01: numerosity, commonality, typicality, and adequacy of representation. See Lewy 1990 Trust v. Inv. Advisors, Inc., 650 N.W.2d 445, 451-52 (Minn. App. 2002). Finally, the action must also come within one of the categories described in Rule 23.02. See id. at 455. Plaintiffs bear, at *all* times, the burden of proof as to *all* elements. Cf. Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994).¹

To determine the propriety of class certification, the Court must undertake a rigorous analysis of Plaintiffs' claims. See Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS § 3.7, at 265 (4th ed. 2002) (citing Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147 (1982)). Plaintiffs fail to mention, and would have the Court ignore, this requirement. They do so because a rigorous analysis of their arguments and evidence demonstrates that they cannot carry their burden to establish the prerequisites of Rule 23.

¹ Because of the similarities between Federal Rule 23 and Minnesota Rule 23, Minnesota courts look to federal decisions for guidance. See DLH, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997).

1. Plaintiffs must establish the Rule 23 elements by a preponderance of evidence.

Plaintiffs bear the burden of establishing that the putative class satisfies each of the Rule 23 requirements by a preponderance of the evidence. *See, e.g., In re Initial Public Offering Sec. Litig. ("IPOS")*, 471 F.3d 24, 37 (2d Cir. 2006) ("Complying with [Rule 23]'s predominance requirement cannot be shown by less than a preponderance of the evidence."); *Ilhardt v. A.O. Smith Corp.*, 168 F.R.D. 613, 617 (S.D. Ohio 1996) ("[T]he party seeking class certification bears the burden of proving by a preponderance of the legal evidence the four prerequisites of Rule 23(a) and at least one of the subcategories of Rule 23(b).") (citing *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079-80 (6th Cir. 1996)); *see also Latson v. GC Servs., Ltd. P'ship*, 2000 WL 1292719, at *4 (S.D. Tex. Feb. 15, 2000); *In re Safety-Kleen Corp. Bondholders Litig.*, 2004 WL 3115870, at *2 (D.S.C. Nov. 1, 2004). Merely making "some showing" of allegedly common or typical evidence is insufficient. *IPOS*, 471 F.3d at 40, 42.

2. The Court must weigh the class evidence, and resolve disputes between the parties, even if its "rigorous analysis" overlaps with the merits.

In conducting its "rigorous analysis" under Rule 23, the Court cannot simply assume that Plaintiffs' allegations are true. *See, e.g., Woodard v. Tower Auto. Prods. Co.*, 2002 WL 832572, *1 (N.D. Ill. May 1, 2002). The court must look beyond the pleadings to understand the claims, defenses, facts, and law in order to make a meaningful determination of the class certification issues. *See Blades v. Monsanto Co.*, 400 F.3d 562, 569 (8th Cir. 2005) (Plaintiffs' burden "necessarily requires an examination of the underlying elements necessary to establish liability for plaintiffs' claims"); *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 677 (7th Cir. 2001).

This means that the Court must weigh the evidence concerning the Rule 23 requirements, even if that analysis overlaps with the merits. *See IPOS*, 471 F.3d at 41 ("[C]onsideration of the merits [is precluded] only when a merits issue is *unrelated to* a Rule 23 requirement[;] there is no

