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CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

and

SHERI CALVO, VERONICA FERREK and
MELISSA SCARBOROUGH,

Intervenor-Plaintiffs,

v.

Case No. 99-1371-CIV-T-17A

RIO BRAVO INTERNATIONAL, INC. and
INNOVATIVE RESTAURANT CONCEPTS,
INC., and APPLEBEE'S INTERNATIONAL,
INC. d/b/a RIO BRAVO CANTINA,

Defendants.

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ORDER

THIS CAUSE came before the Court on (1) Defendant's Motion to Compel Mental Examination (doc. 52), (2) Defendants' Motion to Withdraw Defendant's Motion to Compel Mental Examination (doc. 65-1), Defendants' Motion to Substitute Defendant's Revised Motion to Compel Mental Examination (doc. 65-2), Defendants' Revised Motion to Compel Mental Examination (doc. 65-3), and Plaintiffs' response thereto (doc. 67).

This is a Title VII action in which the Plaintiff and Intervenor-Plaintiffs allege sexual discrimination against their former employer. Intervenor-Plaintiffs, Sheri Calvo, Veronica Ferrek, and Melissa Scarborough, contend they were subjected to continuous sexual

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harassment by an assistant manager during their employment as servers and hostesses with a Rio Bravo restaurant located in Clearwater, Florida. Defendants presently seek to have Intervenor-Plaintiffs submit to mental examinations by Dr. Barbara Stein, Ph.D., pursuant to Federal Rules of Civil Procedure rule 35(a) for the purpose of assessing the cause and extent of the Intervenor-Plaintiffs' alleged emotional and mental injuries. Defendants argue the mental examination of each Intervenor-Plaintiff should be ordered because (a) each plaintiff has placed her mental condition in controversy through allegations of continuing and severe emotional pain and mental anguish and by expressing the intention to present both lay and expert testimony as to mental damages; (b) Dr. Stein is suitably licensed to conduct such examinations; and (c) good cause exists to order the mental examinations.

The Intervenor-Plaintiffs contend their mental conditions have not been placed in controversy in this lawsuit because (a) a cause of action for intentional or negligent infliction of emotional distress has not been pled; (b) there is no specific mental or psychiatric injury alleged; (c) no claim for unusually severe emotional distress has been pled; (d) they have not sought any psychiatric or psychological counseling and do not have any present plans to visit any such physicians for problems they relate to what happened at Rio Bravo; (e) they will not be presenting any expert testimony on the issue of emotional damages; and (f) they have not conceded that their mental conditions are in controversy.

Under Fed. R. Civ. P. 35, Defendants must establish the Intervenor-Plaintiffs' mental conditions are in controversy and good cause exists for the examinations sought. The predicates of Rule 35 are not met by the mere conclusory allegations of the pleadings or by arguing the information sought in the mental examination is relevant to the case. Rule 35

requires an affirmative showing by the movant the condition as to which the examination is sought is genuinely in controversy and good cause for ordering the examination exists. *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964). This requires a greater showing than for other types of discovery under Rule 26. *Ali v. Wang Laboratories, Inc.*, 162 F.R.D. 165, 167 (M.D. Fla. 1995).

A party seeking a mental examination must go beyond the pleadings to establish that the need for an IME exists. *Schlagenhauf*, 379 U.S. at 118. For a court to mandate a Rule 35 examination in such an instance, a more specific claim must be made. *See Ali*, 162 F.R.D. at 168 (the plaintiff must state something more than a mere claim for emotional distress); *Lahr v. Fulbright & Jaworski, L.L.P.*, 164 F.R.D. 204, 209 (N.D. Tex. 1996)(a court will likely order an IME where a plaintiff has asserted a separate claim for intentional or negligent infliction of emotional distress or where the plaintiff alleges severe mental suffering); *Shepard v. American Broadcasting*, 151 F.R.D. 194, 212 (D.D.C. 1993)(if plaintiff seeks treatment for the mental injury or is likely to offer expert testimony on the issue of emotional distress, an IME may be appropriate).

Here, the Intervenor-Plaintiffs seek damages for general emotional pain and suffering and mental anguish only as a component of their discrimination claim. In the motion before the Court, Defendants appear to only rely upon conclusory allegations in the pleadings and have not presented hard facts indicating the Intervenor-Plaintiffs have placed their mental conditions at issue. Thus, I find the Defendants have not met their burden to establish the Intervenor-Plaintiffs' mental conditions are in controversy.

Accordingly, it is hereby **ORDERED**:

1. Defendants' Motion to Compel Mental Examination (doc. 52) is **DENIED** as moot.
2. Defendants' Motion to Withdraw Defendant's Motion to Compel Mental Examination (doc. 65-1) is **GRANTED**. The Clerk of the Court is directed to purge Document 52 from the record and return Document 52 to Defendants' counsel.
3. Defendants' Motion to Substitute Defendant's Revised Motion to Compel Mental Examination (doc. 65-2) is **GRANTED**.
4. Defendants' Revised Motion to Compel Mental Examination (doc. 65-3) is **DENIED**.

DONE AND ORDERED in Chambers, at Tampa, Florida, on this 3/ day of October, 2000.



MARK A. PIZZO
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Counsel of Record