

[Doc. No. 120]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

FOODCRAFTERS DISTRIBUTION
COMPANY, et al.,

Defendants.

Civil No. 03-2796 (RBK)

EILEEN HORNER, et al.,

Intervenor Plaintiffs,

v.

FOODCRAFTERS DISTRIBUTION
COMPANY, et al.,

Intervenor Defendants.

MONIQUE LOVENDUSKI,

Plaintiff,

v.

FOODCRAFTERS DISTRIBUTION
COMPANY, et al.,

Defendants.

ORDER

This matter comes before the Court upon the motion of Plaintiffs, Eileen Horner, Danelle Horner, Dayna Horner, Leighanne

Reynolds, and Paula Bobo, pursuant to FED. R. CIV. P. 37 to bar Charles A. Dackis, M.D. (hereinafter "Dackis") and Tracy Steen, Ph.D. (hereinafter "Steen") from serving as Defendants' FED. R. CIV. P. 35 examiners, strike the FED. R. CIV. P. 35 examination reports regarding Paula Bobo and Danelle Horner, and bar the trial testimony of Dr. Dackis and Dr. Steen. Plaintiffs also seek a protective order requiring that: (1) the examinations of the remaining plaintiffs be digitally recorded; (2) the FED. R. CIV. P. 35 examiner be permitted to have only one female staff level person present during the examination, who may not participate in the examination or preparation of the report; and (3) the FED. R. CIV. P. 35 examiner be prohibited from questioning Plaintiffs about sexual relationships, conduct, or activity unrelated to the matter of the lawsuit. The Court has considered Plaintiffs' moving papers, as well as Defendants' opposition thereto, and for the reasons set forth below, Plaintiffs' motion shall be denied.

The facts of the underlying dispute have been set forth in the District Court's Opinion dated February 24, 2006. Therefore, the Court shall only recount those facts relevant to the instant motion. On September 27, 2005, Defendants identified Dr. Dackis as their expert witness and requested that Plaintiffs schedule their independent medical examinations. See Intervening Plaintiffs' Memorandum of Law in Support of Motion to Bar Defendants' F.R.C.P. 35 Examiner, Strike his Report as to Paula Bobo and Danelle Horner and Bar Trial Testimony, and For a Protective Order [hereinafter "Pl. Br."] at 2. Plaintiffs Paula Bobo (hereinafter "Bobo") and

Danelle Horner (hereinafter "Horner") attended their examinations on October 13, 2005 and October 14, 2005, respectively. See id.

Plaintiffs allege that the examinations of Ms. Bobo and Ms. Horner "were conducted in an inappropriate fashion," and that Defendants failed to identify Dr. Steen as one of the examiners. Id. at 1. Specifically, both Ms. Bobo and Ms. Horner assert that during their examinations they were subjected to "tag team" questioning by Dr. Dackis and Dr. Steen, and that their responses were cut off in order to ask additional questions. See id. at 2-3. Both Ms. Bobo and Ms. Horner also assert that the manner in which their examinations were conducted by Dr. Dackis and Dr. Steen made them feel uncomfortable, pressured, and intimidated. See id. Further, Ms. Bobo asserts that she was questioned about her relationship with her ex-husband, which ended over ten years before, and their "marital discord," see Affidavit of Paula Bobo at ¶ 6, and Ms. Horner asserts that she was questioned about prior relationships and whether she has any eating disorders, see Affidavit of Danelle Horner at ¶¶ 12-14. Additionally, Ms. Horner asserts that when she arrived for her examination she overheard Dr. Dackis engaged in a telephone conversation with a person she later learned to be Dr. Steen. See id. at ¶¶ 3-8. During this conversation, Horner asserts that Dr. Dackis stated: (1) "we need to build up the sexual relation between them"; (2) "we need to get to the bottom of the Michael Alfano thing. I don't know what kind of questions to ask her, so you have to help me."; and (3) that he wanted to "press the panic attacks," and "definitely want[s] to get

into her being paralyzed and in the hospital for a week." Id. Based upon these assertions, Plaintiffs seek to bar Dr. Dackis and Dr. Steen from serving as Rule 35 examiners or testifying as expert witnesses and strike Dr. Dackis' report on Ms. Bobo and Ms. Horner, because of their alleged bias. See Pl. Br. at 1. Plaintiffs also seek a protective order governing the examinations of the remaining plaintiffs that requires recording of the examinations, limits attendance of the examinations to one female clerical staff member who cannot participate in the examination or preparation of the report, and prohibits the examiner from inquiring about the sexual relationships, conduct, or activity of remaining plaintiffs unrelated to the subject matter of the case. See id.

In opposition to Plaintiffs' motion, Defendants argue that the reports prepared by Dr. Dackis are "not improper or prejudicial in any respect," and that there is no basis to suppress them, or exclude Dr. Dackis as an expert witness, or prevent Dr. Dackis from performing the remaining independent medical examinations with Dr. Steen as an observer. Memorandum of Law in Opposition to Plaintiffs' Motion to Bar Defendants' F.R.C.P. 35 Examiner, His Report and Testimony at Trial and For a Protective Order For the F.R.C.P. 35 Examinations of Intervening Plaintiffs, Dayna Horner, Eileen Horner and Leighanne Reynolds [hereinafter "Def. Opp."] at 4. There is no evidence, Defendants assert, that Dr. Dackis is or has acted with bias or that he lacks the requisite impartiality to properly conduct independent medical examinations of the remaining plaintiffs. See id. at 10. Additionally, Defendants argue that

the protective order sought by Plaintiffs is inappropriate in light of the fact that Plaintiffs' expert has already conducted his examinations, because imposing conditions on Defendants' examinations that were not imposed on Plaintiffs' examination would "create an unlevel playing field." Id. at 16. Further, Defendants assert that excluding Dr. Dackis at this time would be financially prejudicial to them given the extensive amount of work already done by Dr. Dackis. See id. at 4-5.

In an affidavit submitted along with Defendants' opposition to Plaintiffs' motion, Dr. Dackis contradicts the assertions of Horner and Bobo with respect to how their examinations were conducted. See Affidavit of Charles A. Dackis, M.D [hereinafter "Dackis Aff."]. Specifically, Dr. Dackis states that "he did not say 'we need to build up the sexual relation between them,'" or that he wanted to "press the panic attacks," as alleged by Ms. Horner. Id. at 3, ¶ 4. Dr. Dackis also denies that he and Dr. Steen engaged in "tag team" questioning. See id. at 4, ¶ 10. Rather, Dr. Dackis asserts that Dr. Steen only asked approximately 10-15 questions during the entire 2 ½ hour examination and that Ms. Horner "was in no way treated inappropriately." Id. at ¶ 10. Dr. Dackis further denies that Ms. Horner was ever cut off, asserting instead that she was allowed to talk freely throughout the examination. Id. at ¶ 11. With respect to the topics of inquiry, Dr. Dackis asserts that "[i]n order to properly evaluate Ms. Horner, it was necessary to take a sexual history, which was largely obtained by Dr. Steen in a professional manner," and that questions regarding possible

eating disorders were "important in connection with her evaluation." Id. at ¶¶ 12, 14. Dr. Dackis asserts that Ms. Horner "gave no evidence of being intimidated," and that "[a]t no time did I or Dr. Steen intimidate or harass Ms. Horner." Id. at 5, ¶¶ 16-17. The interview, Dr. Dackis asserts, was "professionally done and was conducted pursuant to normal protocol." Id. at ¶¶ 4-5. During his examination of Ms. Bobo, Dr. Dackis asserts that she "was never cut off in attempting to answer a question," nor was she "'tag teamed' by Dr. Steen and myself." Id. at ¶¶ 4-5. Dr. Dackis asserts that Ms. Bobo was questioned with respect to her ex-husband and their relationship because "[t]hat was important information to obtain in discharging the undertaking to prepare a report addressing Dr. Toborowsky's report." Id. at ¶ 6.

In reply to Defendants' opposition, Plaintiffs assert that the affidavit submitted by Dr. Dackis is "internally inconsistent," and fails to address both the fact that Dr. Steen was not authorized to participate in the examinations and the "inappropriate probing into irrelevant sexual history material and tag team questioning." Intervening Plaintiffs' Memorandum of Law in Reply to Defendants' Opposition to Motion to Bar Defendants' F.R.C.P. 35 Examiner, Strike His Report as to Paula Bobo and Danelle Horner and Bar Trial Testimony, and For A Protective Order [hereinafter "Pl. Rep."] at 1. Plaintiffs argue that Dr. Dackis has not disputed several of the statements attributed to him by Ms. Horner dealing with what type of questions he wanted to get into and how he was going to involve Dr. Steen in the examinations. See id. at 2.

Additionally, Plaintiffs challenge Dr. Dackis' assertion that Dr. Steen only asked 10 to 15 questions, given Dr. Dackis' other assertion that the sexual history was primarily conducted by Dr. Steen. See id. Specifically, Plaintiffs assert that "[i]t is inconsistent to state that her participation was limited, but then attribute an important part of the examination that lasted for an extended period of time to questioning by Dr. Steen." Id. Plaintiffs also assert that Dr. Dackis never provided a medical or scientific rationale for taking the information to which Plaintiffs object. See id.

Federal Rule of Civil Procedure 35 allows the Court to order the physical or mental examination of a party for good cause when the mental or physical condition of that party is in controversy. See Schlagenhauf v. Holder, 379 U.S. 104, 118 (1964). In this case, Plaintiffs Eileen Horner, Danelle Horner, Dayna Horner, Leighann Renolds and Paula Bobo do not dispute that their mental condition is in controversy or that Defendants have good cause for conducting examinations pursuant to FED. R. CIV. P. 35. See Pl. Br. at 4-5.¹ Rather, Plaintiffs contest the impartiality of the psychiatrist chosen by Defendants to perform the mental examination, asserting that he is biased, and assert that he must be disqualified. See id. at 5. Accordingly, the issue is not whether a mental examination may be conducted, but (1) whether Dr.

1. Plaintiff Monique Lovenduski does assert that her mental condition is not in controversy and has filed a separate motion to preclude a Rule 35 examination. That motion will be addressed separately.

Dackis can serve as the examiner and (2) if so, under what circumstances he may conduct the remaining examinations.

"Rule 35 confers on the moving party no absolute right to choose the examiner," and "the Court has the authority to reject an examiner proposed by a party upon a showing of bias or prejudice." McKitis v. DeFazio, 187 F.R.D. 225, 227 (D. Md. 1999) (citing 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2234.2, at 486 (2d ed. 1994)); see also Lahr v. Fulbright & Jaworski, LLP, 164 F.R.D. 196, 203 (N.D. Tex. 1995). In the instant case, as noted above, Plaintiffs assert that Dr. Dackis is biased because of the comments he allegedly made prior to his examination of Ms. Horner. See Pl. Br. at 6. Plaintiffs assert that Ms. Horner overheard Dr. Dackis state that "we need to build up the sexual relation between them," and "press the panic attacks" among other things. See id. However, Dr. Dackis has denied ever having made such comments. See Dr. Dackis Aff. at 3.

Clearly, there is a factual dispute concerning whether Dr. Dackis made certain statements to Dr. Steen. However, having reviewed the submissions, the Court finds that these statements, if accepted by the factfinder, do not demonstrate sufficient bias so as to warrant disqualification of Dr. Dackis from serving as Defendants' expert. As noted by one court, "bias or prejudice usually relates to external factors which would make it difficult for an examiner to render an independent opinion, such as financial ties to a party." Shinn v. Greeness, 2003 WL 22937732, at *1 (M.D.N.C. Dec. 9, 2003) (citing Duncan v. Upjohn Co., 155 F.R.D.

23, 26 (D. Conn. 1994)). In Duncan, the Court cited examples of bias that would be sufficient to warrant rejection of the proposed expert, such as where a physician was a client of defendant's attorney, see 155 F.R.D. at 26 (citing Main v. Tony L. Sheston-Luxor Cab Co., 89 N.W.2d 865 (Iowa 1958)), or where an attorney refused to answer questions about his business relationship with the proposed expert, see id. (citing Adkins v. Eitel, 206 N.E.2d 573 (Ohio 1965)). Here, however, the alleged bias relates to comments allegedly made, which Plaintiffs believe demonstrate that Dr. Dackis "was planning how he could create something out of his examination that was intended to assist the Defendants' case." Pl. Br. at 6. However, "[t]he mere fact that the examiner may have formed a preliminary opinion prior to the examination is not a ground for disqualification." Shinn, 2003 WL 22937732, at *1. To the extent that Plaintiffs assert that these statements were indeed made and demonstrate bias or demonstrate an unsupported opinion, they may attempt to impeach the witness at trial. See McKitis, 187 F.R.D. at 227 ("The issues raised by the defendant speak to the credibility of [the doctor's] opinions, not his qualifications to render them."). Moreover, Plaintiffs will be able to cross-examine Dr. Dackis with respect to issues of bias or prejudice during a deposition and in the event that he is called to testify at trial. See id. at 228; Lahr, 164 F.R.D. at 203. Therefore, the Court does not find a basis to bar the expert on bias grounds.

Plaintiffs also argue that Dr. Dackis should be barred from testifying with respect to Ms. Bobo and Ms. Horner because the

examinations were inappropriately conducted in violation of Rule 35. See Pl. Br. at 7. Plaintiffs allege that the examinations were inappropriate because of the participation of Dr. Steen. See id. Plaintiffs assert that they were only given notice that Dr. Dackis would conduct the examinations, and "[h]ad Defendants requested that two doctors simultaneously examine the Intervening Plaintiffs, Intervening Plaintiffs' counsel would not have agreed." Id. at 8. While Defendants acknowledge that Dr. Steen "sat in at the first two interviews," they assert that she "asked no more than 10 to 15 questions in an aggregate of 4 ½ hours of interviewing," and that she "in no way engaged in any misconduct." Def. Opp. at 13. Plaintiffs, however, assert that "[i]t is inconsistent to state that [Steen's] participation was limited, but then attribute an important part of the examination that lasted for an extended period of time to questioning by Dr. Steen." Pl. Rep. at 2. Having reviewed the submissions, the Court finds that Defendant did not advise Plaintiffs prior to the examination that Dr. Steen would be participating in the examination. The question then is whether such failure to provide notice warrants the remedy Plaintiffs seek here - exclusion of the report and barring of Dr. Dackis' trial testimony. The scope of Dr. Steen's participation is factually disputed. The parties also dispute the effect of Dr. Steen's participation, with Plaintiffs stating in their affidavits that being questioned by both doctors made them feel intimidated. However, the Court finds that the fact that another doctor participated in the examination is not sufficient on its face to

warrant exclusion of the report or to bar the expert. Cf. Romano v. II Morrow, Inc., 173 F.R.D. 271 (D. Ore. 1997) (permitting doctor and physical therapist on his staff to question the plaintiff). The Court does not find that the presence of Dr. Steen at the examinations of Ms. Bobo and Ms. Horner or the fact that Dr. Steen asked questions during the examinations warrant barring Dr. Dackis from testifying with respect to Ms. Bobo and Ms. Horner. Cf. id. Moreover, Plaintiffs shall be permitted to inquire of Dr. Dackis at his deposition as to Dr. Steen's role.

Plaintiffs also assert that the examinations of Ms. Bobo and Ms. Horner were inappropriate because of the "tag team" style of questioning allegedly employed, and because alleged inappropriate questions were asked. See Pl. Br. at 7-8. Plaintiffs assert that "[t]here is no medical purpose served by conducting a psychiatric examination in this manner," see id. at 7. As set forth above, Dr. Dackis has denied that a "tag team" style of questioning was employed, and has asserted both that the information solicited from the women was necessary in order to properly evaluate them and that the interviews were "professionally done and conducted pursuant to normal protocol." Dackis Aff. at 4-5.

Since the independent medical examination provides "the only opportunity for a defendant to have a plaintiff examined by defendant's expert, some preference should be given in allowing the examiner to exercise discretion in the manner and means by which the examination is conducted, provided it is not an improper examination." Ragge v. MCA/Universal Studios, 165 F.R.D. 605, 609

(C.D. Cal. 1995); see also Hertenstein v. Kimberly Home Health Case, Inc., 189 F.R.D. 620, 627 (D. Kan. 1999) (allowing inquiries into the plaintiff's private sexual activity if the examining physician "in his professional discretion has a need" for that information). Discovery regarding the past sexual experiences of a plaintiff in sexual harassment cases is governed by FED. R. CIV. P. 26, although the Court must also consider FED. R. EVID. 412 "'in order to not undermine [its] rationale.'" See Hertenstein, 189 F.R.D. at 627 (quoting Burger v. Litton Indus., No. 91-0918, 1995 WL 476712, at *2 (S.D.N.Y. Aug. 10, 1995)). Although Plaintiffs do not cite to Hertenstein, they use the express language of that opinion to support their argument that questions regarding Plaintiffs' prior sexual relationships should be precluded. See Pl. Br. at 12-13. However, the Hertenstein Court, in a suit brought by an employee against an employer for sexual harassment and retaliation, noted that

[t]o validly assess [a plaintiff's] mental state, the examiner must have leave to make relevant inquiries. To prohibit inquiry into private sexual activities may unreasonably restrict exploring the history of plaintiff relevant to this case. "To restrict a physician from questioning a patient during a physical [or mental] examination unduly restricts the physician's ability to obtain the information necessary to reach medical conclusions." See Romano, 173 F.R.D. at 273 (addressing the issue in the context of a physical examination). The court assumes the examiner will exercise sound professional discretion and will not pursue private information unrelated to the purpose for the examination. An examining physician under Rule 35(a) may ask the examinee such questions as are necessary to form an opinion about her condition and the cause of the alleged injury.

Hertenstein, 189 F.R.D. at 626. Thus, after considering both FED.

R. CIV. P. 26 and FED. R. EVID. 412, the Court in Hertenstein found that "[i]nquiries about private, non-work-related sexual activity appear relevant to evaluate the cause and extent of psychological injuries alleged by plaintiff." 189 F.R.D. at 627. Here too, as stated above, Dr. Dackis has set forth by way of affidavit that the subject matter inquired about the past relationships of Ms. Bobo and Ms. Horner was necessary. Moreover, Plaintiffs have not produced any affidavits from their medical expert to dispute Dr. Dackis' assertions that the information he solicited was necessary for him to properly evaluate Ms. Horner and Ms. Bobo. Thus, the Court will not bar Defendants' report on this basis.

Having concluded that barring Dr. Dackis from serving as Defendants' FED. R. CIV. P. 35 examiner or prohibiting him from testifying with respect to Ms. Bobo and Ms. Horner is not warranted, the Court now considers under what circumstances he may conduct the remaining examinations. Plaintiffs seek a protective order requiring that: (1) the examinations of the remaining plaintiffs be digitally recorded; (2) the FED. R. CIV. P. 35 examiner be permitted to have only one female staff level person present during the examination, who may not participate in the examination or preparation of the report; and (3) the FED. R. CIV. P. 35 examiner be prohibited from questioning Plaintiffs about sexual relationships, conduct, or activity unrelated to the matter of the lawsuit. See Pl. Br. at 9-10.

Federal Rule of Civil Procedure 26(c) provides that a court "may make any order which justice requires to protect a party or

person from annoyance, embarrassment, oppression, or undue burden or expense." In determining whether to make such an order, "[t]he appropriate inquiry is whether special conditions are present which call for a protective order tailored to the specific problems presented.'" Bethel v. Dixie Homecrafters, Inc., 192 F.R.D. 320, 324 (N.D. Ga. 2000) (quoting Tirado v. Erosa, 158 F.R.D. 294, 299 (S.D.N.Y. 1994)). "It is the burden of the party seeking the special conditions to establish their existence." Id.

First, Plaintiffs seek to have the remaining examinations recorded. See Pl. Br. at 11. Plaintiffs assert that "[t]he mechanical recording of the remaining Intervening Plaintiffs' examinations would ensure that the examinations were conducted in a manner that is consistent with that to which the Plaintiff, Intervening Plaintiffs and Defendants agreed, and in a manner that is appropriate and professional." Id. Defendants oppose Plaintiffs' request that the remaining examinations be recorded, asserting that "[a]llowing plaintiffs to audio-record Dr. Dackis' examinations of plaintiffs while defendants are deprived of the benefit of an audio-recording of Dr. Toborowsky's examinations would create an unlevel playing field." Def. Opp. at 16.

"There does not appear to be any well-settled law either requiring or prohibiting the recording of such examinations." Gavenda v. Orleans County, 174 F.R.D. 272, 274 (W.D.N.Y. 1996); see also Shirsat v. Mutual Pharmaceutical Co., Inc., 169 F.R.D. 68, 71 n.2 (E.D. Pa. 1996) (describing three different approaches employed by courts in determining whether to permit observers or recording

devices in psychological examinations). However, "[a]s a general rule, the safeguards in Rule 35(b) and the general discovery rules are sufficient to protect a party's rights." Gavenda, 174 F.R.D. at 274. In denying a plaintiff's request for an independent observer to be present during a psychological examination, the court in Shirsat found "that an observer, court reporter, or recording device, would constitute a distraction during the examination and work to diminish the accuracy of the process." 169 F.R.D. at 70; see also Bethel, 192 F.R.D. at 324 (agreeing with the reasoning of the Shirsat court and denying a plaintiff's request to have her attorney present during an examination); Hertenstein, 189 F.R.D. at 629 (finding that a plaintiff had "no right to the presence of any third person or mechanical recording device at the examination"); Tomlin v. Holecek, 150 F.R.D. 628, 631-32 (D. Minn. 1993) ("[T]he presence of a third person, physically or by tape[-]recording, is inimical to the conduct of a valid psychiatric examination."). The Shirsat court also noted that the plaintiff there did not establish that any "unorthodox or potentially harmful techniques" would be employed by the examiner. 169 F.R.D. at 71.

Although Plaintiffs assert that a recording of the remaining examinations is necessary because the examiner has allegedly "cut off" the answers given by Plaintiffs, see Pl. Br. at 2-3, the Court notes that Defendants' expert disputes that assertion, see Dackis Aff. at 4. Moreover, as noted by Defendants, Plaintiffs' expert did not provide them with a recording of Plaintiffs' expert's examinations. The Court thus finds that the circumstances here do

not warrant that the remaining examinations be recorded.

Second, Plaintiffs request that only one female staff level person be permitted to attend the remaining examinations, and that she not participate in the examination or preparation of the report. See Pl. Br. at 11. Plaintiffs argue that "the use of a PhD [sic] level 'female observer' who participates in the examination" is inappropriate. Id. In response to Plaintiffs' request, Defendants assert that "Dr. Steen's presence at future examinations will be in the capacity of a passive observer, nothing more." Def. Opp. at 16. The Court finds that barring Dr. Steen is not warranted and Defendants' agreement that Dr. Steen will solely observe and not participate in the remaining examinations addresses Plaintiffs' concern about alleged "tag team" questions.

Finally, Plaintiffs request that Dr. Dackis be prohibited from questioning Plaintiffs about sexual relationships, conduct, or activity unrelated to the matter of the lawsuit. See Pl. Br. at 12. Plaintiffs assert that such questioning "would serve no purpose other than to harass," and that FED. R. EVID. 412 excludes such information from evidence. Id. However, as noted above, Plaintiffs do not provide any expert affidavit to support their assertion in this regard. Therefore, for the same reasons that the Court rejected Plaintiffs' argument on this issue with respect to Defendants' expert report regarding Ms. Bobo and Ms. Horner, the Court will not issue a protective order precluding such inquiry. Rather, the Defendants' expert shall be permitted to ask such questions if, in his professional opinion, there is a need for such

inquiry in order to form an opinion as to a plaintiff's condition and any cause thereof. See Hernstein, 189 F.R.D. at 627. However, nothing in this Order shall preclude Plaintiffs from challenging the admissibility of such evidence at trial on evidentiary grounds.

CONSEQUENTLY, for the reasons set forth above and for good cause shown,

IT IS on this 11th day of July 2006,

ORDERED that Plaintiffs' motion to disqualify Defendants' FED. R. CIV. P. 35 examiner and for a protective order shall be, and hereby is, **DENIED**; and it is further

ORDERED that Dr. Steen is prohibited from asking any questions during any future examinations conducted by Dr. Dackis.

s/ Ann Marie Donio
ANN MARIE DONIO
UNITED STATES MAGISTRATE JUDGE

cc: Hon. Robert B. Kugler