

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

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. ARGUMENT .....	1
A. Plaintiffs Have Adequately Defined the Proposed Class .....	1
B. 3M’s Arguments Are Classwide and Go to the Merits, Thus Admitting the Existence and Predominance of Common Questions .....	3
1. The Relevant HR Practices Are Common and Centralized .....	3
2. Evidence of Bias Favoring Young Employees Creates Questions Common to the Class .....	4
3. 3M’s Attacks on Plaintiffs’ Statistical Evidence Also Highlight the Common Questions to Be Determined at the Pattern or Practice Liability Trial .....	6
C. Typicality Is Met .....	8
D. The Plaintiffs Are Adequate Representatives .....	9
E. Certification Is Appropriate Under Rule 23.02 .....	10
III. CONCLUSION .....	11

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page</b>
<i>Ace Elec. Contrs., Inc. v. IBEW, Local Union No. 292</i> , 414 F.3d 896 (8th Cir. 2005) .....	2
<i>Ario v. Metropolitan Airports Comm'n</i> , 367 N.W.2d 509 (Minn. 1985) .....	8
<i>Bevan v. Honeywell</i> , 118 F.3d 603 (8th Cir. 1997) .....	5
<i>Carlson v. C.H. Robinson Worldwide, Inc.</i> , 2005 U.S. Dist. LEXIS 5674 (D. Minn. Mar. 31, 2005) .....	3
<i>Castaneda v. Partida</i> , 430 U.S. 482 (1977).....	3
<i>Clayborne v. Omaha Pub. Power Dist.</i> , 211 F.R.D. 573 (D. Neb. 2002) .....	10
<i>Donaldson v. Microsoft Corp.</i> , 205 F.R.D. 558 (W.D. Wash. 2001) .....	10
<i>Dukes v. Wal-Mart Stores, Inc.</i> , 222 F.R.D. 137 (N.D. Cal. 2004), <i>aff'd</i> , 474 F.3d 1214 (9th Cir. 2007).....	9, 10
<i>Dukes v. Wal-Mart, Inc.</i> , 474 F.3d 1214 (9th Cir. 2007) .....	4
<i>Ellis v. Costco Wholesale Corp.</i> , 240 F.R.D. 627 (N.D. Cal. 2007).....	8
<i>Glass v. IDS Fin. Servs., Inc.</i> , 778 F. Supp. 1029 (D. Minn. 1991).....	8
<i>Glen Lewy 1990 Trust v. Investment Advisors, Inc.</i> , 650 N.W.2d 445, 455 (Minn. Ct. App. 2002).....	11
<i>Hamblin v. Alliant Techsystems, Inc.</i> , 636 N.W.2d 150 (Minn. Ct. App. 2001).....	7
<i>Hartzell v. Patterson Dental Co.</i> , 1992 Minn. App. LEXIS 108 (Minn. Ct. App. Jan. 30, 1992) .....	5

<i>Hnot v. Willis Group Holdings Ltd.</i> , 228 F.R.D. 476 (S.D.N.Y. 2005).....	9
<i>Hnot v. Willis Group Holdings, Ltd.</i> , 241 F.R.D. 204 (S.D.N.Y. 2007).....	1, 6
<i>Hyman v. First Union Corp.</i> , 982 F. Supp. 1 (D.D.C. 1997).....	10
<i>In re Initial Public Offering Sec. Litig.</i> , 471 F.3d 24 (2d Cir. 2006).....	1
<i>Int'l Bhd. of Teamsters v. United States</i> , 431 U.S. 324 (1977).....	2, 4, 8
<i>Kadas v. MCI Systemhose Corp.</i> , 255 F.3d 359 (7th Cir. 2001).....	3
<i>Kroll v. St. Cloud Hosp.</i> , 2006 U.S. Dist. LEXIS 46633 (D. Minn. June 30, 2006).....	2
<i>LaBonte v. TEAM Indus.</i> , 2007 Minn. App. Unpub. LEXIS 737 (Minn. Ct. App. July 24, 2007).....	7
<i>McReynolds v. Sodexho Marriott Servs.</i> , 208 F.R.D. 428 (D.D.C. 2002).....	10
<i>McReynolds v. Sodexho Marriott Servs.</i> , 349 F. Supp. 2d 1 (D.D.C. 2004).....	8
<i>Moorhead v. Merrill Lynch, Pierce, Fenner &amp; Smith, Inc.</i> , 1989 U.S. Dist. LEXIS 9819 (D. Minn. May 24, 1989).....	1-2
<i>Oncale v. Sundowner Offshore Servs.</i> , 523 U.S. 75 (1998).....	3
<i>Richardson v. School Bd.</i> , 210 N.W.2d 911 (Minn. 1973).....	11
<i>Shores v. Publix Super Mkts., Inc.</i> , 1996 U.S. Dist. LEXIS 3381 (M.D. Fla. Mar. 12, 1996).....	8
<i>Staton v. Boeing Co.</i> , 327 F.3d 938 (9th Cir. 2003).....	5

<i>Valentino v. U.S. Postal Service</i> , 674 F.2d 56 (D.C. Cir. 1982).....	8
<i>Velez v. Novartis Pharms. Corp.</i> , 244 F.R.D. 243, 2007 U.S. Dist. LEXIS 55856 (S.D.N.Y. July 31, 2007).....	1, 4, 6

**Statutes and Rules**

Minn. Stat.	
§ 363A.03, subd. 2.....	2
§ 363A.29, subd. 3.....	2
Minnesota Rules of Civil Procedure	
Rule 23.....	1, 11
Rule 23.01(d).....	9
Rule 23.02(b).....	11
Rule 23.02(c).....	11
Federal Rules of Civil Procedure	
Rule 23.....	11

## I. INTRODUCTION

The Court's only task in deciding a class certification motion is to determine whether plaintiffs have satisfied the requirements of Rule 23. 3M's opposition brief acknowledges this initially, but then spends the bulk of its pages arguing why plaintiffs should not prevail on the merits of their claims. These merits arguments are premature but highlight why the Court should certify the proposed class: every time 3M makes a company-wide argument that it has not engaged in age discrimination, it admits the existence of a common liability question.

The Court should rely on guidance offered by Minnesota appellate courts as to Rule 23 standards. To the extent the Court also wishes to consider federal law, *In re Initial Public Offering Sec. Litig.* ("IPO"), 471 F.3d 24 (2d Cir. 2006), provides the most complete analysis, along with two cases applying *IPO* to employment class actions, *Velez v. Novartis Pharms. Corp.*, 244 F.R.D. 243, 2007 U.S. Dist. LEXIS 55856, at \*27-83 (S.D.N.Y. July 31, 2007) and *Hnot v. Willis Group Holdings, Ltd.*, 241 F.R.D. 204, 206-12 (S.D.N.Y. 2007). These cases instruct a court to engage in a "rigorous analysis" of whether plaintiffs have satisfied the Rule 23 standards, but not to assess "any aspect of the merits unrelated to a Rule 23 requirement." *IPO*, 471 F.3d at 41. These instructions also apply to expert reports, which courts should examine only "as far as they bear on the Rule 23 determination," and not to "determine which of the parties' expert reports is more persuasive." *Hnot*, 241 F.R.D. at 210.

## II. ARGUMENT

### A. Plaintiffs Have Adequately Defined the Proposed Class

Plaintiffs' class is precise because it is defined by age, job grade and employment dates, thereby providing "an 'objective standard by which potential class members can be readily identified.'" *Moorhead v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1989 U.S. Dist. LEXIS

9819, at \*4-5 (D. Minn. May 24, 1989) (citation omitted). 3M wrongly argues that the class is too broad in including persons not entitled to relief. All proposed class members will be entitled to injunctive and other relief under the Minnesota Human Rights Act (“MHRA”) if the Court finds discrimination has occurred. Minn. Stat. § 363A.29, subd. 3, Ex. 5002.<sup>1</sup> Under the *Teamsters* bifurcated process of determining pattern or practice claims, “potential victim[s] of the proved discrimination” will identify themselves by coming forward in Phase Two to claim individual relief. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977).<sup>2</sup>

Plaintiffs’ class definition also reflects a reasonable measure of the point at which 3M treats its employees as “older” in the five areas challenged. A class of those age 46 and above is appropriate under the MHRA, which prohibits employers from “using a person’s age as a basis for a decision if the person is over the age of majority ....” Minn. Stat. § 363A.03, subd. 2 (emphasis added), Ex. 5000. *See also Ace Elec. Contrs., Inc. v. IBEW, Local Union No. 292*, 414 F.3d 896, 898, 901 (8th Cir. 2005) (permitting claim based on age 50 and below because under MHRA’s “broad language . . . any decision made with reference to a person’s age, be it old or young, is impermissible”); *Kroll v. St. Cloud Hosp.*, 2006 U.S. Dist. LEXIS 46633, at \*7 (D. Minn. June 30, 2006) (permitting claim on behalf of those less than age 45).<sup>3</sup>

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<sup>1</sup> References to “Ex. \_\_\_” to are the exhibits attached to the Affidavit of Susan M. Coler in Support of Plaintiffs’ Motion for Class Certification; references to the Reply Affidavit of Susan M. Coler in Support of Plaintiffs’ Motion for Class Certification are indicated as “Coler Reply Aff., \_\_\_.”

<sup>2</sup> Despite the thousands of persons in the proposed class, 3M also challenges (Defendant’s Memorandum of Law in Opposition to Plaintiffs’ Motion for Class Certification (“3M Opp.”) at 39-41) “numerosity” based on the small alleged shortfalls resulting from Dr. Thornton’s analyses. 3M ignores that “pools” analyses consider only situations in which both older and younger persons are in a “pool,” and do not count victims of discrimination in “uni-age” pools. Thus, “pools” analyses undercount victims of discrimination. 3M also forgets that plaintiffs seek injunctive relief that will benefit all class members.

<sup>3</sup> Nor is grade 17 as the upward limit of the class arbitrary. It separates 3M’s decision-making executives from those affected by the decisions. That older employees are in the decision-

**B. 3M's Arguments Are Classwide and Go to the Merits, Thus Admitting the Existence and Predominance of Common Questions**

3M's opposition brief does not dispute the existence of the common questions articulated in plaintiffs' moving brief at pages 21-27. Instead, 3M argues that lower performance appraisals, pay increases, rates of promotion and so forth are "expected" in the workplace and that explicit preferences for "younger" employees represent "succession planning" rather than intentional age discrimination. These merits questions are all *common to the class*, making class certification appropriate.

**1. The Relevant HR Practices Are Common and Centralized**

3M does not seriously contest that the specific practices subject to plaintiffs' claims are common and centralized. 3M does not point to one significant variation among the business units in any practice. For example, while saying that MTRs are managed differently in different units, 3M does not challenge plaintiffs' assertions that 3M requires MTR's, that all units engage in them, that the purpose is the same, and that MTR results go up the line to the heads of each business. Where decisions are implemented through this type of common and centralized practice, certification is appropriate. *See, e.g., Carlson v. C.H. Robinson Worldwide, Inc.*, 2005 U.S. Dist. LEXIS 5674, at \*29-30 (D. Minn. Mar. 31, 2005) (finding common question where review process includes "some management oversight" and high level executives "have significant influence in some aspects of the compensation review process").<sup>4</sup>

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making group does not disprove discrimination: "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." *Castaneda v. Partida*, 430 U.S. 482, 499 (1977) (cited with approval in *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75, 78-79 (1998)). *See also, e.g., Kadas v. MCI Systemhose Corp.*, 255 F.3d 359, 361-62 (7th Cir. 2001) (explaining why older decision makers may discriminate against other older employees).

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2. **Evidence of Bias Favoring Young Employees Creates Questions Common to the Class**

3M's opposition on commonality issues also largely ignores the "elephant in the living room": plaintiffs' compelling evidence that 3M's executives implemented each of the challenged practices in a manner that favored young employees. This evidence includes an analysis of employee data, over 250 documents, 13 summary exhibits, 55 affidavits,<sup>5</sup> and substantial deposition testimony. 3M's opposition does not undercut this evidence for purposes of class certification for at least four reasons. First, affidavits by executives containing conclusory allegations of "good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion." *Teamsters*, 431 U.S. at 343 (citation omitted).

Second, where 3M (3M Opp. at 18-19) confronted plaintiffs' evidence directly, its arguments are unpersuasive. The importance of McNerney's speech about "young leaders" is its age-based content, and the evidence shows he gave the speech to a non-student group, the Dell Global Executive Management Committee. *See* Ex. 2016 at 99.

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is directly contradicted by the sworn testimony of Cutler and James Mahoney, the executive responsible for job eliminations throughout most of the period, that the process is centrally determined and uniform across the company. Cutler Dep. 25:23-26:5, 110:23-111:4, 129:3-130:5; Mahoney 105-5-10

<sup>5</sup> All of the affidavits flesh out the human experience behind the statistics. *See Velez*, 2007 U.S. Dist. LEXIS 55856, at \*65 (no minimum number of declarations required); *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1230 (9th Cir. 2007) (120 declarations sufficient to raise inference of common discriminatory experiences for class of 1.5 million).

*See, e.g., Hartzell v. Patterson Dental Co.*, 1992 Minn. App. LEXIS 108 (Minn. Ct. App. Jan. 30, 1992) (unpublished) (finding that termination lists including employee names and ages were probative of discrimination), Ex. 5005.

Third, 3M's explanation that it was intentionally developing "junior" employees as part of "legal" succession planning either constitutes an admission of liability or raises a common legal issue. Although the MHRA does not prohibit succession planning or leadership training by employers, it prohibits using age as a basis for decision-making, including as to succession planning and training. *See Bevan v. Honeywell*, 118 F.3d 603, 610 (8th Cir. 1997) (holding that a reasonable jury could conclude from evidence including succession planning documents referencing employee ages, "that the company's revitalization campaign . . . consisted of a new company policy to weed out the older leaders and replace them with talented young ones"). 3M cites no precedential authority otherwise. And it makes no difference whether 3M's expert declares its conduct a "best practice" because that moniker does not make it legal. Dr. Landy is not a legal expert and admitted that he has no understanding of how the MHRA defines discrimination. *Coler Reply Aff.*, Landy at 68:5-7.

Finally, Dr. Landy's opinion that 3M has "state-of-the-art HR systems" with "checks and balances" is irrelevant. Plaintiffs contend that, regardless of the claimed quality of 3M's HR practices, its executives, motivated by the articulated goal of advancing "junior" leaders earlier in their careers, used their influence and authority to dictate, review and monitor the relevant decisions and effectuate a pattern or practice of age-conscious decision-making at 3M. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 956 (9th Cir. 2003) (noting that where plaintiffs have introduced evidence of centralized decisionmaking, "'the unsurprising fact' that some employment decisions are made locally does not allow a company to evade responsibility for its

policies”).

When 3M executives spoke, everyone listened.

**3. 3M's Attacks on Plaintiffs' Statistical Evidence Also Highlight the Common Questions to Be Determined at the Pattern or Practice Liability Trial**

3M cannot argue against class certification on the usual statistical basis of excessive variance in results among organizational units. In the face of plaintiffs' showing of consistent disparities across all businesses and years, all that 3M can argue is that less than a majority of the “business unit-by-year combinations” showed statistically significant disparities. 3M Opp. at 33-34 n.19. But the importance of the analyses is that the results were consistently adverse; in the examples 3M cites, MBB decisions were adverse to older employees in [redacted] of unit-years, and favorable in [redacted], ALDP I decisions were adverse to older employees in [redacted] of unit-years, and favorable in [redacted]; and compensation change decisions were adverse to older employees in [redacted] of unit-years and favorable in only [redacted] Thornton Rep. at 72, 115.

Instead, as above, 3M admits that the record presents common questions to be decided on the merits, and argues a different answer to those questions. See *Velez*, 2007 U.S. Dist. LEXIS 55856, at \*33 (““statistical dueling” is not relevant to the certification stage *unless such dueling presents a valid basis for denying class certification*”) (quoting *Hnot*, 241 F.R.D. at 210). Dr. Thornton’s analyses show enormous disparities in the treatment of older employees compared to similarly-situated younger employees. With Dr. Thornton’s controls, there should be no statistically significant differences in outcomes between older and younger employees. The Minnesota Court of Appeals has twice credited as statistical proof of age discrimination these

same types of analyses, controlling for even fewer variables (thus making plaintiffs' analyses here far more conservative and favorable to the employer). *LaBonte v. TEAM Indus.*, 2007 Minn. App. Unpub. LEXIS 737 (Minn. Ct. App. July 24, 2007), Ex. 5004; *Hamblin v. Alliant Techsystems, Inc.*, 636 N.W.2d 150 (Minn. Ct. App. 2001). Thus, 3M's argument (3M Opp. at 22, 23) that these analyses are "meaningless" and "unreliable" contradicts established precedent.

Further, 3M has premised its entire defense on what it asserts as "the simple truth that age is negatively correlated with performance and potential in any job grade." 3M Opp. at 26 (emphasis added). This blanket assignment of negative characteristics to older employees is neither simple nor true. Rather, it is based on "complex and convoluted" hypotheses derived from varying and sometimes contradictory labor economics theories with "relatively little supporting evidence." Neumark Rep. 36-38.

3M's brief reflects such contradictions. On the one hand, it trumpets that "3M's 'older' employees, as a group, are 3M's most highly paid and highest ranking employees," as "one would expect to see in a nondiscriminatory environment." 3M Opp. at 9.

On the other hand, 3M argues that it is to be expected that older employees should suffer substantial disparities in pay increases and promotions. 3M Opp. at 26. These internal contradictions represent 3M premiering a never-before-tried-or-accepted defense, based on conjecture, not science. At this stage, however, what is relevant is that both plaintiffs' claims and 3M's defense are premised on questions common to the class, making class certification appropriate.

In the end, 3M's defenses and benchmark criticisms of Dr. Thornton's analyses reduce to the proposition that she controlled for only some, not all, "available performance measures." 3M

