

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

JIONNI CONFORTI,

Plaintiff,

v.

ST. JOSEPH'S HEALTHCARE SYSTEM,
INC.; ST. JOSEPH'S HOSPITAL AND
MEDICAL CENTER D/B/A ST. JOSEPH'S
REGIONAL MEDICAL CENTER; and
FATHER MARTIN D. ROONEY,

Defendants.

Case No. 2:17-cv-00050 (CCC/CLW)

Motion Day: August 19, 2019

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL MENTAL
EXAMINATION OF PLAINTIFF**

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Plaintiff Jionni Conforti (“Mr. Conforti”) respectfully submits this opposition to the Motion to Compel Mental Examination of Plaintiff submitted by Defendants St. Joseph’s Healthcare System, Inc., St. Joseph’s Hospital and Medical Center (d/b/a St. Joseph’s Regional Medical Center) (“St. Joseph’s”) and Father Martin D. Rooney (collectively “Defendants”). Mr. Conforti does not oppose Defendants’ accompanying Motion to Seal.

PRELIMINARY STATEMENT

Mr. Conforti filed this action against Defendants following the discrimination he suffered in June 2015, when he was improperly denied a medically necessary hysterectomy by Defendants because of his sex, gender identity, nonconformity with sex stereotypes, and transgender status. Mr. Conforti brings only two claims in his Complaint for violations of Section 1557 of the Patient Protection and Affordable Care Act (“ACA”), 42 U.S.C. § 18116, and the New Jersey Law Against Discrimination (“NJLAD”), N.J.S.A. 10:5-12. To remedy Defendants’ wrong, Mr. Conforti requests declaratory and injunctive relief against Defendants, as well as standard compensatory damages for the “garden variety” emotional distress Mr. Conforti experienced consistent with other victims of discrimination.

Seizing on this undisputed fact, Defendants have now filed their Rule 35 motion seeking to force Mr. Conforti to undergo a highly invasive mental examination by a psychiatric expert handpicked by Defendants. The instant Rule 35 motion is only the latest in a string of belated attempts by Defendants to disregard Mr. Conforti’s privacy rights and engage in cumulative, harassing, invasive, unnecessary, harmful, and disproportionate discovery based on Mr. Conforti’s status as a transgender man and his standard request for garden variety emotional distress damages as part of his discrimination claims. Defendants’ request is entirely unwarranted under Rule 35’s heightened discovery requirements, as Defendants failed to establish both that Mr. Conforti’s current mental status is “in controversy” as contemplated by Rule 35, or that there is “good cause”

to order a mental examination here. Defendants' vague arguments and lack of documentary support renders their motion woefully deficient on both fronts and fails to meet their burden under Rule 35.

Under the prevailing standards in the Third Circuit and District of New Jersey, this Court should reject Defendants' invitation to find that Rule 35 is satisfied merely because Mr. Conforti is transgender and sought mental health treatment *unrelated to Defendants' discriminatory conduct*. Crucially, Mr. Conforti does *not* bring a claim for intentional or negligent infliction of emotional distress, and he does *not* allege that Defendants' actions caused him to suffer unusually severe emotional distress or a specific psychological injury. Nor does Mr. Conforti intend to offer expert testimony on his compensatory damages claim for the non-clinical emotional distress he felt after experiencing discrimination. Rather, Mr. Conforti claims to have suffered exactly the same kind of emotional distress one would expect a victim of discrimination to suffer after facing Defendants' discriminatory denial of medical services.

Moreover, Mr. Conforti has already provided Defendants with seven years' worth of medical records and hours of deposition testimony. Yet Defendants fail to offer any rationale or evidentiary support for why a mental examination is still needed, or what information could be gleaned that Defendants do not otherwise already have access to, such that either Rule 26's threshold relevancy standard or Rule 35's additional heightened requirements are satisfied. A "discriminating application" of the law, as applied to the facts of this case, can result in no other conclusion than that Mr. Conforti's mental health is not "in controversy," that there has not been good cause shown by Defendants for ordering this invasive exam, and that such an exam would be disproportionate to the needs of this case and a gross violation of Mr. Conforti's right to privacy. Defendants' motion should therefore be denied.

FACTUAL BACKGROUND

A. The Underlying Dispute

In 2014, Mr. Conforti was diagnosed with gender dysphoria. *See* Compl. ¶¶ 3, 55. Mr. Conforti subsequently began treatment for gender dysphoria, which included receiving hormone therapy and undergoing a double mastectomy. *Id.* ¶¶ 4, 55–56. In 2015, in consultation with and at the recommendation of his medical providers, Mr. Conforti took the next steps to undergo a hysterectomy as part of his medically necessary treatment for gender dysphoria. *Id.* ¶¶ 4, 57. Ultimately, Mr. Conforti consulted with Dr. Brian Day, an experienced surgeon at Totowa OB/GYN who had been referred to Mr. Conforti and who had admitting privileges at St. Joseph’s, Mr. Conforti’s lifelong hospital of choice. *Id.* ¶¶ 4–5, 49–50, 58–59, 76.

However, despite Dr. Day previously confirming that he would be “happy” to help Mr. Conforti obtain a hysterectomy, on June 16, 2015, the day of Mr. Conforti’s appointment with Dr. Day, Defendant Father Martin Rooney, Director of Mission Services at St. Joseph’s, e-mailed Mr. Conforti for the first time to inform him that, “as a Catholic Hospital we would not be able to allow your surgeon to schedule” “a total hysterectomy ... to remove all female parts based on the medical necessity for Gender Reassignment.” *Id.* ¶¶ 8, 60, 69. Because Dr. Day only had admitting privileges at St. Joseph’s, he was unable to perform the hysterectomy at all. *Id.* ¶ 68. As a result of this blatant discrimination, Mr. Conforti felt frustrated, humiliated, depressed, and anxious, particularly at having to once again search for a surgeon he could trust to perform this highly sensitive surgical procedure. *Id.* ¶¶ 9, 73–74. He was further afraid of being discriminated against by St. Joseph’s again if he returned. *Id.* ¶ 75. In September 2015, Mr. Conforti was able to undergo a hysterectomy at another hospital with a different surgeon, Dr. Charles Haddad.

B. The Instant Dispute

On January 5, 2017, Mr. Conforti filed the instant Complaint alleging discrimination in violation of the ACA and the NJLAD. Dkt. 1. Throughout 2018 and 2019, the parties faced numerous discovery issues relating to Defendants' pursuit of medical records and testimony regarding Mr. Conforti's mental state. These interactions are documented in more detail in Mr. Conforti's currently pending motion to quash. *See* Dkt. 69. Ultimately, Mr. Conforti agreed to produce medical records from six different medical providers, spanning from January 1, 2011 to August 23, 2018 (over twenty months after the Complaint was filed). Currently pending with the Court is Plaintiffs' motion to quash Defendants' attempt to depose *six* of Mr. Conforti's medical providers, and seek additional medical records from these individuals, including Mr. Conforti's former and current therapists. Dkt. 69.

On July 23, 2019, Defendants filed this motion to compel a mental examination of Mr. Conforti. Dkt. 96.

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 26(b)(1), a party may generally "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." When considering whether additional discovery is warranted under Rule 26, courts should consider "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

A motion to compel a party to undergo a mental examination, however, is a particularly invasive discovery tool, and requires a far greater showing than relevancy by the movant to prove a mental examination is warranted under the additional requirements of Federal Rule of Civil

Procedure 35. Pursuant to Rule 35, the Court “may order” a mental examination of a party “by a suitably licensed or certified examiner” when the moving party demonstrates that a mental or physical condition is “in controversy,” Fed. R. Civ. P. 35(a)(1), and only “for good cause” shown, Fed. R. Civ. P. 35(a)(2)(A). The movant must further “specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.” Fed. R. Civ. P. 35(a)(2)(B). The “in controversy” and “good cause” requirements are unique to Rule 35: “[I]n none of the other discovery provisions is there a restriction that the matter be ‘in controversy,’ and only in Rule 34 is there Rule 35’s requirement that the movant affirmatively demonstrate ‘good cause.’” *Schlagenhauf v. Holder*, 379 U.S. 104, 117 (1964). A motion based on “mere conclusory allegations of the pleadings” and “mere relevance to the case” fails to meet the stringent requirements of Rule 35. *Id.* at 118; *Kuminka v. Atlantic County New Jersey*, 551 F. App’x 27, 29 (3d Cir. 2014).

As the Supreme Court dictated, “Rule 35 ... requires *discriminating application* by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule’s requirements of ‘in controversy’ and ‘good cause.’” *Schlagenhauf*, 379 U.S. at 118–19 (emphasis added); see *Bowen v. Parking Auth. of Camden*, 214 F.R.D. 188, 192–93 (D.N.J. 2003) (same).

ARGUMENT

Defendants’ request for a highly invasive mental examination of Mr. Conforti is entirely unwarranted under both the applicable law and the facts of this case. Allowing a mental examination here would greatly infringe on Mr. Conforti’s privacy rights while providing no assistance to the Court or a jury in deciding the core issues in this case. The standard for this extreme form of discovery is exacting, and unmet by Defendants here: pursuant to Federal Rule of

Civil Procedure 35, a mental examination may only be ordered where a party's mental condition is "in controversy," Fed. R. Civ. P. 35(a)(1), and only "for good cause" shown, Fed. R. Civ. P. 35(a)(2)(A).

Defendants have failed to demonstrate both that Mr. Conforti's mental condition is "in controversy" as understood under Rule 35 and that there is "good cause" to warrant ordering Mr. Conforti to undergo an invasive mental examination. Moreover, permitting a mental examination here on such a minimal showing by Defendants would contradict the clear public policy goals underlying the restrictions set forth in Rule 35, as Defendants' generic arguments that a mental examination is warranted here are equally applicable to nearly *any* victim of discrimination and/or litigants with separate mental health history. Upon a "discriminating application ... of the limitations prescribed by" Rule 35, *Schlagenhauf*, 379 U.S. at 121, and under existing Supreme Court and Third Circuit precedent, it is clear that Defendants' motion to compel a mental examination of Mr. Conforti must be denied.

I. MR. CONFORTI'S MENTAL CONDITION IS NOT "IN CONTROVERSY"

Defendants have offered no plausible basis for the Court to find that Mr. Conforti's mental condition is sufficiently "in controversy" to meet the high threshold for a Rule 35 mental examination. The allegations in the Complaint and Mr. Conforti's deposition testimony confirm that Mr. Conforti only claims that Defendants' discriminatory acts caused him "garden variety" emotional distress, which the District of New Jersey has determined is insufficient to place a plaintiff's mental condition "in controversy" under Rule 35. "[M]ost courts agree that for a plaintiff's mental status to be 'in controversy' requires more than 'garden variety' emotional distress allegations that are part and parcel of the plaintiff's underlying claim." *Bowen*, 214 F.R.D. at 193 (collecting cases). Numerous federal courts, including the Third Circuit and the District of New Jersey, have embraced the Rule 35 test set forth in *Turner v. Imperial Stores*, 161 F.R.D. 89

(S.D. Cal. 1995),¹ which “conducted an exhaustive and exacting review of the relevant cases,” *Bowen*, 214 F.R.D. at 193, and found five circumstances beyond a generic claim of emotional distress in which a mental condition is sufficiently placed “in controversy” under Rule 35:

[A] court will order plaintiffs to undergo mental examinations when, *in addition to a claim of emotional distress*, one or more of the following elements are present: “(1) a cause of action for intentional or negligent infliction of emotional distress; (2) an allegation of specific mental or psychiatric injury or disorder; (3) a claim of unusually severe emotional distress; (4) plaintiff’s offer of expert testimony to support a claim of emotional distress; and/or (5) plaintiff’s concession that his or her mental condition is “in controversy” within the meaning of Rule 35(a).”

Bowen, 214 F.R.D. at 193 (quoting *Turner*, 161 F.R.D. at 95) (emphasis added). None of the factors in the *Bowen* and *Turner* test, addressed in turn below, are applicable and/or satisfied here:

1. “[A] cause of action for intentional or negligent infliction of emotional distress”:

This basis is inapplicable. Mr. Conforti has not asserted a cause of action for intentional or negligent infliction of emotional distress. The Complaint in this matter asserts only two claims of discrimination on the basis of sex, non-conformity with sex stereotypes, gender identity, and transgender status in violation of: (1) Section 1557 of the ACA and (2) the NJLAD. Compl. ¶¶ 2, 82–101.

2. “[A]n allegation of specific mental or psychiatric injury or disorder”:

This basis is wholly unsatisfied. Mr. Conforti has *never* alleged that Defendants’ discriminatory actions caused a “specific mental or psychiatric injury or disorder,” or that Mr. Conforti sought treatment for and/or was diagnosed with any “specific mental or psychiatric injury or disorder” as a result of Defendants’ conduct. It is patently insufficient under Rule 35’s “in

¹ See, e.g., *Kuminka*, 551 F. App’x at 29 (applying the *Turner* test to a Rule 35 motion); *Ortiz v. Potter*, 2010 WL 796960, at *2 (E.D. Cal. Mar. 5, 2010) (the *Turner* “in controversy” test “has been regularly applied by district courts”); *Fox v. Gates Corp.*, 179 F.R.D. 303, 307 (D. Colo. 1998) (the “majority of courts” apply the *Turner* test for Rule 35 motions).

controversy” requirement that Mr. Conforti was *previously* diagnosed with gender dysphoria or other mental and physical health conditions, which Mr. Conforti has (i) never disputed and, regardless, (ii) never sought compensatory damages for or alleged they were caused and/or worsened by Defendants’ conduct.

3. “[A] claim of unusually severe emotional distress”:

This basis is likewise unsatisfied. Defendants do not argue Mr. Conforti’s emotional distress is alleged to be “unusually severe,” and Mr. Conforti has never portrayed the general emotional distress he suffered as a result of Defendants’ discrimination as severe or unusually severe. The circumstances supporting Mr. Conforti’s claim for generic damages stand in stark contrast to the cases where a court has found unusually severe emotional distress was at issue.²

4. “[P]laintiff’s offer of expert testimony to support a claim of emotional distress”:

This basis is inapplicable. Mr. Conforti has consistently represented that he will not offer expert testimony to support his claim for damages. This position has not changed. While Defendants appear to allude to the possibility of Mr. Conforti doing an about face and bringing in

² See, e.g., *Hardin v. Mendocino Coast Dist. Hosp.*, 2019 WL 1493354, at *2 (N.D. Cal. Apr. 4, 2019) (“Someone who has been hospitalized for emotional distress has likely suffered unusually severe emotional distress.”); *Diunugala v. Dep’t of Conservation*, 2018 WL 6137595, at *2 (C.D. Cal. Jan. 31, 2018) (finding severe emotional distress when the plaintiff suffered the following physical symptoms of his emotional distress: “diabetes, blurry vision, extreme chest pains prompting emergency room visits, high blood pressure and chest pains, and concerns about heart attacks”); *Simon v. Bellsouth Advert. & Publ’g Corp.*, 2010 WL 1418322, at *1, *3 (W.D.N.C. Apr. 1, 2010) (categorizing an allegation that the plaintiff “suffered very severe emotional distress, with resulting physical manifestations” as “unusually severe emotional distress”); *Kob v. Cty. of Marin*, 2009 WL 3706820, at *2 (N.D. Cal. Nov. 3, 2009) (finding stress which caused weight loss, problems with the plaintiff’s esophagus, and teeth-grinding, which resulted in fractures and two root canals, constituted unusually severe emotional distress); *Cauley v. Ingram Micro, Inc.*, 216 F.R.D. 241, 244 (W.D.N.Y. 2003) (finding allegations of more than “garden variety” emotional distress where the plaintiff alleges she was “so filled with stress that she” required hospitalization); *Dahdal v. Thorn Ams., Inc.*, 1998 WL 37532, at *2 (D. Kan. Jan. 28, 1998) (finding allegations of a “total relapse” and suicidal thoughts indicated something more extensive than “garden variety” emotional distress).

expert testimony at the eleventh-hour, Def. Br. at 12 (noting that Mr. Conforti has not retained a medical expert “as least for now”), there is no merit to their blatant conjecture.

5. “[P]laintiff’s concession that his or her mental condition is ‘in controversy’ within the meaning of Rule 35(a)”:

This basis is likewise inapplicable. Mr. Conforti clearly does not concede, and has never conceded, that his mental condition is “in controversy.”

* * *

In sum, Defendants have not shown that *any* of the potential justifications required “in addition to a claim of emotional distress” for an extreme Rule 35 mental examination are present here. Defendants instead heavily rely on the uncontested facts in this action that Mr. Conforti, a transgender man bringing a discrimination claim, was previously diagnosed with gender dysphoria and certain mental health conditions prior to Defendants’ acts of discrimination due to Mr. Conforti’s “sex, nonconformity with sex stereotypes, gender identity, and transgender status.” Compl. ¶ 70; *see* Def. Br. at 10 (arguing that Mr. Conforti’s gender dysphoria “directly implicate[s] the claims in this matter”). Yet Defendants’ refusal to provide medical services to Mr. Conforti in June 2015 was *not* premised on any concern over the validity or proof of Mr. Conforti’s diagnosis of gender dysphoria; both parties agree that Mr. Conforti sought a hysterectomy as treatment for his gender dysphoria, and Defendants refused to allow that procedure to go forward on that basis. *See generally* Compl. ¶ 65 (hysterectomy was sought as “treatment of Jionni’s gender dysphoria”); *id.* ¶ 69 (alleging that an e-mail from Defendant Father Martin Rooney, dated June 16, 2015, specifically stated that St. Joseph’s would not schedule Mr. Conforti’s surgery “to remove all female parts *based on the medical necessity for Gender Reassignment*” (emphasis added)). The mere fact that Mr. Conforti is transgender and was diagnosed with gender dysphoria is patently insufficient to satisfy Rule 35, and Defendants cite to no case law where a transgender litigant was

ordered to undergo a mental examination on such a paltry (and offensive) showing. *See* Def. Br. at 1, 10–11 (arguing that a medical examination is warranted because “the entire basis of this lawsuit arises out of Plaintiff’s mental health condition”).

And regardless, the Supreme Court, as well the Third Circuit and the District of New Jersey, explicitly determined that mere relevance is insufficient to justify a Rule 35 mental examination. The “in controversy” requirement of Rule 35 is “not met by ... mere relevance to the case.” *Schlagenhauf*, 379 U.S. at 118; *see also Kuminka*, 551 F. App’x at 29 (“mere conclusory allegations of the pleadings” and “mere relevance to the case” do not satisfy Rule 35). Rather, satisfying the “in controversy” element “require[s] an affirmative showing by the movant that *each condition* as to which the examination is sought is *really and genuinely in controversy*.” *Schlagenhauf*, 379 U.S. at 118 (emphasis added). Defendants have not made this showing. Simply put, a discrimination claim arising from the undisputed denial of treatment for a mental condition does not place that mental condition “in controversy” for the purposes of Rule 35.

Nor is the generic emotional distress Mr. Conforti experienced as a result of Defendants’ discrimination the kind of “specific mental or psychiatric injury or disorder” contemplated by courts when considering whether the heightened “in controversy” standard under Rule 35 is satisfied. While the Complaint in this action recounts the negative feelings and emotions experienced by Mr. Conforti as a result of Defendants’ discrimination, it only alleges the same emotional consequences that any victim of discrimination would suffer. For example, Mr. Conforti alleges that, having not “previously experienced such blatant discrimination,” after being discriminated against by Defendants he “was shocked, confused, and hurt,” “felt betrayed,” “became deeply depressed,” had “great anxiety,” and “remains[] anxious” about visiting St. Joseph’s, and that he “suffered emotional distress, humiliation, embarrassment, and a loss of

dignity at the hands of St. Joseph’s Healthcare.” Compl. ¶¶ 2, 10, 71–72. Mr. Conforti’s deposition testimony confirms the limited, non-clinical nature of his emotional distress allegations. *See* Mayer Decl., Ex. A, Conforti Tr. at 162:2-11 (testifying that he “was upset” and felt “hurt,” “shame,” “some depression,” “[i]t was a lot of things, a lot of emotions” after the discrimination).

As is clear from the face of the Complaint, and as Mr. Conforti and his medical records confirm, Mr. Conforti does not contend he was diagnosed with or suffers from any “specific mental or psychiatric injury or disorder” as a result of Defendants’ conduct which could warrant a Rule 35 mental examination. *See Montana v. Cty. of Cape May Bd. of Freeholders*, 2013 WL 5724486, at *4 (D.N.J. Oct. 18, 2013) (“Describing plaintiff’s character traits or stating that he experienced stress and anger after experiencing alleged harassment neither raises plaintiff’s emotional distress claims to a level of severe mental injury, nor does it highlight a specific mental injury.”). The colloquial allegations from Mr. Conforti that he felt “anxious” or “depressed” after the discrimination he suffered do not, as Defendants assert, hold special significance under Rule 35, and “assigning such weight to [such words] is a mistake—taken *in context*, the word [anxiety] in this case does not mean ‘a severe anxiety disorder,’ but rather the type of anguish that normally accompanies ... discrimination, or perhaps something only slightly more serious than that.” *Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs*, 315 F.R.D. 612, 615 (N.D. Fla. 2016). “The same can be said of the words ‘depression’ and ‘insomnia.’ No doubt these are real health problems, but they’re also (1) the type of psychological injuries one would expect to occur as the result of ... discrimination and (2) somewhat vague terms that have both clinical and non-clinical meanings.” *Id.* Mr. Conforti’s broad allegations of his feelings simply describe his “anxiety [and feeling depressed] in a generalized way” and not “in a manner that suggests a clinical condition of

anxiety [or depression]” resulting from Defendants’ actions. *Karrani v. JetBlue Airways Corp.*, 2019 WL 2269818, at *3 (W.D. Wash. May 28, 2019).

The references to feeling depressed or anxious in Mr. Conforti’s narrative, on which Defendants rely, (*see* Def. Br. at 2, 10–11), are only made in the most general, non-clinical sense.³ *See* Mayer Decl., Ex. A, Conforti Tr. 162:8-11, 259:3-6 (“I mean I was upset. There was definitely emotional distress and hurt and, you know, shame and of course some depression from that. It was a lot of things, a lot of emotions ... Q. And are you qualified to diagnose depression? A. No, I’m not.”). And regardless, it is undisputed that Mr. Conforti’s request for compensatory damages does not include any form of anxiety or depression, clinical or otherwise, but is explicitly limited in the Complaint to the “emotional distress and suffering, embarrassment, humiliation, emotional pain and anguish, violation of his dignity, and loss of enjoyment of life” he felt as a result of Defendants’ discrimination. Compl., Prayer for Relief (C); *see also* Compl. ¶¶ 90, 101 (alleging only the same garden-variety emotional distress under Counts I and II). There is no allegation or claim of a “specific mental or psychiatric injury or disorder” in the clinical sense which would warrant an invasive mental examination by a psychiatric expert chosen by Defendants.

This comes back to the fact that Mr. Conforti, at base, has asserted only “garden variety” non-clinical claims of emotional distress. Confusingly, Defendants appear to imply in their brief that “garden variety” is a foreign concept that Mr. Conforti plucked out of thin air. *See* Def. Br. at 14 (describing the term “garden variety” as “a non-medical term that does not appear in the remedy provisions of the Affordable Care Act or Law Against Discrimination”). However, this is the very standard used to analyze a Rule 35 motion in many jurisdictions, including the Third

³ Any prior diagnoses of depression and anxiety do not place Mr. Conforti’s emotional distress in controversy. Mr. Conforti’s allegations of emotional distress caused by Defendants’ actions are entirely separable from his past mental health history.

Circuit and the District of New Jersey. *See generally Bowen*, 214 F.R.D. at 193 (“[M]ost courts agree that for a plaintiff’s mental status to be ‘in controversy’ [under Rule 35] requires more than ‘garden variety’ emotional distress allegations that are part and parcel of the plaintiff’s underlying claim.”); *Jackson v. Chubb Corp.*, 193 F.R.D. 216, 225 n.8 (D.N.J. 2000) (noting that under Rule 35, “courts have generally found that ‘garden variety’ emotional distress does not satisfy the rule’s requirement that the plaintiff’s mental condition must be ‘in controversy,’” and thus “a ‘garden variety’ claim of emotional distress, without more, does not” warrant a mental examination). “The general consensus is that ‘garden variety’ emotional distress allegations that are part and parcel of the plaintiff’s underlying claim are insufficient to place the plaintiff’s mental condition ‘in controversy’ for purposes of Rule 35(a).” *Kuminka*, 551 F. App’x at 29.

Defendants further mistake the legal term-of-art “garden-variety” as a commentary on the factual uniqueness of the case or the personal characteristics of the plaintiff, rather than its intended meaning of seeking only those compensatory damages directly and naturally flowing from Defendants’ acts of discrimination. *See* Def. Br. at 15 (arguing that it is “hard to imag[in]e a case that is less ‘garden variety’” based on the facts of the case, rather than the extent of damages sought or the claims asserted). The case law makes clear that Mr. Conforti’s damages claim falls well within the “garden variety” type experienced by a typical victim of discrimination. As one court describes it, “garden variety emotional distress refers to anxiety, humiliation, shame, embarrassment, mental suffering, and distress that may flow naturally from an event that is an affront to one’s dignity” and which one “would likely feel as a result of being victimized.” *Zinaman v. Kingston Reg’l Senior Living Corp.*, 2014 WL 282633, at *2 (N.D.N.Y. Jan. 23, 2014). “In these types of claims, the evidence is often described in vague or conclusory terms.” *Id.*; *see also Karrani*, 2019 WL 2269818, at *3 (finding that the plaintiff only asserted “garden variety”

damages by seeking compensation for “non-medical emotional harm damages ... as a result of Defendant’s conduct”). Emotional distress including generalized descriptions of depression and anxiety has been labeled as no more than “garden variety” by other courts. *See, e.g., Karrani*, 2019 WL 2269818, at *3 (distinguishing between “garden variety” allegations of “anxiety in a generalized way, relying on the dictionary definition of the term: ‘fear or nervousness about what might happen,’” which was a “lay observation of Mr. Karrani’s emotions” and not a “medical diagnos[is]” or a “clinical condition of anxiety”); *Winstead*, 315 F.R.D. at 615 (finding allegations of “loss of enjoyment of life, pain and suffering, mental anguish, ... depression, anxiety and lack of sleep” to be “inside the garden”); *Hernandez v. Simpson*, 2014 WL 4090513, at *3 (C.D. Cal. Aug. 18, 2014) (finding allegations of “mental anguish, and attendant bodily injury, fear, anxiety, sleeplessness, anger, sadness, nervousness, insecurity, loss of appetite, and depression” to be “garden variety”).

By contrast, Mr. Conforti’s general allegations fall far below the type of specific injuries and disorders alleged in the cases cited by Defendants, (*see* Def. Br. at 11–12), for which courts have found to be more than mere garden variety. *See, e.g., Denny v. Wingspan Portfolio Advisors, LLC*, 2013 WL 2434572, at *2 (N.D. Tex. June 5, 2013) (plaintiff alleged “she has been diagnosed with major depressive disorder” with extensive physical manifestations and “received professional treatment” due to the defendants’ actions); *Green v. Mich. Dep’t of Nat. Res.*, 2009 WL 1883532, at *2–3 (E.D. Mich. June 30, 2009) (finding that the plaintiff had alleged “unusually severe emotional distress” by claiming defendants had caused him to suffer “bodily injury, depression, emotional and physical distress, mental and physical anguish,” among others, and specifying the “physical manifestations of” his severe distress); *Duncan v. Upjohn Co.*, 155 F.R.D. 23, 24–25 (D. Conn. 1994) (plaintiff alleged the use of defendants’ drug caused permanent psychiatric harm,

including becoming “psychologically unstable” and undergoing personality changes); *Thiessen v. Gen. Elec. Capital Corp.*, 178 F.R.D. 568, 570 (D. Kan. 1998) (plaintiff alleged defendants’ conduct caused “real health problems,” including water in his lungs, congestive heart failure, sleeplessness, and more). Unlike these plaintiffs, Mr. Conforti does not claim to have suffered any clinical mental health injuries or extreme physical manifestations of his emotional distress caused by Defendants, or that he directly sought any treatment or therapy as a result of Defendants’ conduct. The allegations in those cases do not even remotely resemble Mr. Conforti’s allegations of emotional distress.

Defendants assert another basis for why Mr. Conforti’s mental condition is “in controversy”—because Mr. Conforti suffers “from *ongoing* gender dysphoria, anxiety, and depression.” Def. Br. at 12. Defendants’ argument is a red herring. The fact of Mr. Conforti’s gender dysphoria, past or present, is entirely undisputed, and more importantly, not “in controversy” in this discrimination action. *See Robinson v. HD Supply, Inc.*, 2013 WL 3815987, at *4 (E.D. Cal. July 19, 2013) (although the plaintiff alleged defendants’ wrongful termination exacerbated his pre-existing PTSD, it was not “in controversy” for purposes of Rule 35, as “the fact that he suffered from PTSD before he was hired by HDS as well as during the period of his employment is not disputed”). Defendants have never asserted a defense that Mr. Conforti was denied a hysterectomy because he did not, in fact, have gender dysphoria; thus, whether or to what extent Mr. Conforti experienced or continues to experience gender dysphoria is even more removed and less relevant than his initial diagnosis, and certainly not “in controversy” here. *Cf. Hodges v. Keane*, 145 F.R.D. 332, 335 (S.D.N.Y. 1993) (ordering a Rule 35 mental examination on a Section 1983 claim when defendants presented “compelling documentary evidence” on their defense that the plaintiff “was a pathological liar suffering from paranoid schizophrenic delusions

of persecution affecting his memory and perception of events at the time of the events relevant to these actions and at the trial itself,” therefore implicating “the very existence of the alleged violations”).⁴

The same holds true for any continued treatment for any separate diagnoses of depression and/or anxiety unrelated to Defendants’ discriminatory actions and Mr. Conforti’s emotional distress claim. Mr. Conforti has never alleged that Defendants’ conduct caused or resulted in a clinically-diagnosed medical condition, or that Mr. Conforti sought treatment for or experienced any extreme emotional injury, such that it would be explicitly put “in controversy” by Mr.

⁴ Further illustrating that Mr. Conforti’s diagnosis of gender dysphoria is not “in controversy” is the fact that the crux of Mr. Conforti’s claim is that “[b]y denying [him] the ability and opportunity to schedule a hysterectomy at SJRMC because it was related to the medically necessary treatment for [his] gender dysphoria, Defendants discriminated against [Mr. Conforti] based on his sex, gender identity, transgender status, and nonconformity with sex stereotypes.” Compl. ¶ 99. For purposes of this case, it does not matter whether Mr. Conforti is transgender and suffers from gender dysphoria—though he is and he does. Here, Defendants’ reasons for denying Mr. Conforti the ability to schedule a hysterectomy is in writing. Defendants discriminated against Mr. Conforti because the hysterectomy was related to “the medical necessity for Gender Reassignment.” Compl. ¶ 8. And it is blackletter law that Defendants’ mere perception that Mr. Conforti is transgender and suffers gender dysphoria, which is inextricably linked to his sex and transgender status, Compl. ¶¶ 28–29, is more than enough to support Mr. Conforti’s discrimination claims. See N.J.S.A. 10:5-5(rr) (defining “Gender identity or expression” as “having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person’s assigned sex at birth”).

Put simply, under both the ACA and the NJLAD, discrimination based on a plaintiff’s perceived protected characteristic is just as actionable as discrimination based on a plaintiff’s actual protected characteristic. See *K.S-A v. Hawaii, Dep’t of Educ.*, 2018 WL 2144143, at *16 (D. Haw. May 9, 2018) (“[A] Title IX claim can be based on either actual gender or *perceived* nonconformance with gender stereotypes.” (emphasis added)); *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 355 (S.D.N.Y. 2014) (“[T]he Office for Civil Rights has made clear that ‘anti-Semitic harassment can trigger responsibilities under Title VI ... when the harassment is based on the group’s actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members’ religious practices.’” (citation omitted)); *Cowher v. Carson & Roberts*, 40 A.3d 1171, 1178 (N.J. App. Div. 2012) (“Thus, if plaintiff can demonstrate that the discrimination that he claims to have experienced would not have occurred *but for the perception* that he was Jewish, his claim is covered by the LAD.” (emphasis added)).

Conforti's routine discrimination action. *See Hernandez*, 2014 WL 4090513, at *3 (“[A]lthough plaintiff’s deposition testimony indicates that she has been diagnosed with bipolar disorder, for which she took medication and was briefly hospitalized, at no point does she claim that defendant’s actions caused this disorder ... evidence of plaintiff’s existing medical conditions and corresponding medications that she took in the past or currently takes is insufficient to establish that her mental condition is in controversy.”); *O’Quinn v. N.Y. Univ. Med. Ctr.*, 163 F.R.D. 226, 228 (S.D.N.Y. 1995) (denying Rule 35 motion when plaintiff only asserted a “boilerplate statement” of emotional distress and did not seek claims for any “ongoing severe emotional harm”); *cf. Preston v. City of Oakland*, 2015 WL 12976100, at *2 (N.D. Cal. Jan. 28, 2015) (“[T]o the extent defendants contend that the mere fact that plaintiff is alleging some ongoing emotional distress justifies a mental examination, the Court disagrees.”). Indeed, courts have recognized that, unlike cases where a plaintiff voluntarily submits to his own expert’s examination to “advance [a] litigation position,” “a plaintiff should not be effectively punished for seeking treatment [by being compelled to undergo a Rule 35 examination], particularly when that treatment was initially sought (as it was here) prior to the onset of litigation.” *Winstead*, 315 F.R.D. at 616 n.3. This is particularly true considering that over 40% of Americans have seen a mental health professional at some point in their lives.⁵

Mr. Conforti has pleaded and testified to only “garden variety,” non-clinical emotional distress directly arising from an act of discrimination. He does not bring a claim for intentional or negligent infliction of emotional distress or plan to call a emotional distress damages expert; nor does he assert that Defendants’ conduct caused a specific mental or psychiatric injury or disorder

⁵ Barna Grp., *Americans Feel Good About Counseling* (Feb. 27, 2018), <https://perma.cc/H4PB-22PT>.

or that the emotional distress he suffered was “unusually severe.” A “discriminating application” of the strictures of Rule 35 can reach no other result than that Mr. Conforti simply has not placed his mental condition “in controversy” in this matter.

II. DEFENDANTS FAILED TO ESTABLISH “GOOD CAUSE” TO COMPEL A MENTAL EXAMINATION

Even if Mr. Conforti’s mental condition was placed “in controversy” (it wasn’t), Defendants’ motion still fails on the separate and independent grounds that they fail to show any “good cause” for a Rule 35 examination. *See Robinson*, 2013 WL 3815987, at *6 (a plaintiff’s “unusually severe” emotional distress was “in controversy,” but defendants’ “asserted bases for good cause are unpersuasive,” and therefore denying the motion for a Rule 35 examination). “Good cause” requires a “greater showing of need” than other discovery mechanisms subject only to Rule 26’s relevancy requirement: “The specific requirement of good cause would be meaningless if good cause could be sufficiently established *by merely showing that the desired materials are relevant*, for the relevancy standard has already been imposed by Rule 26(b).” *Schlagenhauf*, 379 U.S. at 118 (emphasis added) (quoting *Guilford Nat’l Bank of Greensboro v. S. Ry. Co.*, 297 F.2d 921, 924 (4th Cir. 1962)). Rule 35’s “good cause” requirement is “not met by mere conclusory allegations of the pleadings[,], nor by mere relevance to the case.” *Id.*; *see also Montana*, 2013 WL 5724486, at *2 (“the ‘good cause’ requirement must be higher than the general relevancy standard governing discovery,” otherwise it would “be meaningless”). Rather, “moving beyond relevancy, the parties *must show necessity*” to establish “good cause” under Rule 35. *E.E.O.C. v. Maha Prabhu, Inc.*, 2008 WL 2559417, at *2 (W.D.N.C. June 23, 2008) (emphasis added). Again, Defendants confuse the heightened “good cause” requirement in Rule 35 with a relevance standard, arguing “[g]ood cause exists for an independent mental examination of Plaintiff because the examination will likely adduce facts highly relevant to Defendant’s defense.”

Def. Br. at 13. This is patently insufficient to establish “good cause” under Rule 35, as “Rule 35 is meant to act as a shield against unnecessarily subjecting a plaintiff to a mental examination on just general allegations of emotional distress, or using it as a means to harass the plaintiff.” *Montana*, 2013 WL 2724486, at *2.

Moreover, when considering whether the good cause requirement is satisfied, courts consider, among other factors, the “ability of the movant to obtain the desired information by other means.” *Schlagenhauf*, 379 U.S. at 118; *see also McLaughlin v. Atlantic City*, 2007 WL 1108527, at *4 (D.N.J. Apr. 10, 2007) (stating that “[o]ne common theme” in Rule 35 case law “is that a request to examine a party will be denied when the information that can be obtained from a Rule 35 examination is available through other means”). Here, Defendants improperly offer nothing but vague statements that a mental examination “will likely adduce facts” and “gather additional information” relevant to their defense, (Def. Br. at 12–14), but point to no information they do not currently have access to and for which they *need* a mental examination to obtain. In 2018, Mr. Conforti agreed to produce medical records from six of his medical providers, ranging from January 2011, i.e., four and a half years prior to the act of discrimination, to, ultimately, August 2018, i.e., over twenty months after the Complaint was filed. Defendants also deposed Mr. Conforti on January 29, 2019, in which they inquired extensively into his entire mental history and his allegations of emotional distress. Indeed, Defendants repeatedly cite to Mr. Conforti’s medical records and deposition testimony in their motion, Def. Br. at 10–16, apparently seeking to confirm such undisputed facts a third time with a mental examination, but fail to explain how they cannot “adequately prepar[e] to defend” this action with the existing record, *id.* at 14. Defendants offer no reason for why the seven years’ worth of (irrelevant) medical records Mr. Conforti has already produced—as well as Defendants’ exhaustive questioning of Mr. Conforti on the same records

during his deposition—are insufficient to satisfy their purported discovery needs to defend against a request for standard compensatory relief in a discrimination action.

Defendants have identified no specific information they need which can only be obtained through a Rule 35 mental examination, nor any basis for the Court to find that a mental examination is necessary in light of their existing access to hundreds of pages of medical records and deposition testimony providing the same information they seek. *See generally Winstead*, 315 F.R.D. at 616 (pointing to other available discovery mechanisms which “offer[] a less intrusive means of obtaining similar (if not the same) information”); *Hardin v. Mendocino Coast Dist. Hosp.*, 2019 WL 1493354, at *3 (N.D. Cal. Apr. 4, 2019) (finding “no good cause” when “[i]t was possible to obtain the desired information by other means, namely, by deposing Hardin,” even though he claimed “ongoing depression”); *Marroni v. Matey*, 82 F.R.D. 371, 372 (E.D. Pa. 1979) (finding a lack of good cause when the party “made no showing that the information they seek cannot be obtained by other discovery techniques”). Thus, not only is a mental examination unwarranted under Rule 35 for lack of good cause shown, it fails to meet even the threshold liberal discovery standard of Rule 26, as it is neither necessary nor proportional to any purported needs in this case, and is undoubtedly outweighed by the incredible invasiveness and heavy burden such an examination would place on Mr. Conforti. *See, e.g., Winstead*, 315 F.R.D. at 616 (finding the defendant could, “through other discovery tools, gather adequate information to call into question [the plaintiff]’s claims of ongoing emotional injury”). Similar to the denial of a Rule 35 motion in *McLaughlin*, here Defendants already have access to “detailed notes” and medical records and “had more than an adequate opportunity to obtain” the sought information “through interrogatories and depositions” of Mr. Conforti. 2007 WL 1108527, at *4.

Courts will also consider whether there were any recent changes or developments in a plaintiff's mental health status which might establish "good cause" for a mental examination after litigation commences. *See, e.g., Ziemann v. Burlington Cty. Bridge Comm'n*, 155 F.R.D. 497, 501 (D.N.J. 1994) (permitting examination because: (1) no dispute plaintiff's mental condition was "in controversy"; and (2) good cause shown because plaintiff was previously evaluated while "she was working" but subsequently stopped "due to a further, serious deterioration of her emotional state"). Yet Defendants do not point to any such change or development in Mr. Conforti's alleged emotional distress which might necessitate an intensive examination of his current mental health status. *See, e.g., McLaughlin*, 2007 WL 1108527, at *3 (while there was "no serious question" that defendant's mental condition was "in controversy" when plaintiff claimed he was psychologically unfit to be a police officer, plaintiff failed to establish good cause for a Rule 35 examination, as he "has not provided credible evidence that an examination of Officer Raddi in April 2007 is relevant to determining his mental status on October 12, 2003"). Indeed, Defendants' failure to meet their burden to show any "good cause" is particularly evident here, where the "average lay person" would have no "difficulty evaluating the nature, extent, and cause" of Mr. Conforti's personal, non-clinical emotional distress he felt as a result of Defendants' misconduct. *Maha Prabhu, Inc.*, 2008 WL 2559417, at *2. Simply stated, Defendants offer no reason why a mental examination in 2019 is necessary or relevant to determining Mr. Conforti's emotional distress arising from discrimination over four years ago, let alone how "good cause" purportedly exists.

As the District of New Jersey has recognized, plaintiffs have a "constitutional right to privacy of mind and body." *See Bowen*, 214 F.R.D. at 192. "Rule 35 is meant to act as a shield against unnecessarily subjecting a plaintiff to a mental examination on just general allegations of

emotional distress, or using it as a means to harass the plaintiff.” *Montana*, 2013 WL 5724486, at *2. Granting a Rule 35 mental examination under these circumstances, where no more than the anticipated emotional distress that one would suffer after an act of discrimination has been alleged, would deeply infringe on Mr. Conforti’s right to privacy, without any cognizable benefit to helping a jury or this Court decide the issues in controversy in this case. As Defendants failed to demonstrate “good cause” for a mental examination, Defendants’ motion should be denied.

III. GRANTING DEFENDANTS’ MOTION WOULD BE CONTRARY TO PUBLIC POLICY AND CHILL THE RIGHTS OF ALL DISCRIMINATION VICTIMS

Defendants have failed to show that a mental health examination is warranted under the heightened requirements imposed by Rule 35, as Mr. Conforti only asserts generalized non-medical allegations of emotional distress in support of his “garden variety” damages request. Yet, as Defendants would have it, any plaintiff bringing a standard discrimination claim with pre-existing mental health history could be forced to endure an invasive Rule 35 examination merely by seeking redress in the judicial system for an act of discrimination. Such a warrantless expansion of a highly invasive discovery mechanism is precisely what the heightened requirements under Rule 35 are intended to prevent, as it would chill victims of discrimination from coming forward to assert their rights in court and make unnecessary and invasive medical discovery a routine part of civil litigation.

More specifically, as Defendants would have it, any time a transgender person brings a lawsuit for the discrimination they have endured, they could be subject to a Rule 35 examination based on the fact that they have sought treatment for gender dysphoria. That simply cannot be the case. It would at best present a discriminatory obstacle to transgender people seeking justice, or at worst close the courthouse doors to transgender plaintiffs who want to protect their privacy on the same terms as any other person. Already nearly a quarter of transgender people do not seek

health care they need “due to fear of being disrespected or mistreated as a transgender person.”⁶

The mere fact that someone is transgender or has previously sought mental health treatment should not automatically subject them to an invasive Rule 35 examination whenever they seek redress in federal court.

Courts have recognized that these concerns are a “good reason for such restraint” in compelling a Rule 35 examination:

Extraordinarily intrusive as they invariably are, such orders would have an unwarranted chilling effect on persons who believe that they have been subjected to unlawful discrimination if they faced a physical or mental examination anytime they sought redress for such perceived discrimination.

Benham v. Rice, 2007 WL 8042488, at *2 (D.D.C. Sept. 14, 2007) (reversing order granting motion for Rule 35 examination and for medical records for plaintiff who “makes a claim for the same type of distress or humiliation attendant to any ‘garden-variety’ claim of discrimination”). “‘To hold otherwise would mean that such examinations could be ordered routinely’ in cases where there is a claim of damages for emotional distress.” *Cody v. Marriott Corp.*, 103 F.R.D. 421 (D. Mass. 1984) (quoting *Schlagenhauf*, 379 U.S. at 121–22). “The plain language of Rule 35 precludes such an untoward result.” *Schlagenhauf*, 379 U.S. at 122.

Defendants have offered no compelling basis or specific facts which would warrant subjecting Mr. Conforti to the “sweeping examinations” of Rule 35. *Id.* at 121. Defendants’ vague and conclusory statements are insufficient under existing case law to find either that Mr. Conforti’s emotional distress claim is “in controversy” or that “good cause” was shown. Defendants’ motion should be denied.

⁶ See Sandy E. James et al., Nat’l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* at 98 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

CONCLUSION

For the aforementioned reasons, Mr. Conforti respectfully requests the Court deny Defendants' Motion to Compel Mental Examination.

DATED: August 5, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jaclyn M. Palmerson, hereby certify that, on August 5, 2019, I served true and correct copies of Plaintiff's opposition to Defendants' Motion to Compel on the following counsel of record by ECF:

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