

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

FILED
02 JUL -31 PM 5:02
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,**

Plaintiff,

and

ANTONIO ANGLIN,

Plaintiff/Intervener

vs.

Case No.: 8:00-CV-2012-T-24EAJ

ENTERPRISE LEASING COMPANY

Defendant.

ORDER

Before the court are **Defendant's Motion to Compel Rule 35 Mental Examination** (Dkt. 142) filed on May 20, 2002, and **Plaintiff EEOC's Plaintiff-Intervener's Joint Response to Defendant's Motion to Compel Rule 35 Mental Exam** (Dkt. 147) filed on June 7, 2002.

Defendant seeks an order requiring Intervener Antonio Anglin ("Anglin") to submit to a mental examination, to be conducted by Dr. Barbara Stein, M.D. and Randy Otto, Ph.D. Dr. Otto is to conduct psychological testing and Dr. Stein, a forensic psychiatrist, will evaluate plaintiff.

Plaintiff's amended complaint alleges race discrimination and retaliation by defendant. Paragraph 19 alleges that plaintiff has "suffered damages" as a result of defendant's unlawful employment actions. (Dkt. 67)

152

Federal Rule of Civil Procedure 35(a) states, in relevant part:

When the mental or physical condition (including blood group) of a party or of a person...is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner... The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

The “in controversy” and “good cause” requirements of Rule 35 “are not met by mere conclusory allegations of the pleadings - nor by mere relevance to the case - but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each examination.”

Schlagenhauf v. Holder, 379 U.S. 104, 118 (1964)

Defendant asserts that this court should order a mental examination based on 1) Anglin’s deposition testimony concerning the emotional distress caused by defendant’s alleged discrimination; and 2) plaintiff’s demand for close to \$1 million dollars in compensatory damages. Additionally, defendant asserts that because Anglin has not seen any mental health professionals, there is no possibility of examining medical records or deposing his health care providers to gain relevant information.

Plaintiff and Anglin respond that the court should deny the motion because defendant has not met its burden as outlined in Rule 35(a), by establishing that plaintiff’s mental condition is “in controversy” and there is “good cause” for the requested examination. They also contend that defendant’s proposed examination is so broad as to be invasive.

A mere claim for emotional damages, without more, does not justify a Rule 35 mental

examination at the request of the opposing party. See e.g. Ali v. Wong Laboratories, 162 F.R.D. 165, 167 (M.D. Fla. 1995); See also Stevenson v. Stanley Bostitch, Inc., 201 F.R.D. 551, 553 (N.D. Ga. 2001)(“The majority of courts have held that plaintiffs do not place their mental condition in controversy merely by claiming damages for mental anguish or ‘garden variety’ emotional distress”)(citations omitted).

A mental exam is warranted when one or more of the following factors are present: (1) a tort claim is asserted for intentional or negligent infliction of emotional distress; (2) allegations of a specific mental or psychiatric injury or disorder is made; (3) a claim of unusually severe emotional distress is made; (4) plaintiff intends to offer expert testimony in support of a claim for emotional distress damages; and/or (5) plaintiff concedes that her mental condition is in controversy within the meaning of Rule 35. Stevenson, 201 F.R.D. at 553 (citations omitted).¹

Factors (1), (2), (4) and (5) do not apply to this case. Plaintiff has not brought a tort claim of infliction of emotional distress, intentional or otherwise, and he has not conceded that his mental condition is in controversy within the meaning of Rule 35. Nor has plaintiff indicated that he will offer expert testimony in support of his claim of emotional distress.²

There is also no indication that plaintiff sought or received treatment for his emotional distress; the deposition excerpts submitted by defendant do not include a claim that he suffers from

¹Even where these five factors have not been expressly recognized, most cases allowing mental examinations involve a separate tort claim for emotional distress or an allegation of ongoing severe mental injury. See Stevenson, 201 F.R.D., at 553 (citations and quotation marks omitted)

²Plaintiff admits that she has submitted expert disclosures “in an abundance of caution” in the event that defendant’s motion to compel a Rule 35 examination is allowed. (Dkt. 147 at 6 n.4) This conditional disclosure does not establish that plaintiff intends to offer expert testimony to support his claim of emotional distress.

a specific mental injury or disorder.

The only remaining issue is whether plaintiff has presented a claim of “unusually severe emotional distress.” Id. at 553.

Defendant cites portions of plaintiff’s deposition testimony that defendant’s alleged discrimination was “life altering”, “changing”, and made him feel “the lowest of the low”; that his employment with defendant was one of the worst experiences he has ever had; and that only his mother’s death was more traumatic than defendant’s alleged actions. (Dkt. 142 at 2)

Additionally, defendant contends that plaintiff’s demand for almost one million dollars in compensatory damages evidences a claim for a severe mental injury.

While at least one court has emphasized the amount of compensatory damages sought in ordering a Rule 35 mental examination, see EEOC and Calvo, Ferlk and Scarborough v. Rio Bravo International, case number 8:99-CV-1371-T-17MAP (M.D. Fla. 2001)(request for at least one million dollars in non-economic damages)³, this approach is problematic. Rule 35 motions are necessarily fact-intensive; drawing a line between substantial and insubstantial compensatory damages is a slippery slope this court declines to descend.

Emotional distress is not synonymous with the term “mental injury” for the purpose of ordering a Rule 35 examination. See Id. at 96; see also Neal v. Siegel-Robert, Inc., 171 F.R.D. 264, 267 (E.D. Mo. 1996)(where plaintiff’s amended complaint and deposition testimony demonstrated that plaintiff “is not complaining of any definable psychological symptoms, but rather suffering from basic complaints that are within the understanding of the jury,” plaintiff has not placed his mental

³A copy of this unreported decision is attached to defendant’s motion. (Dkt. 142, exhibit 3)

condition in controversy). But see Shepard v. American Broadcasting Companies, Inc., 151 F.R.D. 194, 212 (D.D.C. 1993)(plaintiffs placed mental condition in controversy by demanding damages to compensate them for emotional distress and submitting affidavits describing at great length the emotional distress each claimed; one of two plaintiffs also consulted a physician about her emotional problems) rev'd in part and vacated in part on other grounds, 62 F.3d 1469 (D.C. Cir. 1995).

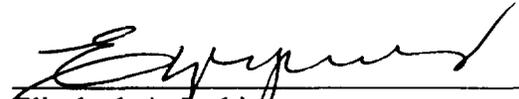
Upon consideration, this court finds that plaintiff has not made a claim of "unusually severe mental distress", Stevenson, 201 F.R.D. at 553, which places his mental condition in controversy.

Nor has defendant shown good cause for the requested mental examination by a psychiatrist and forensic psychologist to explore his claim of emotional distress. The request for an open-ended mental status examination and administration of unidentified psychological tests lacks the requisite specificity for a Rule 35 mental examination.

Accordingly, and upon consideration, it is **ORDERED**:

- 1) Defendant's motion to compel a Rule 35 mental examination (Dkt. 142) is **DENIED**.

DONE AND ORDERED in Tampa, Florida on this 3rd day of July, 2002.


Elizabeth A. Jenkins
United States Magistrate Judge

Copies To:
Counsel of Record

Date Printed: 07/05/2002

Notice sent to:

✓
— M. Teresa Rodriguez, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

— Delner Franklin-Thomas, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

— Gwendoln Y. Reams, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

— Michael J. Farrell, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

— C. Gregory Stewart, Esq.
Equal Employment Opportunity Commission
Miami District Office
One Biscayne Tower
2 S. Biscayne Blvd., Suite 2700
Miami, FL 33131

✓
— Peter W. Zinober, Esq.
Zinober & McCrea, P.A.
201 E. Kennedy Blvd., Suite 800
Tampa, FL 33602

— Luisette Gierbolini, Esq.
Zinober & McCrea, P.A.
201 E. Kennedy Blvd., Suite 800
Tampa, FL 33602

✓
— Mitchell Dean Franks, Esq.
Gray, Harris, Robinson, Lane, Trohn
1 Lake Morton Dr.
P.O. Box 3
Lakeland, FL 33802-0003

— Neil A. Roddenbery, Esq.

Gray, Harris, Robinson, Lane, Trohn

1 Lake Morton Dr.

P.O. Box 3

Lakeland, FL 33802-0003