

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]

SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODCUTION.....1

ARGUMENT.....1

**I. THE COURT OF APPEALS HAS LIMITED THIS COURT’S TASK
 ON REMAND TO ADDRESSING AND DECIDING ALLEGED
 DEFECTS IN PLAINTIFFS’ EXPERT WITNESS TESTIMONY**.....1

**II. THIS COURT MUST ADDRESS ONLY THOSE MERITS ISSUES
 THAT OVERLAP WITH RULE 23 REQUIREMENTS**2

**III. THE *TEAMSTERS* FRAMEWORK PROVIDES AN EFFICIENT
 MECHANISM TO RESOLVE THE CLAIMS OF THE CLASS**.....5

CONCLUSION6

TABLE OF AUTHORITIES

CASES

Blades v. Monsanto, 400 F.3d 562 (8th Cir. 2005).....3

Craik v. Minnesota State University Bd., 731 F.2d 465 (8th Cir. 1984)..... 5-6

General Telephone Co. v. Falcon, 457 U.S. 147 (1982) 3-4

In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).....3

In re New Motor Vehicles Canadian Export Antitrust Litig.,
522 F.3d 6 (1st Cir. 2008).....3

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).....5

Whitaker v. 3M Co., 764 N.W.2d 631 (Minn. Ct. App. 2009)1, 2, 3

STATUTES

Minn. Stat. § 363A.29 subd. 3 5-6

Minn R. Civ. P. 23 *passim*

INTRODUCTION

The Court of Appeals' decision is clear – this Court must address and resolve “the battle of the experts” using the preponderance-of-the-evidence standard, **but only** to the extent that their disagreements are relevant to the Rule 23 requirements. *Whitaker v. 3M Co.*, 764 N.W.2d 631, 638 (Minn. Ct. App. 2009). Instead of limiting its arguments to the specific expert issues identified by the Court of Appeals, 3M asks this Court to revisit matters previously decided and far outside the scope of the remand instructions from the Court of Appeals. Further, 3M asks to Court to decide merits issues that are not necessary to a Rule 23 determination. Plaintiffs have presented compelling statistical and anecdotal evidence establishing the Rule 23 certification requirements by a preponderance-of-the-evidence, if not by clear and convincing evidence.

ARGUMENT

I. THE COURT OF APPEALS HAS LIMITED THIS COURT’S TASK ON REMAND TO ADDRESSING AND DECIDING ALLEGED DEFECTS IN PLAINTIFFS’ EXPERT-WITNESS TESTIMONY.

Upon review, the Court of Appeals focused on this Court’s alleged failure to resolve the disputes between experts “regarding the significance of various statistical analyses.” *Whitaker*, 764 N.W.2d at 634. Contrary to 3M’s assertion that the “field has changed fundamentally,” this is the same field; only now, the Court must expressly resolve the alleged defects in Plaintiffs’ expert-witness testimony related to the Rule 23 requirements. In granting Plaintiffs’ motion for class certification two years ago, this Court addressed all of the Rule 23 requirements, but without expressly resolving Rule 23 disputes between the parties’ respective expert-witnesses. Now, this Court need only revisit and expressly resolve the disputes between the expert-witnesses under the preponderance-of-the-evidence standard. Plaintiffs satisfied this standard two years ago, and they will provide further proof that they have satisfied their evidentiary burden during the hearing scheduled to begin May 5, 2010.

The Court of Appeals has provided a clear directive to this Court – “using the preponderance-of-the-evidence standard, [this Court] must address and decide all of the alleged defects in [plaintiffs’] expert-witness testimony relating to the rule 23 requirements of numerosity, commonality, typicality, and predominance.” *Id.* at 639. Specifically, the Court of Appeals limited this task as follows:

determin[ing] the validity and weight of 3M’s concerns with demonstrating a baseline of expected, non-discriminatory differences, bridging the gap between individual claims of discrimination and the existence of a class of similarly situated employees, selected problems with doing a “snap-shot” analysis, and the alleged inappropriate use of certain statistical controls for the predicted non-discriminatory correlation between age and employment outcomes.

Id. The field has not changed “fundamentally” or otherwise. The Court need not revisit any of its previous factual findings; rather, it need only augment those findings by addressing the limited expert issues identified by the Court of Appeals.

Defendant’s Supplemental Memorandum in Opposition ignores the Court of Appeals’ limited directive on remand as well as the issues resolved by this Court’s previous order on class certification. For instance, 3M argued before the Court of Appeals that Plaintiffs could not serve as adequate class representatives. However, this issue was not addressed by the Court of Appeals. If 3M’s argument had merit, then the Court of Appeals would have reversed class certification on this basis and this motion would not be back before this Court.

II. THIS COURT MUST ADDRESS ONLY THOSE MERITS ISSUES THAT OVERLAP WITH RULE 23 REQUIREMENTS.

The Court of Appeals warned that this Court should make sure that the “class certification motion does not become a pretext for a partial trial of the merits.” However, 3M continues to focus on whether Plaintiffs’ statistical evidence requires, rather than permits, the ultimate conclusion that 3M has engaged in systemic discrimination on the basis of age. 3M has

put “the cart before the horse.” This is not the question before this Court at this time. At the class certification stage, the court must conduct a “searching inquiry into the viability” of a statistical or economics theory and “the existence of the facts necessary for the theory to succeed.” *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008). A district court should not seek “hard factual proof,” but “a more thorough explanation of *how* the pivotal evidence behind plaintiffs’ theory can be established.” *Id.* at 29 (emphasis in original). See also *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 314 (3d Cir. 2008) (court should determine at class certification whether statistical methods are “feasible” or “impossible”); *Blades v. Monsanto*, 400 F.3d 562, 575 & n.9 (8th Cir. 2005) (at class certification stage, plaintiffs must show that expert evidence “could work” to prove claims with common evidence, and it was a mistake to intermingle “opinions on the actual merits of the injury element with opinions on the nature of the evidence that would be required to prove injury”). The federal appellate courts in all of these cases did not concern themselves with whether the plaintiffs’ expert’s analysis ultimately would prove victorious on the merits.

3M repeatedly cites the phrase “common discriminatory practice” used by the Court of Appeals. *Whitaker*, 764 N.W.2d at 639. 3M perverts the context of the three word phrase and focuses solely on the word “discriminatory” and whether Plaintiffs have proven that 3M is discriminatory. However, the Court of Appeals used the phrase “common discriminatory practice” to describe the role of statistics in bridging the gap between the individual claims and the class claims as described in *General Telephone Co. v. Falcon*. In that case, the United States Supreme Court stated the plaintiff’s burden as showing “the existence of a class of persons who have suffered the same injury as [the named plaintiff], such that the [named plaintiff’s] claim will share common questions of law or fact and that the [named plaintiff’s] claims will be typical

of the class claim.” *General Telephone Co. v. Falcon*, 457 U.S. 147, 157 (1982). Here, Plaintiffs have presented compelling statistical evidence showing a class of similarly situated employees who have been subjected to the same types of injuries, i.e. lower pay, lack of training opportunities, lack of promotions, terminations, etc.¹ These common injuries share common questions of law and fact. 3M asks the Court to inappropriately jump ahead to the merits and resolve the ultimate question – whether it is illegally discriminatory to implement, maintain and foster practices that lead to these common injuries for older employees.

The ultimate question in this case – whether 3M has discriminated on the basis of age – does not overlap with any of the Rule 23 requirements. The Court need consider Plaintiffs’ statistical evidence only to determine whether the individual claims of the Named Plaintiffs raise questions common to the claims of the other class members. 3M’s attempt to explain why the Court should expect to see statistical evidence of discrimination is a merits issue that does not overlap with class certification. The appropriate question before the Court is whether the statistical evidence creates a bridge between the Named Plaintiffs and Class Members. And, of course, in determining that a bridge has been formed, this Court must expressly use the preponderance-of-the-evidence standard.²

¹ Indeed, this Court made that finding earlier: “[Respondents] have presented statistical evidence that strongly suggests a consistent pattern across 3M’s business units of disparities suffered by older employees in each of the human resource practices challenged.” *Whitaker*, 764 N.W.2d at 634-35 (quoting Class Certification Memorandum on Order, April 11, 2008, at p. 4).

² In its initial class certification decision, this Court did that, stating, “[a]lthough 3M disputes the analysis conducted by plaintiffs’ expert, the court finds that sufficient statistical evidence has been presented to suggest that the data presents common questions for a class-wide pattern or practice trial.” (Class Certification Memorandum on Order at p. 4.) The Court, however, did not make clear that it was making that determination based on a preponderance of the evidence.

III. THE TEAMSTERS FRAMEWORK PROVIDES AN EFFICIENT MECHANISM TO RESOLVE THE CLAIMS OF THE CLASS.

3M claims that too many individual issues prevent certification of the class and certification would prove to be unmanageable. 3M's "Chicken Little" allegations ignore that for over three decades both state and federal courts throughout the country have been resolving claims of systemic employment discrimination under the legal framework established by the United States Supreme Court in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 (1977), and its bifurcated or two-phase scheme. In the first "liability" phase, the plaintiffs establish a prima facie case by proving that the employer has engaged in a broad-based pattern or practice of discrimination – that "unlawful discrimination has been a regular procedure or policy followed by an employer." 431 U.S. at 360. This is not an individualized inquiry. *Id.* at 361. "The point is that at the liability stage of a pattern-or-practice trial the focus often will not be on individual [employment] decisions, but on a pattern of discriminatory decisionmaking." *Id.* at 360 n.46. Plaintiffs typically make this prima facie case through a combination of statistical and anecdotal evidence showing disparities of treatment. *Craik v. Minnesota State University Bd.*, 731 F.2d 465, 470 (8th Cir. 1984). If the employer cannot demonstrate that the plaintiffs' proof is "either inaccurate or insignificant," a trial court may then find that the employer has engaged in a pattern or practice of discrimination that "justifies an award of prospective relief" consisting of injunctive remedies designed to eliminate the discriminatory practices and their effects. *Teamsters*, 431 U.S. at 360-61; *see* Minn. Stat. § 363A.29 subd. 3 (directing judge who "finds that the respondent has engaged in an unfair discriminatory practice" to "issue an order directing the respondent to cease and desist from the unfair discriminatory practice ... and to take such affirmative action as in the judgment of the [] judge will effectuate the purposes of this chapter"). Although the elements of the prima facie case and defense for disparate impact claims from

pattern or practice claims, the first phase of a disparate impact case similarly focuses on the overall effect of the employer's policies rather than on individualized decisionmaking.³

Once the pattern or practice or disparate impact is proved, then the case advances to a second "remedial" phase. Proof of a pattern and practice of discrimination, or a policy creating a disparate impact, creates a presumption that the employer has discriminated against class members who have been subjected to the challenged decisions. *Id.* at 359 n.45. "The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Id.* at 362. During the remedial stage, each class member therefore only needs to show that he or she was a "potential victim of the proved discrimination" – that is, an individual subject to an adverse employment action during the relevant time – to shift the burden to the employer to prove that its decision was non-discriminatory. *Id.* In other words, the presumption of discrimination shifts to the employer not only the burden of production, but also the burden of persuading the trier of fact that it is more likely than not that the employer did not unlawfully discriminate against the individual. *Craik*, 731 F.2d at 470. 3M has presented no evidence or rationale to explain why *Teamsters* does not provide a workable plan for resolving any individual issues intertwined with the class issues.

CONCLUSION


For the reasons set forth in their previous submissions and in this supplemental reply, and based on the evidence they previously submitted and the supplemental evidence they will present during the hearing on May 5-6, the Court should find by a preponderance of the evidence that

³ This Court already has denied 3M's motion for summary judgment on the disparate impact claims.

Plaintiffs have met each of 3M's concerns identified by the Court of Appeals and therefore that
Plaintiffs have satisfied the requirements for class certification.

DATED: April 22, 2010

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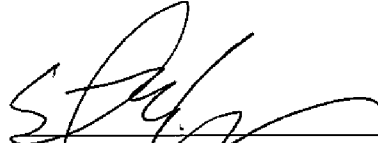
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ACKNOWLEDGMENT

Plaintiffs, by their attorneys, acknowledge that costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties pursuant to Minn. Stat. §549.211.

Dated: April 22, 2010



Steven M. Sprenger

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PROOF OF SERVICE

3M Company,)
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[Class Action]

I hereby certify that I caused to be served on April 22, 2009, a copy of the following:

- 1) Plaintiffs' Supplemental Reply Brief in Support of Motion for Class Certification
- 2) Notice of Motion *In Limine* to Exclude the Testimony of Defense Witness Kevin Murphy
- 3) Motion *In Limine* to Exclude the Testimony of Defense Witness Kevin Murphy
- 4) Memorandum of Law in Support of Motion *In Limine* to Exclude the Testimony of Defense Witness Kevin Murphy
- 5) Proposed Order on Motion *In Limine* to Exclude the Testimony of Defense Witness Kevin Murphy

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via Federal Express Standard Overnight Service by placing it in an envelope, affixing the mailing label, appropriately pre-paid and addressed as above, and bringing it to the Federal Express location at 1445 Eye Street NW, Washington, DC 20005 for delivery.


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