

STATE OF MINNESOTA
COUNTY OF RAMSEY

EMPLOYMENT
DISTRICT COURT
SECOND JUDICIAL DISTRICT

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

Plaintiffs,)

vs.)

3M Company,)

Defendant.)

Court File No. 62-C4-04-012239

[G. Johnson]

[Class Action]

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

I. OVERVIEW1

II. FACTUAL BACKGROUND.....2

 A. 3M’s Centralized Personnel Policy-Making and Decision-Making2

 1. Executive-Level Approvals of HR Decisions.....2

 2. Meetings of 3M’s Top Executives.....2

 3. 3M’s HR Staff.....3

 4. Tier II Reviews4

 B. 3M’s Corporate Bias in Favor of Young Employees4

 C. Statistical Evidence of 3M’s Company-Wide Pattern of Age
 Discrimination7

 D. 3M’s Specific Practices Subject to Plaintiffs’ Claims9

 1. Performance Appraisal Practices9

 2. Leadership Development Opportunities12

 3. Promotions14

 4. Compensation17

 5. Job Eliminations18

III. ARGUMENT.....21

 A. The Proposed Class Satisfies the Elements of Rule 23.0121

 1. The Proposed Class Satisfies the Numerosity Requirement
 of Rule 23.01(a).....21

 2. The Proposed Class Satisfies the Commonality Requirement
 of Rule 23.01(b).....21

 a. 3M Has Centralized Policy- and Decision-Making Led
 by Top Executives that Create Company-Wide
 Common Questions21

b.	The Statistical Evidence Establishes Strong Evidence of Company-Wide Common Questions.....	23
c.	Plaintiffs' Pattern or Practice Claims Involve Questions Common to the Class.....	24
d.	Plaintiffs' Disparate Impact Claims Involve Questions Common to the Class.....	26
e.	Plaintiffs' Claims Raise Common Issues Concerning the Continuing Violations Doctrine.....	27
3.	The Proposed Class Satisfies the Typicality Requirement of Rule 23.01(c).....	28
4.	The Proposed Class Satisfies the Adequacy Requirements of Rule 23.01(d).....	28
B.	The Proposed Class Satisfies the Requirements of Rule 23.02.....	29
1.	This Case Can Be Prudently Managed.....	30
2.	The Proposed Class Satisfies the Requirements of Rule 23.02(b).....	31
3.	The Proposed Class Satisfies the Requirements for a Hybrid Class.....	32
a.	Common Issues Predominate Over Individual Issues.....	32
b.	A Class Action Is Superior to Other Means for Resolving the Disputes.....	33
C.	Proposed Class Counsel Satisfies the Requirements of Rule 23.07.....	34
IV.	CONCLUSION.....	35

TABLE OF AUTHORITIES

Cases	Page
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975).....	29
<i>Ario v. Metropolitan Airports Comm'n</i> , 367 N.W.2d 509 (Minn. 1985)	28
<i>Arnold v. Cargill</i> , 2006 U.S. Dist. LEXIS 41555 (D. Minn. June 20, 2006).....	22, 23
<i>Beckmann v. CBS, Inc.</i> , 192 F.R.D. 608 (D. Minn. 2000)	21, 22, 30
<i>Carlson v. C.H. Robinson Worldwide, Inc.</i> , 2005 U.S. Dist. LEXIS 5674 (D. Minn. Mar. 31, 2005)	8, 22
<i>Dukes v. Wal-Mart, Inc.</i> , 474 F.3d 1214 (9th Cir. 2007)	23, 25, 30
<i>Ercegovich v. Goodyear Tire & Rubber Co.</i> , 154 F.3d 344 (6th Cir. 1998)	23
<i>Forcier v. State Farm Mut. Auto. Ins. Co.</i> , 310 N.W.2d 124 (Minn. 1981)	33, 34
<i>Glen Lewy 1990 Trust v. Investment Advisors, Inc.</i> , 650 N.W.2d 445 (Minn. Ct. App. 2002).....	<i>passim</i>
<i>Hamblin v. Alliant Techsystems, Inc.</i> , 636 N.W.2d 150 (Minn. Ct. App. 2001).....	22, 23, 26
<i>Hazelwood School Dist. v. United States</i> , 433 U.S. 299 (1977).....	8, 25
<i>Int'l Bhd. of Teamsters v. United States</i> , 431 U.S. 324 (1977).....	25, 30, 33
<i>Jenson v. Eveleth Taconite Co.</i> , 139 F.R.D. 657, 658-59 (D. Minn. 1991)	30
<i>Johnson v. Jensen</i> , 433 N.W.2d 472 (Minn. Ct. App. 1988), <i>aff'd in part and</i> <i>rev'd in part on other grounds</i> , 446 N.W.2d 664 (Minn. 1989).....	26

<i>Kalia v. St. Cloud State Univ.</i> , 539 N.W.2d 828 (Minn. Ct. App. 1995).....	24, 25
<i>Klicker v. State</i> , 197 N.W.2d 434 (1972).....	33
<i>LaBonte v. TEAM Indus.</i> , 2007 Minn. App. Unpub. LEXIS 737 (Minn. Ct. App. July 24, 2007).....	23
<i>Mathers v. Northshore Mining Co.</i> , 217 F.R.D. 474, 487 (D. Minn. 2003)	30
<i>Morse v. Southern Union Co.</i> , 174 F.3d 917 (8th Cir. 1999).....	23
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999).....	30
<i>Paxton v. Union Nat'l Bank</i> , 688 F.2d 552 (8th Cir. 1982)	21, 30
<i>Potter v. LaSalle Court Sports & Health Club</i> , 384 N.W.2d 873 (Minn. 1986)	26
<i>Rathbun v. W.T. Grant Co.</i> , 219 N.W.2d 641 (Minn. 1974)	33, 34
<i>Ryder v. Westinghouse Elec. Corp.</i> , 128 F.3d 128 (3d Cir. 1997)	23
<i>Slattery v. Swiss Reinsurance Am. Corp.</i> , 248 F.3d 87 (2d Cir. 2001)	23
<i>Streich v. American Family Mut. Ins. Co.</i> , 399 N.W.2d 210 (Minn. Ct. App. 1987).....	21, 29, 32
<i>Velez v. Novartis Pharms. Corp.</i> , 2007 U.S. Dist. LEXIS 55856 (S.D.N.Y. July 31, 2007).....	24
<i>Vernon J. Rockler & Co. v. Graphic Enter., Inc.</i> , 52 F.R.D. 335 (D. Minn. 1971)	34
<i>Wilfong v. Rent-a-Center, Inc.</i> , 2001 U.S. Dist. LEXIS 22718 (S.D. Ill. Dec. 27, 2001)	22

Statutes and Rules

Minn. Stat.

§ 363A.03, subd. 21
§ 363A.29, subds. 330
§ 363A.29, subd. 4.....26, 30
§ 363A.33, subd. 6.....30
§ 549.20, subd. 1(a)26

42 U.S.C.

§ 1981a(a)(1)30

Minnesota Rules of Civil Procedure

Rule 231
Rule 23.012, 21
Rule 23.01(a)21
Rule 23.01(b)21
Rule 23.01(c)28
Rule 23.01(d)28
Rule 23.0229
Rule 23.02(b)2, 29, 31, 32
Rule 23.02(c)2, 29, 32, 33
Rule 23.03(b)(1)29
Rule 23.04(b)29
Rule 23.0728, 34

Federal Rules of Civil Procedure

Rule 23(b)(2)29, 30
Rule 23(b)(3)29, 30

Minnesota Department of Human Rights

Rule 5000.1100, Subp. 3.....30

I. OVERVIEW

Through this and other initiatives 3M engaged in a pattern of age-conscious decision-making favoring younger employees not only in leadership development, but also in performance appraisals, compensation, promotions and job eliminations.

Evidence suggests that 3M discriminated against older employees before McNerney, but his “vision” of a more youthful 3M resulted in a pattern of age discrimination manifested across all organizational units of the company since at least 2001. Plaintiffs claim that this pattern and practice of discrimination in each of the five challenged Human Resources (“HR”) practices violate the Minnesota Human Rights Act (“MHRA”), which prohibits an employer from “using a person's age as a basis for a decision.” Minn. Stat. § 363A.03, subd. 2, Ex. 5000. They also raise five disparate impact claims.

However, the issue before the Court today is not whether plaintiffs ultimately will be able to prove their claims, but whether this case satisfies the requirements of Minnesota Rule of Civil Procedure 23 to proceed as a class action on behalf of the following proposed class:

All persons who were 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.²

¹ The Affidavit of Susan M. Coler in Support of Plaintiffs’ Motion for Class Certification, ¶¶ 4-12, explains the method of citing exhibits and other supporting evidence. Plaintiffs cite the last two digits of the Bates number to provide page cites in multi-page exhibits.

² Each salaried exempt position has a grade level. Managerial and administrative jobs run from grades 1 to 17 and executive positions begin above grade 17, at grade L3. Grenz 262:19-264:4.

A survey of the facts and HR practices shows that the patterns at issue in this case are appropriate for class treatment. Plaintiffs demonstrate that the numerosity, commonality, typicality, and adequacy of representation prerequisites of Rule 23.01 are met. They also show that this case can be maintained either under Rule 23.02(b) or under a combination of Rules 23.02(b) and (c), and propose a reasonable, manageable plan for doing so.

II. FACTUAL BACKGROUND

A. 3M's Centralized Personnel Policy-Making and Decision-Making

McNerney accomplished this goal by using at least four types of structural controls, both vertical and horizontal.

1. Executive-Level Approvals of HR Decisions

Since 2001, 3M has had six or seven line business units, called "Big Bs," each headed by an Executive Vice President, and subdivided into divisions. 3M also has several staff functions, including HR, that support the Big Bs and are headed by Senior Vice Presidents. Ex. 4000.

Employees' supervisors and next-level managers within the business and staff units generally lack authority to make the HR decisions about which plaintiffs complain. Instead, pursuant to 3M's policies and procedures, business unit and staff executives provide directions about the decisions before recommendations are made and subject the recommendations to review before they are finalized. *See* § II.D., below.

2. Meetings of 3M's Top Executives

3M's CEO coordinates his HR priorities among the various business units. He generally

Scientist, sales, and technical jobs have separate scales, but all have grade equivalents called PeopleSoft ("PS") Grades. The PS Grades of the proposed class are from 070 to 170. Ex. 3000.

meets with his Operating Committee (direct reports) monthly and their agenda includes HR issues; that same group also convenes regularly as the Executive Resource Committee to approve various types of personnel placement decisions. Grenz 41:17-42:7, 43:21-24; Lalor 17:7-9, 102:6-105:13; McNerney 258:1-259:1. Early in each year 3M executives assess every Big B and staff unit in an HR review called a *Health of the Organization* (“HOO”) review. The process culminates in written reports to and meetings of the CEO with the head of the Big B or staff unit, and top HR officials, with a follow-up meeting in the fall. Exs. 237, 952, 954; Grenz 9:17-10:4; McNerney 217:22-218:4. Finally, each December until McNerney departed in 2005, the top executives met to evaluate and plan for the development of the company’s “top talent.” Ex. 587; Grenz 142:4-142:16; Martyn 30:17-31:1; McNerney 259:19-260:15.

3. 3M’s HR Staff

At the direction of the CEO and his Operating Committee, the HR staff promulgates policies and issues instructions that apply to all salaried employees, regardless of business unit, grade, or type of job. Grenz 43:21-24, 108:3-109:20; Lalor 16:6-20, 41:15-42:14, 108:18-109:6; Mahoney 15:13-16:19; Nagorka 33:20-35:5. Through such broadly applicable policies and instructions, 3M strives for “consistency across the organizations.” Grenz 156:9-12; *see also* Mahoney 32:11-15. 3M further assigns a network of HR employees to each of the principal business units and their organizational and geographical subunits to support and coordinate consistent application of the policies. Grenz 52:21-23; Lalor 108:18-109:6, 121:20-124:24. The HR staff also facilitates consistent application of HR policies throughout the company by educating managers and supervisors about the policies, Mahoney 32:16-33:5, making HR policies accessible to all employees on 3M’s intranet, Ronningen 32:17-34:21, and assisting in the identification and development of top talent. Ex. 74; *see also* Ex. 901.

4. Tier II Reviews

Leaders of functional staff groups across relevant business units and HR employees conduct "Tier II" meetings each year to, among other things, compile cross-unit lists of candidates for current and future promotions. Ex. 894 at 83, 91; Ihlenfeld 138:18-141:7.

B. 3M's Corporate Bias in Favor of Young Employees

Nowlin Aff. ¶¶ 7-12. Although Alldredge's team designed the content of the Accelerated Leadership Development Program ("ALDP") as McNerney directed, Nowlin Aff. ¶¶ 18-32, they immediately recognized McNerney's "vision" as biased against older employees. *Id.* at ¶¶ 13-16. Alldredge cautioned them not to talk about the issue outside team meetings because it could lead to legal trouble. *Id.* ¶¶ 16-18. They were not the only ones to notice. An ALDP participant asked McNerney himself whether the young age of the participants in the program created a risk of lawsuits. He responded, "That's a cost of doing business." *Id.* ¶¶ 40-41.

Separately, McNerney also told his direct reports that they should "select somebody in the early 40s or less" for Black Belt and Master Black Belt ("BB/MBB") training, Bloomer 71:6-17, another McNerney initiative to institute a management methodology called Six Sigma company-wide. McNerney 46:12-47:16. McNerney's explicit focus on searching for

subsequently appeared less

blatantly as variants of phrases like

McNerney 101:10-23.

To fulfill these expressed objectives, McNerney pushed executives to include persons earlier in their careers, which “often mean[t] younger” employees. Martyn 59:24-61:15. And he monitored and reported the number of employees promoted after completing these leadership development programs. For example, in 2003 he explained to investors that his initiatives gave leadership opportunities “often very early in people’s careers” and presented data showing that about of the BBs and MBBs re-entered with 1 and 2 job grade increases and that of the ALDP graduates were “already promoted.” Ex. 2020 at 13-14; McNerney 94:22-101:23.

McNerney’s direct reports and other executives institutionalized the goal of developing leaders “early” in their careers as a “CEO expectation.” *E.g.*, Exs. 1013 at 46, 2059 at 90.

As a result of the CEO's message and centralized processes, 3M employees in PS grades 070-170 quickly experienced McNerney's "vision" for 3M. The experience included overt expressions of age bias, such as Robert Brunsell hearing that he was "too old to be promoted into management," Brunsell Aff. ¶ 11, and a statement to Alton Bennett that the "new people are going to be younger and smarter." Bennett Aff. ¶ 16; *see also* S.Ex. 3-4. The experience also is reflected in the language of 3M documents commenting on employees who are "young," or "up

³ McNerney and Campbell were hardly alone in tracking employees' ages. 3M prepared scores of reports for various purposes listing employees' ages and analyzing employee groups by age. Exs. 232, 467; S.Exs. 1-2. However, when employees asked management to see age data, their requests were summarily dismissed with assertions that 3M does not make age-based decisions. *E.g.*, Exs. 160, 161, 1001, 1002, 3001.

and comers” and linking decisions to the length of an employee’s “runway” (describing the remainder of an employee’s career). S.Ex. 5.

Indeed, a team composed primarily of HR employees examined employee opinion surveys for possible causes of declining trust and confidence in management. Ex. 1019; Grenz 129:1-130:13.

More importantly, however, McNerney’s “vision” was experienced in the pattern of concrete decisions affecting older employees’ incomes, opportunities and careers reflected in the statistical and anecdotal evidence discussed below.

C. Statistical Evidence of 3M’s Company-Wide Pattern of Age Discrimination

Dr. Janet Thornton, an experienced labor economist retained by plaintiffs, performed a series of “cross-sectional” analyses that examined 3M’s decisions at particular points in time, e.g., by year for compensation decisions or at the time promotions were made, by comparing similarly situated persons. Thornton Rep. 15-17. She used three widely accepted methodologies – pools analyses, logistic regressions, and multiple regressions – and in each controlled for various measurable factors that reasonably might influence the results. These generally included each employee’s grade, job, facility/location, business, and division, and often the employee’s time-in-grade, time at the company not in current grade, and one or more performance appraisal ratings. *Id.* 19-31.

Dr. Thornton found “statistically significant” disparities – exceeding two “standard deviations” – between the EC&DP ratings, compensation increases, leadership training and promotional opportunities, and job eliminations 3M assigned to older employees of the proposed

