

No. A08-816

State of Minnesota
 In Court of Appeals

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

Respondents,

vs.

3M Company,

Petitioner.

BRIEF AND APPENDIX OF *AMICI CURIAE* ALLIANT TECHSYSTEMS, INC.,
 CARGILL, INC., C.H. ROBINSON WORLDWIDE, INC., MEDTRONIC, INC.,
 NASH FINCH COMPANY, SUPERVALU, INC., TARGET CORPORATION,
 AND THE MOSAIC COMPANY

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STATEMENT OF ISSUES

- 1. Must the elements of Minnesota Rule of Civil Procedure 23 class certification be established by a preponderance of the evidence?**

Finding that "plaintiffs have presented evidence" that would, if correct, establish the commonality and typicality elements of Rule 23, the district court rejected a preponderance of the evidence standard. Memorandum of Law In Support of Order Certifying Class and Appointing Class Counsel, p. 4 (May 14, 2008) ("Certification Order"). The district court further declined to compare plaintiffs' class evidence to evidence offered in opposition to class certification.

Apposite Authorities:

Gordon v. Microsoft Corporation, 645 N.W.2d 393 (Minn. 2002).

Heerwagen v. Clear Channel Communications., 435 F.3d 219 (2nd Cir. 2006).

Ilhardt v. A.O. Smith Corp., 168 F.R.D. 613 (S.D. Ohio 1996).

In re Safety-Kleen Corp. Bond Holders Litigation, 2004 WL 3115870 (D.S.C. Nov. 1, 2004).

- 2. Is evidence of a correlation between age and professional advancement sufficient to establish the numerosity of the identified class, as well as common, typical age discrimination within the class?**

The district court concluded that "statistical evidence presented by plaintiffs is sufficient to establish evidence of company-wide common questions of discrimination." Certification Order at p. 5. The court did not address whether such evidence is typically appropriate for age discrimination cases, or whether such evidence might also exist in workplaces free of age discrimination.

Apposite Authorities:

Smith v. City of Jackson, 544 U.S. 228 (2005).

EEOC v. McDonnell Douglas Corporation, 191 F.3d 948 (8th Cir. 1999).

Pottenger v. Potlatch Corporation, 329 F.3d 740 (9th Cir. 2003).

INTEREST OF AMICI CURIAE¹

The employers participating as amici curiae are the following companies, with roughly the following number of full- and part-time Minnesota employees over the age of 21 as of August 1, 2008: Alliant Techsystems Inc. (1,882); Cargill, Inc. (4,800); C.H. Robinson Worldwide, Inc. (1,532); Medtronic, Inc. (7,860); Nash Finch Company (1,343); Supervalu, Inc. (10,067); Target Corporation (25,500); and The Mosaic Company (200). Collectively this group of amici will be referred to as the "Employer Group."

With more than 53,100 Minnesota employees potentially subject to the Minnesota Human Rights Act, the Employer Group has a strong interest in ensuring that the standards by which a court considers class certification proposals are both clear and appropriate, particularly in age discrimination cases. The Employer Group has a further interest in promoting an understanding of the practical impact of the class certification standard and the approach employed by the district court.

¹ Pursuant to Rule 129.03 of the Minnesota Rules of Appellate Procedure, the undersigned certifies that no counsel for a party authored this brief in whole or in part and that no one made a monetary contribution to the preparation or submission of this brief other than the *amici curiae* and their counsel.

ARGUMENT

I. PLAINTIFFS MUST PROVE THE ELEMENTS OF CLASS CERTIFICATION BY A PREPONDERANCE OF THE EVIDENCE.

A class action lawsuit is a powerful tool that, used properly, enables consideration of claims that are too small to warrant individual attention. *In re Rhone-Poulenc Rorer, Inc. ("Rhone-Poulenc")*, 51 F.3d 1293, 1298 (7th Cir. 1995). Used improperly, the class action mechanism can also be a tool to coerce defendants to settle lawsuits, regardless of liability or the merits, rather than incur the burdensome costs of defense and risk a massive verdict. *Id.* Procedural safeguards ensuring that a proposed class truly fits within the ambit of Minn. R. Civ. P. 23 not only protect defendants from "blackmail settlements," but also protect plaintiffs from the developing stigma of frivolous class action lawsuits. This is no less true in the context of employment claims, where putative employee class members can be catapulted unknowingly into unwanted litigation, and into a position adverse to their employer. For this reason, analysis of the Rule 23 class certification elements must be rigorous and exacting.

In Minnesota, a court may not certify a class that does not satisfy the prerequisites of Minn. R. Civ. P. 23. *Lewy v. Inv. Advisors, Inc.*, 650 N.W.2d 445, 451 (Minn. Ct. App. 2002). Further, the party moving for class certification bears the burden of establishing that all of the class action requirements are satisfied. *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 659 (D. Minn. 1991); *Glenn v. Daddy Rocks, Inc.*, 203 F.R.D. 425, 428 (D. Minn. 2001). It is incumbent upon a court to perform "a rigorous analysis" before granting certification. *Id.*; see also *Gen. Tel. Co. of the Sw. v. Falcon*,

457 U.S. 147, 161 (1982). To this end, multiple federal circuits have established that a class may not be certified unless plaintiffs prove, by a preponderance of the evidence, that all of the elements of Rule 23 are met. Minnesota courts should require no less from plaintiffs seeking class action certification under Minn. R. Civ. P. 23.

A. Class Litigation Places Substantial Burdens On Employers.

As is well documented in cases, law reviews, and newspapers, class action lawsuits are becoming increasingly frequent. *See, e.g.*, "Findings and Purposes" of The Class Action Reform Act, Pub. L. 109-2, § 2, 119 Stat. 4 (2005) ("Over the past decade, there have been abuses of the class action device that have... harmed class members with legitimate claims and defendants that have acted responsibly... and... undermined public respect for our judicial system."). Mere identification of a putative class often necessitates months, if not years, of costly discovery related to class certification issues. And an unfortunate side effect of increased litigation is that class certification is frequently threatened in order to raise the stakes to the point where a company must gamble its very existence against the merits of its case. *Rhone-Poulenc*, 51 F.3d at 1298. This creates an inordinate pressure on defendants to settle class cases, regardless of the strength of any individual plaintiff's claims. *Id.*; *Gordon v. Microsoft Corp.* 645 N.W.2d 393, 401-02 (Minn. 2002). These settlements may be enormous even where the value of the individual claims is quite small.

Class action litigation alleging employment discrimination is the quintessential "pressure to settle" situation. And under the Minnesota Human Rights Act and Age Discrimination in Employment Act, plaintiffs are given explicit statutory rights to seek

attorney's fees.² Minn. Stat. § 363A.33, subd. 7 (2006); 29 U.S.C. § 626(b). In such cases, the employer faces not only potential conflict with significant portions of its own workforce, but also the cost of its own attorney fees plus the extensive attorney fees plaintiffs incur representing the class. In such situations, the merits of the class claims become secondary at best.

For these reasons, great care should be taken to scrutinize whether plaintiffs have established class-wide discrimination claims. The preponderance of the evidence standard ensures the appropriate level of scrutiny.

B. The Elements Of Class Certification Must Be Established By A Preponderance Of The Evidence.

Both the language of Minn. R. Civ. P. 23 and the case law interpreting that rule are silent as to the proof requirements necessary to justify class certification. However, this Court can find guidance in court interpretations of the federal rule governing class certification.

In discussing the propriety of class certification, the United States Supreme Court has stated that a plaintiff must show actual compliance with the requirements of Fed. R. Civ. P. 23(a) and 23(b). *Falcon*, 457 U.S. 147, 157 (1982). Specifically, the Court held that certification is inappropriate where there are "unsupported allegations" of class-wide

² The issue of whether disparate impact classes may be appropriately certified for Minnesota Human Rights Act age discrimination cases is not presently before the Court; rather, the parties have focused on whether the evidence presented and the level of scrutiny applied to that evidence warrants class certification. Consequently, this is the Employer Group's focus as well.

discrimination attached to individual claims – regardless of the merits of the individual claims. *Id.* at 158.

While the Rule 23 requirements should not impede certification of properly constituted classes, they similarly should not be seen as a mere procedural speed bump for plaintiffs; valid individual claims may still be lucrative absent class certification, but improper class certification puts the defendant in the unenviable position of deciding between continuing potentially crippling litigation and an unfairly damaging settlement. Requiring plaintiffs to demonstrate the elements of class certification by a preponderance of the evidence balances these equities, and is not particularly burdensome to plaintiffs with valid class claims.

Accordingly, plaintiffs and putative class representatives hoping to successfully assert class status must support their claims with sufficient evidence. *Ilhardt v. A.O. Smith Corp.*, 168 F.R.D. 613, 617 (S.D. Ohio 1996); *see also In re Am. Med. Sys. Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). The court must then perform a rigorous analysis of this evidence to determine whether the party has met its burden to establish the four necessary elements and one of the three additional requirements of Rule 23 class certification. *Am. Med. Sys. Inc.*, 75 F.3d at 1079 (citing *Falcon*, 457 U.S. at 161).

"The party seeking the class certification bears the burden of proof." *In re Am. Med. Sys.*, 75 F.3d at 1079. Federal courts that have decided the issue have commonly held that "[a] 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)." *Ilhardt*, 168 F.R.D. at 617; *In re Safety-Kleen Corp.*

Bond Holders Litig., No. 3:00-1145-17, 2004 WL 3115870 at * 2 (D.S.C. Nov. 1, 2004).

A preponderance standard assures that classes will be certified only when there is a clearly defined judicial conclusion that the requirements of Rule 23 have been satisfied.

Heerwagen v. Clear Channel Commc 'ns., 435 F.3d 219, 233 (2nd Cir. 2006).³

II. PURPORTED PROOF OF TYPICALITY AND COMMONALITY MUST BE CONSIDERED PARTICULARLY CAREFULLY IN AGE DISCRIMINATION CASES.

Determining the standard of proof required to justify class certification is only part of the equation; it is also necessary to determine what kind of evidence may satisfy this burden. In race and gender disparate impact cases, statistical evidence is usually necessary to establish commonality and typicality. Because race and gender generally have no bearing on job qualifications, statistical evidence is offered to show that persons in the protected class do not receive employment benefits in direct proportion to the number of members of the protected class in the identified workplace. Paul Grossman, Paul W. Cane Jr., & Ali Saad, *Lies, Damned Lies, and Statistics: How The Peter Principle Warps Statistical Analysis of Age Discrimination Claims*, 22 THE LAB. LAW. 251, 252 (2007) (hereinafter "Grossman, Cane, & Saad") ("The traditional statistical model assumes that, all else being equal, both favorable and unfavorable employment

³ Courts in the Second Circuit have subsequently confirmed this standard. See *Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 79 (E.D.N.Y. 2007) ("The class may be certified only if the Court determines, by a preponderance of the evidence, that each of the Rule 23(a) and Rule 23(b)(3) factors are met in this case."); *In re Credit Suisse First Boston Corp. Analyst Sec. Litig.*, No. 03 Civ. 2467, 2008 U.S. Dist. LEXIS 14198, at *9-10 (S.D.N.Y. Feb. 26, 2008); *Mendoza v. Casa De Cambio Delgado, Inc.*, No. 07 CV 2579, 2008 U.S. Dist. LEXIS 27519, at *4-5 (S.D.N.Y. Apr. 7, 2008).

events should be distributed among [the protected class] in proportion to their numbers."); *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005). Such statistical evidence is not useful in age discrimination cases because accepting it would require assumptions that (1) age can have no correlation to job qualifications; and (2) a correlation between employment decisions and age necessarily implies discrimination. These propositions are wrong.

A. Evidence Of Mere Correlation Between Age And Professional Growth Does Not Establish Common, Class-Wide Age Discrimination.

Nationwide, lawmakers and labor experts have recognized that age naturally correlates to employment decisions, even where those decisions are not made because of age. This is because age, unlike race or gender, routinely changes with time and correlates to experience, education, and the length of one's track record:

As shown, in an age neutral environment, there will emerge with the passage of time correlations between termination and age that are not due to age in any causal manner[.]... It is simply that the passage of time causes all employees to ultimately become protected, but the passage of time also causes the highly capable employees to move upwards and out of initial hire groupings, leaving behind the less capable employees. The employees age, become protected, and become mixed together with successive waves of new hire cohorts. This process creates correlations between age group and termination, just as it does between age group and promotion, and age group and performance evaluation, for that matter.

Ali Saad, *Beyond the Peter Principle – How Unobserved Heterogeneity in Employee Populations Affects Statistical Analysis in Age Discrimination Cases*, at 36 (2007) (hereinafter "Saad").

Because a person's age is constantly changing, any person who achieves his or her maximum potential and remains in that position eventually becomes part of a protected, age-based class:

Within any given job title, there will emerge over time a natural correlation between worker quality and age. This correlation has nothing to do with older workers being inherently less capable – it is simply a by-product of the passage of time, and the outflows of higher ability, subsequently older employees, the stationary nature of lower ability employees, who then age, and the inflows of employees across the entire ability spectrum.

Saad at 9; Kristin McCue, *Promotions and Wage Growth*, 14 J. OF LAB. ECON. 175, 182 (1996) ("One can see that mobility of all types declines with experience[.]"); Grossman, Cane, and Saad at 259 ("The continued presence of persons whose careers have plateaued warps any conventional statistical analysis of evaluations, promotions, layoffs, and discharges.").

Statistical evidence can create the false impression that "older" employees have received an unfavorable employment decision because of their age rather than their individual potential. The reality, however, is that mere correlation between age and employment decisions is not evidence of age discrimination. *Smith v. City of Jackson*, 544 U.S. 228, 240-41 (2005) (quoting 1965 U.S. Secretary of Labor Report) ("[C]ertain circumstances ... unquestionably affect older workers more strongly, as a group than they do younger workers.' Thus it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group."); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999) ("[E]mployment decisions motivated by factors other than age (such as retirement

eligibility, salary, or seniority), even when such factors correlate with age, do not constitute age discrimination."); *Pottenger v. Potlach Corp.*, 329 F.3d 740, 748 (9th Cir. 2003) ("An employer does not violate the ADEA by discriminating based on a factor that is merely empirically correlated with age.").

Because of the strong correlation between age, seniority,⁴ and experience – among other valid employment considerations – it would be easy for a dissatisfied employee to assume that any given employment decision actually based on a legitimate factor (such as experience, seniority, job performance or track record) was instead based on the employee's age. Consequently, a court asked to certify a class should determine whether the evidence of an alleged class-wide disparate impact truly relates to the ages of the class members, rather to some other legitimate factor that merely correlates with age.

B. To Establish Class-Wide Disparate Impact Claims, Plaintiffs' Evidence Must Distinguish Between The Allegedly Discriminatory Workplace And A Nondiscriminatory Workplace.

The strong correlation between age, seniority, and the length of one's performance record lends itself to statistical evidence showing that "older" employees are typically

⁴ For example, the Minnesota Human Rights Act permits employers to employ bona fide seniority systems:

The provisions of section 363A.08 do not apply to the operation of a bona fide seniority system which mandates differences in such things as wages, hiring priorities, layoff priorities, vacation credit, and job assignments based on seniority, so long as the operation of the system is not a subterfuge to evade the provisions of this chapter.

Minn. Stat. § 363A.20, subd. 5 (2006). Of course, seniority must be the true basis for awarding privileges and not a pretext for age discrimination.

more senior in the workplace but not advancing as quickly, or that "younger" employees are typically more junior but are developing more rapidly. Statistics, however, "cannot show causation; they can only show correlation. They cannot explain why a statistically realistic result happened." Sean W. Colligan, *In Good Measure: Workforce Demographics and Statistical Proof of Discrimination*, 23 LAB. LAW. 59, 61 (Summer 2007) ("Colligan").

Nonetheless, a required element of class certification is proof that a proposed class of employees is suffering a common disparate impact because of the employees' age.⁵ See *Sigurdson v. Carl Bolander & Sons Co.*, 532 N.W.2d 225, 229 (Minn. 1995) ("Although discriminatory motive need not be shown in disparate impact cases... Sigurdson must demonstrate, by competent evidence, that the presumptively valid reasons for his rejection were in fact a pretext for a discriminatory decision based on age.") (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973)); *Strand v. Interlachen Country Club*, No. C0-01-1826, 2002 WL 1365637 at *7 (Minn. Ct. App. June 25, 2002) (holding, in a disparate impact age discrimination case, that "[b]ecause

⁵ This question undoubtedly invokes the merits of the case as well as the class certification requirements, but it is widely recognized that the two inquiries are frequently intertwined. The United States Supreme Court has held that "evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978). Consequently, "[p]laintiffs cannot tie the judge's hands by making allegations relevant to both the merits and the class certification' and then claim that the court cannot assess the associated evidence." *Colligan* at 79-80 (quoting *Szabo v. Bridgeport Mach., Inc.* 249 F.3d 672, 677 (7th Cir. 2001)); see also *IPO Litigation*, 471 F.3d at 41 (holding that the obligation to determine whether the Rule 23 requirements have been met "is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement").

appellants failed to produce evidence that a causal link exists between the challenged practice and the statistics appellant presented, we affirm the district court's dismissal of the disparate-impact claims."); *Peterson v. City of Minneapolis*, No. C3-90-429, 1990 WL 163094, at *3 (Minn. Ct. App. Oct. 30, 1990) (unpublished decision) ("To establish a prima facie case of disparate impact discrimination, the plaintiff must offer 'statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.' This theory requires a high standard of statistical proof to eliminate the possibility the plaintiff was excluded by chance." (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1986)); *Evers v. Alliant Techsystems, Inc.*, 241 F.3d 948, 953 (8th Cir. 2001); see also *Leidig v. Honeywell, Inc.*, 850 F. Supp. 796, 802 (D. Minn. 1994) (holding in an age discrimination disparate impact case, that "Leidig fails to demonstrate any causal connection between his statistics and the challenged employment practice[.]").

A court focusing primarily on whether statistics show a correlation between age and job opportunity could erroneously find commonality and typicality on the basis of evidence that has nothing to do with actual discrimination.⁶ To avoid this anomalous and unfair result (particularly since the damage a defendant suffers from erroneous class

⁶ This appears to be what happened here. The district court accepted plaintiffs' statistical evidence at face value, finding it to be sufficient to establish the commonality and typicality elements of class certification. Certification Order at p. 3, 5-6. But when the defendant challenged that same statistical evidence and proffered contradictory evidence, the court concluded that comparing statistical evidence would result in a mere "battle of the experts" on substantive issues. Certification Order at 4-5.

certification is difficult to reverse), class certification should be based on a more rigorous review of the evidence. *See E.E.O.C. v. Texas Instruments Inc.*, 100 F.3d 1173, 1185 (5th Cir. 1996) ("[P]articularly in age discrimination cases where innumerable groupings of employees are possible according to ages and divisions within the corporate structure, statistics are easily manipulated and may be deceptive.").

Consequently, "[i]n any case where workforce statistics are offered to prove or disprove discrimination, the underlying question of what the workforce would look like in the absence of discrimination is critical." Colligan at 83-84; *Strand*, 2002 WL 1365637 at *6-8; Michael J. Piette & Douglas G. Sauer, *Legal and Statistical Approaches to Analyzing Allegations of Employment Discrimination*, 3 J. LEGAL ECON. at 1, 5 (Mar. 1993) ("Piette & Sauer") ("[C]omparisons must be made between what actually happened (other things equal) and what would have happened if the event were determined in a nondiscriminatory manner.") To put it differently, "[t]o have value, it is important that a regression model include ('control for') all major independent or explanatory variables that are measurable and may have an effect on the dependent variable." Colligan at 60; *Hilbert v. Ohio Dep't of Rehab & Corrections*, 121 F. Appx. 104, 110 (6th Cir. 2005) (to support inference of discrimination, statistics "must not only show a significant disparity between two groups, but must also 'eliminate the most common nondiscriminatory explanations for the disparity.'"); *Schultz v. McDonnell Douglas Corp.*, 105 F.3d 1258, 1259-60 (8th Cir. 1997); *Leidig*, 850 F. Supp. at 802-03 ("Leidig fails to eliminate obvious nondiscriminatory explanations... for the numerical disparity.").

Here, the district court made no comparison between a nondiscriminatory workplace and plaintiffs' statistical evidence regarding 3M, nor between plaintiffs' statistical evidence and a control group. In other words, the plaintiffs failed to establish a "baseline" to which statistical evidence about alleged disparate impact at 3M must be compared – and the district court declined to review conflicting evidence showing that a nondiscriminatory environment would, statistically, look virtually identical to 3M's. In short, the district court not only failed to assess whether a preponderance of the evidence supported class certification, but altogether declined to consider any statistical evidence other than plaintiffs' evidence.

Given that years have been invested in class certification discovery, the district court's rote acceptance of plaintiffs' statistical evidence at the class certification stage is particularly troubling. The district court should not have accepted plaintiffs' alleged proof of typicality and commonality without considering (1) what a nondiscriminatory work environment would look like; and (2) whether plaintiffs' evidence actually indicates a class-wide disparate impact because of age.

C. Classes Must Be Narrowly Defined In Age Cases.

In age cases, it is also particularly easy to define a class in overbroad terms by identifying solely the age and pay grade(s) of the proposed class. The result is that class members have "common" claims simply by virtue of their common age, combined with the correlation between age and less rapid professional growth. In such cases, commonality and typicality do not result from the claims of the group, but merely from the group's overall demographic.

Perhaps for such reasons, the Advisory Committee Comments to Minn. R. Civ. P. 23 note that "[p]recise definition of the class is necessary to identify the persons entitled to relief, bound by judgment in the case, and entitled to notice." (citing MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.222). Several problems are created by defining a class in overly broad terms, as the district court has done here.

1. Putative class representatives must prove class-wide impact to show commonality and typicality.

A true disparate impact because of age may be shown only if the standard, nondiscriminatory professional growth curve is different from the allegedly discriminatory growth curve of the class. Colligan at 83-84; *Strand*, 2002 WL 1365637 at *6-8; *Piette & Sauer* at 5. Therefore, a court examining a request for class certification should examine whether it is more likely than not that persons within the class simply neared or reached their maximum professional growth potential – and then aged within that job classification. If this possibility is just as likely as the possibility that employees suffered an unfavorable employment decision because of their age, a preponderance of the evidence has not established class-wide issues of age discrimination.

Likewise, to satisfy Rule 23 by a preponderance of the evidence, a putative class must establish that it is more likely than not that younger employees are getting more education and development training from the defendant because of their age, rather than because of their professional growth needs. Plaintiffs who merely establish a correlation between age and employment decisions have not established a class-wide disparate impact because of age. To avoid defining a class based solely on demographic

similarities, it is important to define a class in terms of the alleged common harm to the class (e.g., denial of a particular kind of job benefit) and determine whether the class as a whole has actually suffered such damages.

2. Overly broad class definitions result in commonality and numerosity simply by virtue of the natural aging process, without any age discrimination.

As previously discussed, most long-term employees will go through relatively low pay grades at some early point in their careers, and lower-performing employees may not advance beyond those lower job classifications. *See* Grossman, Crane, & Saad at 257-60. As a result, a class that is defined merely by identifying a particular age group (and all but the highest job classifications) will virtually always share some level of commonality. When statistics confirm that these putative class members are no longer progressing as quickly as other employees, it is easy to suggest that these employees have common "claims" and that the plaintiffs' decreased progression is typical of the class. Furthermore, the fact that employees continue to age means that all but the most exceptional employees will progress through lower pay grades at some point, and a putative class defined like the Whitaker class will naturally become numerous and have common "claims." All of this is possible in the absence of age discrimination. It is therefore necessary to define a class in a manner that does not assume, solely on the basis of (relatively) lower pay grades and higher ages, that age discrimination occurred throughout the class.

3. A class defined solely by age and job classification is both over- and under-inclusive.

It is the Employer Group's understanding that the class definition in this case excludes the highest job classifications within 3M.⁷ This is particularly troubling because purposefully excluding the most senior job classifications, regardless of age, from a proposed class excludes the employees who typically are older and have had the most success within a given company. As a result, the defined class is under-inclusive, in that it does not provide a complete picture of opportunities within the company or of the overall career progress made by the complete group of employees over the given age.

Furthermore, defining the class by all persons of a certain age and within a particular range of pay grades indicates an equal possibility that any disparate impact affected employees because of their job classifications (a legitimate consideration), rather than because of their ages. Thus the question is raised as to whether the alleged disparate impact correlates to age, or to job classification. In this sense, defining a class merely by age and pay grade is over-inclusive. Again, then, it is important to determine whether class certification elements have been met by a preponderance of the evidence; to achieve

⁷ As *amici*, the members of the Employer Group do not know why plaintiffs' proposed class excludes persons between 40 and 45 years old, who would otherwise fall within MHRA and ADEA protections. The district court's analysis also does not explain or justify why persons between ages 40 and 45 were excluded. If the age group was defined arbitrarily, or designed to suit the plaintiffs' statistical evidence, these are not valid bases for class definition. See *Leidig*, 850 F. Supp. at 803 n.7 (noting that plaintiffs' statistical evidence of alleged age discrimination was "troublesome" because it compared persons older than 50 years old to those younger than 50 even though the ADEA protects all persons over 40 years old).

class certification, plaintiffs should be required to prove a disproportionate impact on an identified age group – as opposed to particular job classifications.

4. Overly Broad Class Definitions Threaten The Adequacy Of Representation.

Allowing certification of a class defined as broadly as the putative class in this case also raises questions about the ability of the named plaintiffs to adequately represent the class. *See* Minn. R. Civ. P. 23.01(c). Where persons are added to the class routinely, simply by virtue of turning 46 years old, class members in higher job grades will have made decisions about granting (or not granting) promotions, development opportunities, and pay raises to other class members. The very people accused of making age-based employment decisions may be class representatives or class members. It is questionable whether the named plaintiffs will be able to represent all the named job classifications in such a situation. *Armstrong v. Powell*, 230 F.R.D. 661, 678 (W.D. Okla. 2005).

In addition, the longer the class action proceeds, the greater the chances that persons who were once allegedly "favored" because of their age will eventually become members of the protected class. Some of the putative class members may even have been selected for promotions or career development opportunities early in their careers – thereby benefiting from these opportunities for a longer portion of their careers – and nonetheless become class members as they age. *Id.*

Finally, "there is a potential for conflict between the former employees and current employees, as the former employees may focus on the potential for mandatory relief because they would not benefit from the injunctive relief sought by current employees."

Id. (citing *Elkins v. Am. Showa Inc.*, 219 F.R.D. 414, 423 (S.D. Ohio 2002)). These concerns again highlight the problems inherent in certifying a class solely on the basis of age and pay grade.

III. ACCEPTING PLAINTIFFS' CLASS THEORY MAY FOSTER BURDENSOME CLASS ACTIONS AGAINST EMPLOYERS WHO FOLLOW BEST EMPLOYMENT PRACTICES.

Ironically, the certification of a class based on mere correlation between age and employment decisions, without statistical evidence showing causation, could penalize an employer for following best employment practices that serve the interest of employees. For example, high employee retention rates, due to a supportive and collegial work environment, could by themselves result in evidence of correlation between age and career progress. Such correlations resulting from best practices should hardly support the certification of an age discrimination class.

Holding otherwise would place the very best employers, who retain employees over the long term, at the greatest risk of developing the natural workforce patterns and correlations described here. Employers would effectively be required to promote employees into higher positions as they age regardless of any individual employee's interest or ability to succeed in the position. The law cannot intend this absurd result.

A. Long-Term Succession Planning Is Key To A Successful Business.

One of the Employer Group's significant interests in this case is to aid the Court's understanding of the critical nature of legitimate corporate succession planning, and the extent to which class certification decisions like the district court's may not only

effectively outlaw such planning, but also harm the long-term prospects of Minnesota companies.

First, it is important to understand that succession planning is not about denying opportunities to older employees or "pushing them out the door." This is true both legally and as a matter of good business sense, since companies are already facing the imminent retirement of a much needed, but aging, workforce. Paul Bernthal & Richard Wellins, *Trends in Leader Development and Succession*, HUMAN RESOURCE PLAN. at 32, 39 (June 2006) ("The U.S. General Accounting Office predicts that by 2015, the number of workers older than 55 will balloon by 73 percent.... Retirement of an aging workforce threatens to deplete the overall number of experienced leaders available for organizations."); *Succession Planning Facts and Fantasies*, THE J. FOR QUALITY & PARTICIPATION at 4, 5 (Fall 2005) ("Although an increased proportion of baby boomers will stay in the work force, BLS projects a shortfall of 10 million qualified workers by 2010 as many in this group retire."); Molly Selvin, *Companies Must Plan to Fill Void as Boomers Retire*, LOS ANGELES TIMES, Oct. 23, 2007 at C.2 ("A looming 'tsunami' of baby boomer retirements could decimate the management ranks and hobble productivity at many corporations unless companies intensify efforts to develop younger talent, according to a new study.").

Rather, succession planning is about "building future leaders," Joseph L. Bower, *Solve the Succession Crisis by Growing Inside-Outside Leaders*, HARV. BUS. REV. at 91 (Nov. 2007), or simply "looking ahead and planning." Jeffrey Marshall, *Succession Planning is Key to Smooth Process*, FIN. EXEC. 26, 27 (Oct. 2005). "Planning is the

foundation on which organizations define and build their future successes." William Reeb, *Securing the Future: Building a Succession Plan for Your Firm*, cited in *Why Strategic Planning Comes First – and How to Prepare for Succession Plans*, HR FOCUS at S2 (July 2005). Companies cannot simply look to who will be around in the next few years, but who may develop into company leaders many years into the future. *Qualified Senior Execs in Short Supply*, HR MAG. at 14 (Aug. 2007) ("To shore up talent gaps and plan for the future, organizations need to build long-term external networks and relationships, and identify and 'court superstars within your industry.'"). This does not mean that companies should choose future leaders on the basis of age, and it certainly does not mean that older employees should be deprived of career opportunities – but it does mean that companies must start developing future leaders early in employees' careers:

Early identification of GM potential is not about playing favorites with younger talent, it is about increasing the odds that a number of talented people will gain enough of this diverse experience (because it takes time) to succeed, to demonstrate results, at each level. These development assignments are always in short supply, so early differentiation is critical.

Gregory C. Kesler, *Why the Leadership Bench Never Gets Deeper*, 25 HUMAN RESOURCE PLAN. 32, 40 (2002).

Proper succession planning also means that future leaders may be identified before they have adequate experience or opportunity to prove themselves. D. Kevin Berchelman, *Succession Planning*, THE J. FOR QUALITY & PARTICIPATION at 11, 12 (Fall 2005) ("Most younger managers who are available and eager for responsibility are frequently not prepared to take on that responsibility."). Planning for the future therefore

involves offering education and opportunities to high potential employees early in their careers – which, as common sense tells us, is typically when employees are "younger" than they will be later in their careers. *Succession Planning Facts and Fantasies* at 5 ("What's to be done? The obvious answer is to do a better job at grooming candidates for future openings."); Kevin S. Groves, *Integrating Leadership Development and Succession Planning Best Practices*, 26 J. OF MGMT. DEV. 239, 248 (2007) ("Consistent with the present study's findings, Charan's (2005) review of CEO succession best practices describes the highly flexible process... in which leadership evaluation begins in the first year of employment for managerial personnel[.]").

Without adequate succession planning, businesses would have no strategic future, and little hope of filling senior positions from within the business. In short, precluding succession planning – by effectively prohibiting the highest degree of development in an employee's early years – makes it difficult or impossible for those same employees to succeed in later years, and threatens the very survival of many organizations.

Moreover, the natural aging process means that those who start with a company at a young age and stay there will have benefited from business development practices throughout their careers – and yet ultimately may become part of a class like the one plaintiffs have defined. Looking at disparate impact at a single point in time obscures the long-term, non-disparate impact of succession planning policies. In fact, one might wonder whether long-time 3M employees – at, above, or below PS Grade 180 – would have achieved their present levels of success without corporate succession planning focused on early development.

For all these reasons, courts, employees, and employers cannot afford to take a short-term view of the correlation between age and early succession planning. If courts assume that early training of employees (often, when they are "younger") is (1) necessarily detrimental to more senior employees, and (2) prima facie evidence of class-wide age discrimination, employers will face significant legal risks simply by following best practices in employee development. In considering age discrimination claims related to promotion, training, and development, the Employer Group asks the Court to consider the long-term implications of approving a district court decision that effectively condemns and would thwart legitimate employee development.

B. Class Certification Without Proper Judicial Scrutiny Burdens Employers And Their Businesses.

Just as important as the impact of broad class certification on corporate succession planning is the impact on present-day corporate managerial issues. A defendant who is also an employer must manage the class not just as a group of plaintiffs, but as a group of trusted employees. Thus, "the court should consider the problems of management which are likely to arise in the conduct of a class action." Fed. R. Civ. P. 26(b)(3) advisory committee's note (1966).

1. A class defined by age changes constantly, creating overwhelming class management problems for the employer defendant.

Depending on the minimum age and maximum job classification levels necessary for class membership, as well as the duration of any given lawsuit, employees will enter the class as they age or become promoted or demoted. New employees who happen to

join the company at the proper age and within one of the designated job classifications will likewise become class members automatically. Here, the proposed class is not limited to a particular time period during which the class members must reach a certain age or pay grade, nor to persons between ages 46 and 59, 65, or 70, as one might expect under the MHRA. As a result, the court and the parties will be forced to contend with a class of potentially thousands, which is changing its composition virtually every day.

Such a situation is difficult in any class action situation, but the burden is multiplied many times when class members are current employees of the defendant employer. If a class like the putative Whitaker class is allowed to proceed, employees who reach a particular birthday, or who join the company at a particular age and pay grade, will suddenly be informed that they are in conflict with their employer. Such circumstances make it difficult for the court and the parties to manage the class or to identify its members at any given point. Perhaps just as importantly, such circumstances may make it difficult for class member employees to run the business. Courts should therefore carefully weigh the benefits of class proceedings against the merits of allowing individual employees to identify their own claims or disputes with their employer.

2. Class certification places managerial employees at odds with each other, their supervisors, and subordinates.

The Employer Group also echoes 3M's discussion of the difficulties presented by identifying a class of persons who will now be in litigation with each other, their supervisors who have allegedly denied them opportunities, their subordinates who have allegedly been given opportunities the class members were denied, and their younger

colleagues who may be adverse to the class one day and part of it the next. These are very real concerns for a company that depends on its employees to run an efficient business, and to make decisions that will benefit the corporation as a whole. Since such cases tend to proceed over months and years, this potential for in-fighting also affects employee retention: it is generally difficult to attract and retain employees in a work environment that is unpleasant at best, or mired in class warfare at worst.

The *amici* are not suggesting that any of these class-related burdens on employers justify age discrimination. But given that class certification puts a "gun to the head" of many employers, forcing settlement regardless of the merits, and given the administrative burdens that follow from class certification, courts must take particular care when determining whether to certify a class. This is why the emerging majority of courts requires plaintiffs to establish the class certification elements by a preponderance of the evidence. For the same reasons, the parties' statistical evidence in a disparate impact case must show common, class-wide age discrimination – and not just a correlation between age and legitimate employment decisions based on selective statistical analysis.

CONCLUSION

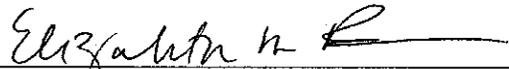
The district court apparently took the plaintiffs' class certification evidence at face value; reciting plaintiffs' evidence and the elements of Rule 23, the district court then certified a broadly-defined class. Parties who have invested years of time and money into class discovery deserve closer scrutiny of the available evidence. Regardless of the merits of individual cases, the relevant case law and the burdens of class certification

warrant consideration of class certification evidence through the lens of the preponderance of the evidence standard.

More particularly, it is important to consider the proffered evidence in light of the claims presented. When the plaintiffs claim age discrimination, evidence showing a difference between the advancement rate and development of older versus younger employees does not support an inference of discrimination because it is the expected result of non-discriminatory policies applied over time. Consequently, a court errs by failing to compare the plaintiffs' class certification evidence to what one would expect in the absence of discrimination.

Dated: August 14, 2008

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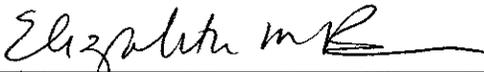
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CERTIFICATE OF COMPLIANCE

The undersigned counsel for *Amici Curiae* Alliant Techsystems, Inc., Cargill, Inc., C.H. Robinson Worldwide, Inc., Medtronic, Inc., Nash Finch Company, Supervalu, Inc., Target Corporation, and the Mosaic Company, certifies that this brief complies with the requirements of Minn. R. App, P. 132.01 in that it is printed in 13 point, proportionately spaced typeface utilizing Microsoft Word Word 2003 and contains 6,949 Word Count words, including headings, footnotes and quotations.

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