

A08-816

STATE OF MINNESOTA
IN COURT OF APPEALS

CLIFFORD L. WHITAKER et al.
on behalf of themselves
and all others similarly situated,

Plaintiffs/Respondents,

vs.

3M COMPANY,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In this appeal about the burden of proof necessary to satisfy the requirements for class certification, Respondents claim that they need only raise “questions.” Despite the rule that plaintiffs must establish the elements of Rule 23, the District Court appears to have adopted a *prima facie* evidence standard, certifying a class based on a showing of some class evidence by Respondents. Respondents and the National Employment Lawyers Association (“NELA”) advocate an even lower standard, arguing that a class should be certified whenever a case involves “common questions.” They claim such questions exist whenever the parties take different positions on an element of fact or law. Extending their logic to its conclusion, Respondents argue that merely pleading a pattern and practice or disparate impact claim is sufficient to satisfy the elements of Rule 23.

The growing consensus among federal and state courts is clear, however, that it is not sufficient for plaintiffs merely to plead a “class” claim, formulate “questions” that echo disputed class pleadings, or make a *prima facie* showing of some evidence. Rather, as this Court has already noted, Respondents must actually “bridge the gap” between their individual claims and a class claim. See June 25, 2008, Order Granting Review at 2. “Bridging the gap” requires Respondents to *prove* that a class actually exists, and to *establish* – by a preponderance of the evidence – that the elements of Rule 23 are met for that class. With respect to the commonality requirement, for example, while “common questions” are necessary, they must apply *to a class*, which Respondents must demonstrate exists by a preponderance of the evidence. That is, Respondents must show

a class of 3M employees affected in some common way by an identified practice or policy of discrimination. If Respondents cannot do so, commonality is absent.

Notwithstanding Respondents' obligation to establish the elements of Rule 23 by a preponderance of the evidence, the District Court did not require Respondents to prove that this case actually involves claimants too numerous for joinder; that Respondents' "questions" actually are common to a class of similarly-situated employees; that Respondents' allegations actually are typical of the experiences of other older employees at 3M; that common issues predominate over individualized issues; and that class treatment is a demonstrably superior method to adjudicate Respondents' claims. Rather, the District Court uncritically accepted Respondents' class evidence, and, while recognizing that 3M disputed that evidence, expressly declined to resolve those disputes. Under the prevailing – and better reasoned – federal and state case law, that was error.

In fact, it is clear that Respondents cannot satisfy the elements of Rule 23 by a preponderance of the evidence. Respondents ignore the undisputed evidence that shows there is no commonality or typicality between the five named plaintiffs and the overwhelming majority of 3M's older employees. This evidence – such as the fact that older employees hold over 90% of 3M's most senior positions; are, on average, paid more than younger employees in the same grade; and were promoted at least as frequently during the class period as were older employees during the previous 25 years – demonstrates that Respondents' claims of unfavorable treatment are not common to the experiences of the vast majority of 3M's older employees. There is no class of older 3M employees who can be fairly lumped together in a single lawsuit with these plaintiffs.

Respondents' also make no attempt to resolve the conflict between the success of 3M's older employees, on the whole, and Respondents' showing of statistical "disparities." They admit – as they must – that such "disparities" between older and younger workers are *expected* in snapshot statistics due to factors other than age discrimination. And they admit that they did not use all available controls for other factors – such as performance – that affect their results, dismissing those factors as "tainted" without any proof of actual taint. Yet, having eliminated variables they acknowledge would affect the analysis, Respondents find expected "disparities" and claim those differences are proof of class-wide discrimination. Such fundamentally flawed "evidence" cannot establish commonality, typicality, or any other element of Rule 23 by a preponderance of the evidence.

Because the District Court did not require Respondents to establish the elements of Rule 23 by a preponderance of the evidence, and because it is now clear that Respondents cannot do so, the District Court's order granting class certification should be reversed.

ARGUMENT

I. The Court of Appeals Should Review the District Court's Order *De Novo*.

Respondents' contention that the District Court's class certification order is subject to abuse of discretion review ignores the fundamental principle that questions regarding the interpretation of the Minnesota Rules of Civil Procedure are questions of law which this Court reviews *de novo*. See, e.g., Leiendecker v. Asian Women United of Minn., 731 N.W.2d 836, 839 (Minn. Ct. App. 2007); Smith v. Flotterud, 716 N.W.2d 378, 381 (Minn. Ct. App. 2006), *review denied* (Minn. Sept. 27, 2006). The questions

presented by this appeal regarding the “quantum and nature of evidence necessary to support findings of commonality and other [R]ule 23 requirements” and “the appropriate level of ‘rigor’ to be applied by the district courts in determining whether [plaintiffs’] burden is met,” June 25, 2008, Order Granting Review at 3, concern the proper interpretation of Rule 23.¹ This Court should review the class certification order *de novo* and, because the District Court applied the wrong burden of proof and relied on legally deficient evidence, hold that class certification was improvidently granted.

II. Respondents Bore the Burden to Establish the Rule 23 Elements By a Preponderance of the Evidence.

In Gen. Tel. Co. of the Southwest v. Falcon, the U.S. Supreme Court observed that “there is a wide gap between (a) an individual’s claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual’s claim and the class claims will share common questions of law or fact and that the individual’s claim will be typical of the class claims.” 457 U.S. 147, 157 (1982). As the Falcon Court held, and as recognized by this Court, plaintiffs bear the burden to “bridge the gap” between individual claims and class claims as a threshold requirement for class certification. Id.

¹ Even under the abuse of discretion standard Respondents advocate, if this Court rules, as it should, that the District Court misinterpreted Rule 23, the District Court abused its discretion as a matter of law. See Emery v. Hunt, 272 F.3d 1042, 1046 (8th Cir. 2001) (“A district court abuses its discretion if it commits an error of law. Thus, even under the abuse of discretion standard, a district court’s rulings on issues of law are reviewed *de novo*.”) (citing Koon v. United States, 518 U.S. 81, 100 (1996)).

Federal and state courts across the country have expressly held that plaintiffs must satisfy that burden by a preponderance of the evidence. See Appellant's Brief at 21-22; In re Credit Suisse First Boston Corp. Analyst Sec. Litig., 2008 WL 512779, at *2-3 (S.D.N.Y. Feb. 26, 2008) (“[T]he Court must determine whether Plaintiff has carried his burden of demonstrating that each element of Rule 23 is met by a preponderance of the evidence.”); Latson v. GC Servs., Ltd. P’ship, 2000 WL 1292719, at *4 (S.D. Tex. Feb. 15, 2000) (“Plaintiffs have the burden of establishing by a preponderance of the evidence that the putative class meets each of the six elements required by Rule 23.”); Cicero v. U.S. Four, Inc., 2007 WL 4305720, at *3 (Ohio Ct. App. Dec. 11, 2007) (“A plaintiff must prove by a preponderance of the evidence that class certification is appropriate.”).

In particular, the U.S. Court of Appeals for the Second Circuit recently affirmed its prior statement that “[c]omplying with [Rule 23]’s predominance requirement cannot be shown by less than a preponderance of the evidence.” In re Initial Pub. Offerings Sec. Litig. (“IPOS”), 471 F.3d 24, 37 (2d Cir. 2006) (quoting Heerwagen v. Clear Channel Comm’s, 435 F.3d 219, 233 (2d Cir. 2006)). Contrary to the arguments of Respondents and NELA, the IPOS court did not disapprove of the Second Circuit’s prior statement of the law and did not adopt a “standard lower than preponderance.” Id. at 37 n.8 (“If a standard lower than preponderance were permitted” (emphasis added)). In fact, the court specifically rejected a lower “some showing” standard. Id. at 42 (“[O]ur conclusions necessarily preclude the use of a ‘some showing’ standard”). The court’s express disavowal of a lesser standard, plus its citation to Heerwagen, clearly established the preponderance standard as the proper burden of proof under Rule 23.

The growing number of cases that expressly adopt the preponderance standard also reflect the more cogent analysis of plaintiffs' burden to prove the elements of Rule 23. See, e.g., In re Safety-Kleen Corp. Bondholders Litig., 2004 WL 3115870, at *2 (D.S.C. Nov. 1, 2004) (“[Plaintiffs must] establish the prerequisites of Rule 23 by the same measure of proof that is applicable to their underlying claims, given that the preponderance of the evidence standard merely requires that plaintiffs demonstrate that it is more likely than not that a particular requirement of Rule 23 has been satisfied.”). Respondents dispute that rationale (for the first time in this appeal), suggesting that the preponderance standard does not fit a Rule 23 analysis. They are wrong. The preponderance standard is consistent with each element and demonstrates precisely what plaintiffs must prove to satisfy the requirements of Rule 23.

A. Rule 23.01(b) & (c): Commonality & Typicality.

Courts routinely deny class certification in disparate impact and pattern and practice cases for failure to establish commonality and/or typicality when plaintiffs' evidence fails to demonstrate the existence of a coherent group of similarly-situated employees. See, e.g., Cooper v. Southern Co., 390 F.3d 695, 715-19 (11th Cir. 2004); Brown v. Nucor Corp., 2007 WL 2284581, at *5-6 & n.4 (D.S.C. Aug. 7, 2007); Mulligan v. S.C. Dep't of Transp., 446 F. Supp. 2d 446, 453-54 (D.S.C. 2006); Bennett v. Nucor Corp., 2006 WL 2473015, at *15-16 (E.D. Ark. Aug. 25, 2006); Rhodes v. Cracker Barrell Old Country Store, Inc., 213 F.R.D. 619, 671, 679 (N.D. Ga. 2003); see also Ellis v. Elgin Riverboat Resort, 217 F.R.D. 415, 427 (N.D. Ill. 2003) (rejecting

argument that “a pattern or practice discrimination case inherently involves class discrimination” and decertifying class).

Nonetheless, Respondents insist that a class should be certified whenever a plaintiff formulates a “common question” that reflects a disputed element of the plaintiff’s class pleadings. See Respondents’ Brief at 26. While Respondents’ argument recites Rule 23.01(b)’s use of the phrase “questions of law or fact common to the class,” that argument renders the commonality requirement meaningless. Merely raising “questions” in a disputed case requires no more than pleading a claim. Indeed, extending their logic to its natural conclusion, Respondents argue that class certification should be virtually automatic in cases in which plaintiffs allege disparate impact or pattern and practice claims. Id. at 32.

NELA’s brief reflects the same flawed thinking. Citing Hnot v. Willis Group Holdings Ltd., 241 F.R.D. 204 (S.D.N.Y. 2007), and Velez v. Novartis Pharm. Corp., 244 F.R.D. 243 (S.D.N.Y. 2007),² NELA asserts that a court should “assess” class evidence, but must not even consider the persuasiveness of that evidence, because to do so would improperly address the merits of questions that plaintiffs need only raise to satisfy Rule 23. NELA Brief at 4, 7-8. That proposition conflicts with the clear instruction of the vast majority of federal and state courts that a district court must *resolve* evidentiary disputes

² Hnot and Velez, both decided by the same judge, are outliers even among the New York federal courts. See, e.g., In re Credit Suisse, 2008 WL 512779, at *2-3; Karvaly v. eBay, Inc., 245 F.R.D. 71, 79 (E.D.N.Y. 2007). If Respondents are correct that Hnot and Velez stand for the proposition that fact disputes regarding the commonality, typicality, and predominance requirements may not be decided as part of a rigorous analysis under Rule 23, those two cases were wrongly decided.

and make specific determinations related to the Rule 23 requirements. See, e.g., Gariety v. Grant Thornton, LLP, 368 F.3d 356, 367 (4th Cir. 2004); West v. Prudential Sec., Inc., 282 F.3d 935, 938 (7th Cir. 2002); see also Mulligan, 446 F. Supp. 2d at 453 (“Courts may not make class certifications in discrimination cases automatically as a mere matter of course on the basis of class allegations.”).

While “common questions” are a *necessary* prerequisite to commonality, it is not *sufficient* for plaintiffs simply to state a “question” that reflects their class allegations and offer some class evidence. Cf. Reeb v. Ohio Dep’t of Rehab. & Corr., 2003 WL 22734623, at *5 (6th Cir. Nov. 18, 2003) (“At a sufficiently abstract level of generalization, almost any set of claims ... could display commonality.”). Courts have made clear that the commonality requirement is not meaningless, as would be true under Respondents’ and NELA’s interpretation. See, e.g., Cooper, 390 F.3d at 714 (“[T]he named plaintiffs’ claims must still share ‘the same essential characteristics as the claims of the class at large.’”); Brown, 2007 WL 2284581, at *3 (“To demonstrate that the class shares a common question of fact or law, a plaintiff must demonstrate that the alleged pattern or practice affects the class in common ways.”) (citing Stastny v. S. Bell Tel. & Tel. Co., 628 F.2d 267, 277 (4th Cir. 1980)); Ellis, 217 F.R.D. at 422 (“[A] party attempting to maintain a pattern or practice discrimination class action must demonstrate more than shared membership in a protected class, but must offer sufficient evidence to bridge the gap between his or her own individual claim and those of the class members who suffered the same injury.” (citing Falcon, 457 U.S. at 157)).

At the heart of these decisions is the fundamental principle underlying the commonality and typicality requirements: “Common” questions and “typical” legal theories must apply *to a class*, that is, a group of similarly situated persons for whom common, class-wide evidence will determine liability in a fair and economical way. See June 26 Order Granting Review at 2 (“[I]n order to proceed as a class, respondents must bridge the gap between their individual claims of discrimination and the existence of a class of similarly situated employees.”); see also Falcon, 457 U.S. at 157 (“The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.”). It is that showing – that there exists a cohesive group of employees whose (alleged) claims can be resolved together with “common” evidence – that plaintiffs must make by a preponderance of the evidence to satisfy the minimum threshold for commonality and typicality. Such a showing is missing in this case.

B. Rule 23.01(a): Numerosity.

To establish numerosity, a plaintiff must show that joinder of individual claimants would be impracticable, which first requires proof that there are, in fact, a substantial number of claimants with common claims. Contrary to Respondents’ pleadings and arguments, this inquiry does not turn on the number of employees of a certain age at 3M. Nor does it ask whether Respondents can formulate “questions.” Numerosity requires a determination, based on the evidence, that there are too many similarly-situated claimants

to join in a single lawsuit – a determination that necessarily requires proof by the greater weight of the evidence. 3M has shown that there is no valid evidence linking the Respondents' individual allegations to the vast majority of 3M's older employees.

C. Rule 23.02: Predominance, Superiority, and “Cohesiveness.”

Respondents can only establish predominance of common issues by showing that common issues *outweigh* individualized issues, Respondents' Brief at 27, a determination that necessarily requires application of a preponderance standard. A determination that class treatment is “*superior* to other available methods for the fair and efficient adjudication of the controversy,” Rule 23.02(c) (emphasis added), also necessarily implicates a preponderance standard, that is, that class treatment is more likely than not the fairest and most efficient way to litigate the plaintiffs' claims. See, e.g., Shelley v. AmSouth Bank, 2000 WL 1121778, at *16 (S.D. Ala. July 24, 2000) (class treatment should not merely be acceptable or comparable to other methods of adjudication, but “must affirmatively be preferable in a legally significant sense”). Likewise, proof that a defendant has “acted or refused to act on grounds generally applicable to the class,” Minn. R. Civ. P. 23.02(b),³ requires the plaintiff to establish, by a preponderance of the

³ As described in 3M's opening brief, class certification is not appropriate under Rule 23.02(b) because “[n]o case involving money damages” falls under that subsection. Minn. R. Civ. P. 23.02(b), *Advisory Committee Note–1968*. This provision is consistent with the prevailing interpretation of Fed. R. Civ. P. 23(b)(2), which precludes certification unless claims for monetary damages are merely “incidental.” See, e.g., Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998); In re St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig., 2003 WL 1589527, *12-13 (D. Minn. Mar. 27, 2003), rev'd on other grounds, 425 F.3d 1116 (8th Cir. 2005); Palmer v. 3M Co., 2007 WL 1879844 (Minn. Dist. Ct. June 19, 2007). Respondents seek millions of dollars in damages, which are not “incidental.” See, e.g., Skipper v. Giant Food Inc., 68 F. App'x 393, 397 (4th Cir. 2003).

evidence, that the putative class is “cohesive,” that is, that a class injunction would remedy common grievances for a coherent group of similarly-situated persons. See, e.g., Thompson v. Am. Tobacco Co., Inc., 189 F.R.D. 544, 557 (D. Minn. 1999) (“Rule 23(b)(2) includes an implicit ‘cohesiveness’ requirement, which precludes certification when individual issues abound.”); see also Barnes v. Am. Tobacco Co., 161 F.3d 127, 143 (3d Cir. 1998); Dhamer v. Bristol-Myers Squibb Co., 183 F.R.D. 520, 529 (N.D. Ill. 1998); Lemon v. Operating Eng., 216 F.3d 577, 580 (7th Cir. 2000).⁴

III. The District Court Erred By Refusing to Require Respondents to Satisfy Their Burden Of Proof.

The District Court did not require Respondents to establish any of the elements of Rule 23 by a preponderance of the evidence. The District Court uncritically accepted Respondents’ class evidence, and, while recognizing that 3M disputed that evidence, expressly declined to resolve those disputes. That was error. As even Respondents concede, a court must resolve factual disputes relevant to the Rule 23 requirements as part of its definitive assessment of whether plaintiffs can carry their burden to satisfy the Rule 23 requirements. See Respondents’ Brief at 22-23.

⁴ Respondents assert that the District Court properly certified a “hybrid” class. Hybrid classes are not a safe haven for classes that do not independently satisfy both Rule 23.02(b) and 23.02(c). See, e.g., Lott v. Westinghouse Savannah River Co., 200 F.R.D. 539, 563 (D.S.C. 2000) (“Certification of a ‘hybrid’ class action requires satisfaction of both the (b)(2) and (b)(3) requirements.”). Respondents’ class does not satisfy either Rule 23.02(b) or (c), because the putative class is not cohesive (and seeks primarily money damages) and individual merits issues overwhelm any common questions of fact and law. Thus, hybrid certification is not permissible to end-run the specific requirements of Rule 23.

The District Court's decision was premised on its mistaken interpretation of Rule 23 to impose only a *prima facie* burden on Respondents and its mistaken view that 3M's arguments went to the merits of Respondents' claims, instead of the elements of Rule 23. While there is some overlap between the merits of Respondents' claims and the Rule 23 disputes at issue in this appeal, that overlap must not prevent a court from examining the evidence relevant to Rule 23. Courts must resolve evidentiary disputes regarding the Rule 23 requirements even if a merits issue is identical to a Rule 23 requirement, see, e.g., IPOS, 471 F.3d at 41, and the law is clear that resolving those issues does not bind a fact finder in later, "merits" stages of the case, see, e.g., Gariety, 368 F.3d at 366; Hohider v. United Parcel Serv., Inc., 243 F.R.D. 147, 166 (W.D. Pa. 2007).

While there is some overlap, however, the evidentiary disputes at issue here are not primarily merits issues. Resolving those disputes as part of a rigorous analysis under Rule 23 would not "transform class certification into a trial on the merits," and would not require the Court to determine which side is "going to win." Respondents' Brief at 27, 50. Deciding the merits of Respondents' disparate impact claim, for example, would require the Court to determine whether any alleged impact was caused by one or more facially neutral employment policies. Resolving the merits of Respondents' pattern and practice claim would require an inquiry into the motivation of 3M's executives. Most significantly, determining the merits of any claimant's individual claim would require a court to resolve myriad evidentiary disputes. For example, an employee's promotion claim would require a review of the promotion mechanism at issue and that employee's relative qualifications, while an employee's termination claim could require analysis of

the statistics of a particular layoff and/or a comparison of that employee's qualifications with those of his or her peers. None of these "merits" inquiries is before this Court, and none was before the District Court.

The fact disputes actually raised by 3M go to the heart of the Rule 23 analysis. While Respondents offer snapshot statistics as the centerpiece of their argument that a class was properly certified, they assert that their statistics are not subject to challenge under Rule 23 because "statistical dueling is not relevant to the certification decision unless such dueling presents a valid basis for denying class certification." Hnot, 241 F.R.D. at 210. But that is precisely the point. As demonstrated by 3M, Respondents' statistics rest on fundamentally flawed assumptions that render Respondents' conclusions completely invalid. Ignoring facts and offering invalid statistics cannot "bridge the gap" between Respondents' individual claims and class claims, because they tell a court nothing about whether a common pattern actually exists.

Because 3M's evidence directly refuted Respondents' argument that class treatment was appropriate in this case, the District Court had a duty to resolve those disputes as part of its rigorous analysis of the class claims, and to hold Respondents to their burden to establish the elements of Rule 23 by a preponderance of the evidence. The District Court erred, as a matter of law, because it did not do so.

IV. Respondents Cannot "Bridge the Gap" As Required to Satisfy the Elements of Rule 23 By A Preponderance of the Evidence.

Had the District Court properly resolved the evidentiary disputes, it would have been apparent that Respondents cannot establish the elements of Rule 23 by a

preponderance of the evidence. As now demonstrated by Respondents' own arguments in this appeal, the record does not permit such a finding.

A. Respondents Ignore the Undisputed Evidence that Describes the "Common" Experiences of 3M's Older Employees.

Respondents assert that 3M implemented a "corporate bias" during the putative class period (somehow crafted to discriminate against employees age 46 and over), notwithstanding the unrebutted evidence that 3M's older employees actually did better during those years than in prior years. The promotion rate for more senior employees was higher during the putative class period than for employees with the same seniority over the previous 25 years. A. 138. Older workers increased as a percentage of 3M's workforce; the average age of 3M's workforce rose; and older employees' tenures increased during the putative class period. A. 129, 189-90. The advantage to older employees in compensation increased. A. 175-80. These undisputed facts refute any link between Respondents' individual discrimination claims and a viable age discrimination class, but Respondents (and the District Court) ignored them.

Respondents and the District Court also ignored the evidence 3M presented showing that the experiences of 3M's older employees, on the whole, were consistent with or more favorable than older employees nationwide. Patterns in pay growth and promotions for 3M's older workers are consistent with (or better than) expected, nondiscriminatory trends in national workforce data, A. 224-26, 228, 330, and tenure at 3M greatly exceeds national labor market norms, A. 116-17, 129.⁵

⁵ Thus, although 3M does not bear a burden to *disprove* the elements of Rule 23, 3M demonstrated clear historical and labor-market benchmarks showing that the

Respondents did not even attempt to describe a company-wide *policy* of age discrimination, suggesting instead the amorphous concept, based on scattered anecdotal evidence, that “corporate bias” against older employees somehow (Respondents have never described the mechanics of this alleged process) filtered through the Company. But that assertion, accepted without question by the District Court, ignores the undisputed facts that 3M retained external experts to develop programs and policies structured to prevent discrimination, A. 114; that 3M’s state-of-the-art human resources systems are designed to minimize the risk of bias, A. 94-95; that 3M’s talent management efforts and performance management systems correspond with nondiscriminatory human resources best practices, A. 102-03, 110-15; and that 3M’s talent management function has been singled out as “the single best such program” among 373 companies participating in a widely respected benchmarking survey, A. 102.

In light of these undisputed facts, Respondents could not show by a preponderance of the evidence that their individual claims share “the same essential characteristics as the claims of the class at large,” Cooper, 390 F.3d at 714, or otherwise “bridge the gap” between their individual claims and the alleged claims of absent class members, Falcon, 457 U.S. at 157-58, in order to prove commonality and typicality under Rule 23.01 or “cohesiveness” under Rule 23.02(b). Nor could they show that alleged common issues *outweigh* the individualized facts that every individual claimant would have to prove in

experiences of 3M’s older employees, as a group, were entirely inconsistent with Respondents’ assertion that there exists a cohesive class of similarly-situated employees with common claims of discrimination.

order to show that their experience was different than the overall positive experiences of older employees at 3M, in order to establish preponderance and superiority under Rule 23.02(c). In ruling otherwise, the District Court erred.

B. Respondents' Evidence, Even Standing Alone, Cannot Link Their Individual and Class Claims.

Even were this Court to ignore, as did Respondents and the District Court, the entire body of evidence in the record regarding the experiences of the vast majority of 3M's older employees, Respondents' own evidence still failed to "bridge the gap" between individual and class claims as required to satisfy the elements of Rule 23.

1. Snapshot Statistics.

Respondents continue to rely primarily on their snapshot statistics to allege commonality of claims. That evidence fails under Rule 23, however, because it rests on the fundamentally flawed assumption that age is the same as "immutable" characteristics such as race or gender. Those flawed premises are now apparent.⁶

Respondents made no effort to refute 3M's explanation that their statistician refused to use all of the controls that were available to her, simply because she speculated that such controls *could be* "tainted" by age bias. Respondents also did not dispute that their statistics are founded on the assumption that experiences of older and younger

⁶ Respondents' assertion that snapshot analyses have been "long accepted by federal courts" in age cases, Respondents' Brief at 35, is without support. The cases cited by Respondents uniformly involved events like reductions in force and restructurings. While discrimination claims based on particular events may lend themselves to point-in-time statistics, Respondents' general allegations do not.

employees should be statistically identical, on average,⁷ notwithstanding the undisputed evidence that statistical differences in promotions, performance ratings, training selections, and rates of pay increases between older and younger employees are always *expected* in any snapshot analysis *in the absence of discrimination*. See, e.g., A. 100-03, 108-09, 114-15, 140-53, 156-69, 202, 206-08, 219-28, 249-53, 257-58, Connolly & Peterson, *Use of Statistics in Equal Employment Opportunity Litigation* 10-38.7 – 10-38.8 (2007) (A. 315-16); Johnson & Neumark, *Age Discrimination, Job Separations, and Employment Status of Older Workers: Evidence from Self-Reports*, 32 J. of Hum. Res. 779, 809 (1997) (A. 320); see also Evers v. Alliant Techsystems, Inc., 241 F.3d 948, 958-59 (8th Cir. 2001) (“[B]ecause successful employees tend to be promoted, low performers at any level will tend to be older than others at the same level.”); Cope v. McPherson, 594 F. Supp. 171, 175 (D.D.C. 1984) (“Among older workers . . . those on the average less qualified will remain in the pool, and as a result the pool can be expected to be ‘weighted’ with more relatively older, less qualified employees.”); Tagatz v. Marquette Univ., 861 F.2d 1040, 1045 (7th Cir. 1988) (“[S]alaries tend to rise rapidly in the early stages of their career and to reach a plateau The phenomenon of diminishing returns to years of experience is well documented.”).

⁷ Respondents’ assertion that the appropriate baseline is the “average for all employees” *after* Respondents’ expert has applied her cherry-picked controls, Respondents’ Brief at 12, is illogical. The results of a statistical analysis cannot be the benchmark for that analysis because the benchmark would then be subject to the same limitations and defects as the analysis. A benchmark must be established *independent of* the analysis. Thus, where, as here, all of the experts agree that statistical differences are expected between older and younger workers in any snapshot analysis, Respondents bear the burden to establish a benchmark that accounts for those expected, nondiscriminatory differences.

Both Respondents and NELA agree that a court must examine statistical evidence pertinent to the Rule 23 issues.⁸ Since Respondents offered their statistics in support of commonality, typicality, and numerosity, they cannot reasonably dispute that the validity of those statistics goes directly to the central inquiry under Rule 23: Can those statistics “bridge the gap” between the named Plaintiffs’ individual claims and class claims? Because Respondents have offered no evidence suggesting that their statistics reflect anything other than the nondiscriminatory differences that statisticians and labor economists expect to find in snapshot analyses in the context of age, those statistics do not support any inference that a class of discrimination claimants exists.

2. Anecdotal Evidence.

Although it was not credited by the District Court as a basis for class certification, Respondents also point to “anecdotal” evidence that they suggest demonstrates a company-wide policy of discrimination emanating from James McNerney. That evidence, which consists of hearsay, complaints about individual managers, and Respondents’ speculation that otherwise non-discriminatory succession planning efforts reflect McNerney’s alleged age bias, is not evidence that 3M systematically excluded older employees from employment opportunities, much less on a class-wide basis. See Appellant’s Brief at 39-42. That evidence, connected to the putative class claims only by assumptions of class-wide disparate impact drawn from Respondents’ flawed statistical

⁸ Respondents assert that 3M’s experts never disputed their alleged disparities. Not only did 3M’s experts show that such “disparities” were expected in the absence of discrimination, but they also showed that the disparities were reduced or eliminated when even incomplete controls, such as 3M’s performance data, were used. See, e.g., A. 118-21, 132.

“disparities,” does not suggest a link between individual claims and a putative class, much less establish that link by a preponderance of the evidence. This is demonstrated no more clearly than by the fact that, notwithstanding Respondents’ assertion that James McNerney was the source of age bias at 3M, 3M’s unrebutted historical evidence shows that older employees’ experiences, in general, were more favorable during McNerney’s tenure than in prior years. A. 129, 138, 175-80, 189-90.

C. Respondents’ Remaining Arguments Are Untenable.

Respondents and NELA make four additional arguments fairly described as red herrings. First, they assert that 3M’s argument that age is different is itself proof of discrimination under the MHRA. 3M has never suggested that age discrimination is permissible. But because there is a natural slowing in the frequency of promotions and in rates of pay increases over employees’ careers, the nondiscriminatory factors that lead to that slowing must be accounted for in any age case.

Second, Respondents assert that 3M believes it can “favor younger employees in training.” Respondents’ Brief at 34 n.16. This misrepresents 3M’s position, which is simply that it is important to provide training as early in a career as possible. There is no prohibition against an employer planning for the long term and offering leadership training to those employees who can benefit most, who are often less-senior employees with less experience in leadership positions.

Third, Respondents assert that older employees received only a fraction of the total number of promotions awarded at 3M. See Respondents’ Brief at 16. As Respondents are well aware, at any company like 3M where there are fewer positions at

the top of the company than at the bottom (a “pyramid” structure), older employees *already* hold the vast majority of upper-level positions, and older employees generally received numerous promotions earlier in their own careers, that argument is meaningless.

Finally, Respondents assert that 3M’s case rests on “age stereotypes” that older workers are poor performers. Respondents’ Brief at 37; see also NELA Brief at 11-12. At 3M, where the overwhelming majority of the Company’s leadership is itself older, nothing could be further from the truth. But when promotions or percentage pay increases are viewed annually and by job grade, as in Respondents’ snapshot statistics, older employees are statistically more likely to be at or near their peak positions and statistically less likely to receive percentage raises as large as less-highly paid, and generally more junior, employees *in the absence of discrimination*. Respondents’ own experts recognize these nondiscriminatory statistical phenomena as unremarkable and expected. A. 202, 249, 250-51, 253. Inflammatory suggestions that these undisputed statistical realities reflect age bias show the bankruptcy of Respondents’ arguments.

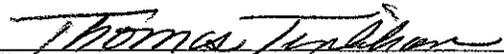
CONCLUSION

For the reasons set forth above, and in 3M’s opening brief, class certification was improvidently granted. Respondents cannot “bridge the gap” between their individual and putative class claims because their evidence does not show – by a preponderance of the evidence – that a class of similarly situated persons actually exists, for whom common, class-wide evidence can determine liability in a fair and economical way. To the contrary – and regardless of how Respondents have styled their case – liability

determinations will turn on individualized proofs for every potential claimant. Therefore, this Court should reverse the April 11, 2008, Order of the District Court.

Dated: September 29, 2008

Respectfully submitted,



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A08-816

**STATE OF MINNESOTA
IN COURT OF APPEALS**

CLIFFORD L. WHITAKER et al.
on behalf of themselves
and all others similarly situated,

Plaintiffs/Respondents,

vs.

3M COMPANY,

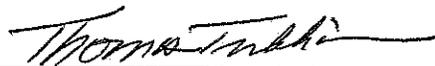
Defendant/Appellant.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 5,789 words. This brief was prepared using Microsoft Word 2003.

Dated: September 29, 2008

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