

STATE OF MINNESOTA
IN SUPREME COURT

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

Respondents

vs.

3M Company,

Petitioner

**RESPONSE IN OPPOSITION TO PETITION FOR
PARTIAL REVIEW OF DECISION OF COURT OF APPEALS**

Appellate Court Case No. A08-0816

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

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I. Statement of the Legal Issue

Should discretionary review be denied when the Court of Appeals reversed and remanded a class certification decision for application of a newly announced standard and Petitioner seeks review of a disputed factual issue that was not decided by the District Court?

In this class action alleging systemic age discrimination by Petitioner/Defendant 3M Company, the Court of Appeals held that the District Court erred by failing to require proof of the certification requirements of Minn. R. Civ. P. 23 by a preponderance of the evidence and by failing to resolve factual disputes among the parties' experts. PA.14. The Court of Appeals reversed and remanded the decision "for the district court's reconsideration of the class-certification motion." PA.16. It instructed the District Court to "resolve the differences among the experts to the extent that they are relevant to, and for the limited purposes of, determining whether class-certification requirements are met." PA.14. It gave the District Court the "discretion ... to re-open the record and accept additional evidence," but affirmed that "a class certification motion [should] not become a pretext for a partial trial of the merits." [*In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006)]." PA.16-17.

In its briefing and in oral argument, 3M asked the Court of Appeals to hold as a matter of law that certification is not available under Rule 23 in this case. The Court of Appeals declined. It stated, "our role as an error-correcting court does not extend to making factual findings in the first instance," thereby rejecting any notion that class certification under these facts could be decided as a matter of law. PA.16, n.1. Petitioner now asks this Court to find as a matter of law that the statistical evidence offered by the Respondents/Plaintiffs cannot satisfy the commonality and predominance requirements of Rule 23. Respondents respectfully urge this Court to do as the Court of Appeals did and decline the petition as inappropriately usurping the fact-finding role of the trial court.

II. Statement of Rule 117 Criteria

3M claims that this certification decision raises an important question under Minn. R. App. P. 117, subd. 2(a) and that application of the new standard for Rule 23 rulings warrants guidance from the Minnesota Supreme Court under Rule 117, subd. 2(d)(1). As discussed below, these are unconvincing "make-weight" arguments.

3M further fails to meet a criterion preliminary to Rule 117 – showing that the District Court actually has decided the issue raised by the Petitioner. Under the guise of “guidance,” what 3M really wants the Minnesota Supreme Court to do is to find that certain facts disputed by the parties are undisputable and then decide as a matter of law that Respondent’s statistical evidence can never satisfy Rule 23 commonality and predominance requirements in an age discrimination case. The Court of Appeals refused to take on this task because finding facts “in the first instance” is not its role. PA.16, n.1. This Court should similarly decline, consistent with its holding that a reviewing court should “not consider the applicability of [an issue] on appeal, even though the question was raised below, if it was not passed on by the trial court.” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (citations omitted).

III. Statement of the Case

Respondents claim that since at least 2001, when then-new CEO James McNerney brought his “vision” of a more youthful company to 3M, the company has engaged in a pattern or practice of age discrimination in performance appraisals, compensation, promotions, leadership development and job eliminations against employees age 46 and older. This illegal age-conscious decision-making is manifest across all organizational units of the company and violates the Minnesota Human Rights Act, which prohibits an employer from “using a person's age as a basis for a decision.” Minn. Stat. § 363A.03, subd.

2. The case is before Ramsey County District Court Judge Gregg E. Johnson.

3M focuses solely on statistical evidence in arguing that older employees experience favorable outcomes at the company. It fails to even mention that Respondents also offered substantial, largely uncontested, anecdotal evidence of a pattern or practice of age-based decision-making at 3M resulting in unfavorable outcomes for older employees who were not executives. *See e.g.*, PA.25; .A.1-39, 158-68.¹

Notwithstanding 3M’s assertions, the statistical evidence is hotly disputed on the merits. Most of the fact section of the Court of Appeals opinion focused on disputes among the parties’ experts, PA.3-5,

¹ For purposes of this petition, Respondents offer only a few examples of the types of evidence ignored by 3M. Descriptions of these unfavorable outcomes and citations to more extensive evidence in the record can be found in Respondent’s Brief to the Court of Appeals at pages 7-11, and Plaintiffs’ Memorandum of Law in Support of Motion for Class Certification at pages 4-7, 9-20.

and on remand, the District Court was instructed to resolve expert disputes relevant to the question whether Respondents have satisfied the requirements of Rule 23. PA.14-15.

3M contends that Respondents' statistical evidence can not support an age discrimination class because "[t]here is no dispute that Respondents did not provide a baseline of expected differences in this case." Petition for Partial Review of Decision of Court of Appeals ("Pet.") at 5. To the contrary, the cross-sectional analyses performed by Respondents' statistical expert, Dr. Janet Thornton, whose credentials 3M does not question, are grounded in a "baseline" – the "expected" or "predicted" rate of selections taking into account all controls used in the analyses. A.49-65. Deviations from the baseline are measured in standard deviations, which are a "precise method of measuring" the likelihood that the difference between an observed and an expected set of values could be produced by chance; two standard deviations is recognized as the threshold for statistical significance rendering "suspect" a hypothesis that the decisions were made in a non-discriminatory manner. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309 n.14 (1977) (citing *Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977)); A.51-53. Dr. Thornton used baselines widely accepted in analyses of this type, and her analyses generally yielded large standard deviations, and showed adverse effects on class members across business units. A.66-134, 139-42, 175.

3M next misrepresents that Dr. Thornton did not account for claimed "universal" age dynamics² and assumed in her analyses that there were no differences between older and younger employees in the same grade. Pet. at 2, 3, 5. Again to the contrary, Dr. Thornton controlled in her analyses for certain performance appraisal ratings, time in current grade, and time at 3M not in current grade, thereby accounting for Petitioner's claim that older employees tend to have longer time in grade and lower performance ratings than younger employees in the same grade, job and unit. A.49-59, 73, 80, 90, 96, 102, 115, 120, 123, 128, 145-54. By so doing, Dr. Thornton underestimated the effect of age, but the

² Petitioner asks this Court to assume the existence of "universal but non-discriminatory, dynamics of age," Pet. at 2, but labor economists do not agree on these claimed dynamics. The attribution of negative characteristics to older employees is based on "complex and convoluted" hypotheses derived from varying and sometimes contradictory labor economics theories with "relatively little supporting evidence." A.154-57.

results still showed significant deviations from the expected baseline. A.55, 77, 150, 175. In effect, 3M's arguments reduce to the proposition that Dr. Thornton should have used even more performance-related controls than she did. This is not the type of dispute which this Court should be resolving, especially when 3M can point to no decision of any court that has rejected a cross-sectional analysis with all of the controls used by Dr. Thornton, or one expert, other than in the opinions purchased for this case, who maintains that cross-sectional analyses with the controls adopted by Dr. Thornton are inappropriate in age discrimination cases in general or this case in particular.³

Finally, 3M's assertion is misleading that the presence of older employees at the upper echelons of the company is "unrebutted evidence" that "most putative *class members* have experienced favorable outcomes" (emphasis added) at the company. Pet. at 3. The proposed class consists of more than 4,900 persons age 46 and over in exempt salaried jobs below the level of 3M executives, PA.18, 24; few class members made it to the executive level. PA.202. That many executives are age 46 or older does not disprove discrimination against older employees in lower job grades: "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 *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78-79 (1998)).

IV. Statement Regarding Why Review Should Be Denied

3M fails to offer reasonable, let alone compelling, justifications under Minn. R. App. P. 117, subd. 2(a) or 2(d)(1) for seeking review of the Court of Appeals' decision. First, the notion that Minnesota district courts need immediate guidance in how to apply the preponderance of the evidence standard to a specific set of facts is specious at best. That is the bread-and-butter work of the trial judges, and the uniqueness of any set of facts relevant to class certification would make any more specific attempt to provide guidance unhelpful. Second, 3M's argument is mistaken that the application of the newly

³ Minnesota Courts of Appeal have twice affirmed even less rigorous cross-sectional analyses in ruling for plaintiffs in age discrimination cases. See *LaBonte v. TEAM Indus.*, 2007 Minn. App. Unpub. LEXIS 737, at *2-3, 6-7, 9-10, 12 (Minn. Ct. App. July 24, 2007), A.169-74; *Hamblin v. Alliant Techsystems, Inc.*, 636 N.W.2d 150, 153 (Minn. Ct. App. 2001).

announced standard to the parties' evidence in certification decisions is a question that is likely to evade review. Minnesota has long allowed for discretionary review of Rule 23 certifications under Minn. R. Civ. App. P. 105, and the newly added Minn. R. Civ. P. 23.06 provides a mechanism for reviewing such decisions. 3M's generalized rhetoric about the number and nature of class actions and the aging of the baby boomer generation provides no sound basis for granting its petition under Rule 117.

Similarly inappropriate, 3M asks this Court to decide as a matter of law that Respondents cannot meet Rule 23 class certification requirements under the new standard. To achieve this result, Petitioner has ignored anecdotal evidence of unfavorable treatment of class members, claimed that facts are undisputable or unrebutted when they are not, and mischaracterized the methodology used in the statistical analyses performed by Dr. Thornton. The Court of Appeals recognized that 3M's request required it to resolve issues that had not been "passed on" by the District Court, a task that this Court has said is particularly inappropriate "when facts on which the ... issue rests are in dispute." *Thiele*, 425 N.W.2d at 582. Accordingly, the Court of Appeals remanded this case to the District Court, with the instruction that the trial judge should first determine the validity and weight to be accorded to Respondents' expert evidence, to Petitioner's challenge of that evidence, and to the evidence offered by Petitioner's statistical expert. PA.14-15. It even gave the District Court the option to re-open the record and accept additional evidence. PA.16. The Court of Appeals clearly did not view this record as necessarily complete or ripe for review as a matter of law. 3M has offered nothing in its Petition to warrant a different conclusion.

V. Conclusion

The petition for partial review should be denied for the reasons stated above.

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Respectfully submitted,

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