

**UNITED STATES DISTRICT COURT
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.

Honorable Claire C. Cecchi, U.S.D.J.
Honorable Cathy L. Waldor, U.S.M.J.

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

Motion Day: August 19, 2019

**REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL
MENTAL EXAMINATION OF PLAINTIFF**

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PRELIMINARY STATEMENT

Defendants St. Joseph’s Health, Inc., St. Joseph’s University Medical Center, Inc. (“SJUMC”), and Father Martin D. Rooney (collectively, “Defendants”) respectfully submit this reply brief in further support of their motion to compel Plaintiff Jionni Conforti (“Plaintiff”) to appear for a mental examination, pursuant to Fed. R. Civ. P. 35(a) and 37. For the reasons set forth in Defendants’ moving papers and briefly herein, a mental examination is warranted here because Plaintiff’s mental condition is clearly in controversy and good cause exists for the proposed examination by Defendants’ psychiatric expert.

Plaintiff has affirmatively placed his mental condition in controversy by (A) admitting to a long prior history of depression and anxiety, (B) seeking emotional distress damages as the only item of compensatory damages, and (C) producing medical records showing a history of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. These facts easily satisfy more than one of the “in controversy” factors articulated by the Third Circuit.

Moreover, as recognized by the United States Supreme Court in Schlagenhauf, a plaintiff’s mental condition may, as is the case here, be placed in controversy by other parties in the litigation. Against the backdrop of [REDACTED]

[REDACTED] Defendants submit that

Plaintiff’s mental condition and the causes thereof are very much in controversy despite Mr. Conforti’s attempt to block discovery under the guise of “garden variety” emotional distress.

There is nothing garden variety about a plaintiff being treated for [REDACTED]

[REDACTED]

[REDACTED].

Plaintiff cannot distance himself from this own Complaint, his deposition testimony, and his medical records which all demonstrate far more than garden variety mental health conditions and multiple likely causes other than Defendants' conduct. A narrowly tailored examination of Plaintiff's mental condition, extensive medical history, and the cause and extent of his emotional distress damages is justified and critical to the defense of Plaintiff's claims.

Moreover, good cause exists under Rule 35 to permit Defendants' psychiatric expert to evaluate Plaintiff's claim that Defendants caused his emotional harm. There is no dispute that Plaintiff's mental condition plays a central role in this case. Not only is Plaintiff's claim of discrimination predicated on his having gender dysphoria, but this condition may, even post-surgery, be a contributing, if not the sole, factor causing the emotional distress he now attributes to Defendants' conduct. And, as shown in Defendants' opening brief, Plaintiff's deposition testimony and medical records [REDACTED]

[REDACTED]. Far from being a "harassing" or "disproportionate" request as Plaintiff argues, Defendants have a right to determine through an independent examination whether Plaintiff's emotional distress was caused by Defendants or other factors.

Accordingly, for the reasons set forth in Defendants' moving papers and briefly herein, Plaintiff should be compelled to appear for an independent mental examination within 30 days of the Court's Order, pursuant to Fed. R. Civ. P. 37 and 35(a).

LEGAL ARGUMENT

**THE COURT SHOULD COMPEL PLAINTIFF TO APPEAR
FOR A MENTAL EXAMINATION**

Rule 35(a) empowers this Court to order a mental examination of a party when the "in controversy" and "good cause" requirements are satisfied. Schlagenhauf v. Holder, 379 U.S.

104, 118 (1964). Contrary to Plaintiff's contention, this motion is not based on "mere conclusory allegations of the pleadings" or "mere relevance to the case." Rather, Defendants have presented the Court with admissions by Plaintiff in his Complaint and deposition testimony and medical records from multiple health care providers demonstrating the undeniably complicated nature of Mr. Conforti's mental condition, both before and after St. Joseph's declined to surgically remove his healthy reproductive organs. As such, this Court should order Plaintiff to submit to an independent mental examination by Defendants' expert pursuant to Rule 35(a).

A. The "In Controversy" Factors Articulated By The Third Circuit Are Satisfied.

The "in controversy" standard articulated by Kuminka v. Atl. Cty., 551 F. App'x 27 (3d Cir. 2014) is disjunctive. In addition to claiming emotional distress, a plaintiff places his mental condition in controversy where "one or more" of the factors are satisfied. Id. at 29-30 (using "and/or" in standard). The cases cited by Plaintiff recognize that the absence of one factor is not dispositive. See Ortiz v. Potter, 2010 WL 796960, at *4 (E.D. Cal. Mar. 5, 2010); Simon v. Bellsouth Advert. & Pub. Corp., 2010 WL 1418322, at *2 (W.D.N.C. Apr. 1, 2010); Kob v. Cty. of Marin, 2009 WL 3706820, at *2 (N.D. Cal. Nov. 3, 2009).

i. Plaintiff Alleges More Than Simple Garden Variety Emotional Distress.

Plaintiff's assertions that he has not placed his mental condition in controversy and merely alleges garden variety emotional distress is belied by the admissions in his Complaint, his deposition testimony, and the medical evidence. Moreover, Mr. Conforti's denial of having placed his condition in controversy is not dispositive because a plaintiff's mental condition can be placed "in controversy" by other parties in the case subject to the Rule 35(a) requirements. Schlagenhauf v. Holder, 379 U.S. 104, 119-120 (1964). Such is the case here. Whether placed in

controversy by Plaintiff’s claims or Defendants’ defenses or both, Mr. Conforti’s mental condition is indisputably “in controversy,” warranting an examination.

The case law cited by Plaintiff for his “in controversy” argument is unavailing. For example, Turner v. Imperial Stores, 161 F.R.D. 89 (S.D. Cal. 1995)—cited by Plaintiff (Pl.’s Opp. at p. 7)—is easily distinguishable. Plaintiff alleges far more in this case. In particular, Plaintiff not only alleges in his Complaint that he has suffered “emotional distress, humiliation, embarrassment, and a loss of dignity,” but that he became “deeply depressed” *as a result* of Defendants’ conduct. See Pl.’s Compl. at ¶¶ 9, 10, 72, 73 (emphasis added). Plaintiff also alleges that Defendants’ refusal to allow him to undergo the total hysterectomy at SJUMC caused him “great anxiety.” Id. at ¶ 9.

This case more closely parallels Denny v. Wingspan Portfolio Advisors, LLC, 2013 WL 2434572 (N.D. Tex. June 5, 2013) where the defendants alleged discriminatory conduct caused the plaintiff to seek out psychological care. See id. at *2. The court in Denny recognized that a plaintiff “affirmatively places her mental condition ‘in controversy’ when she alleges a permanent or ongoing mental disorder or emotional distress or claims that she has required psychiatric or psychological care as a consequence of discriminatory treatment.” Id. at *1. The cases cited by Plaintiff echo this principle. See Cauley v. Ingram Micro, Inc., 216 F.R.D. 241, 244 (W.D.N.Y. 2003) (noting that hospitalization and treatment by physician places plaintiff’s claim beyond a bare allegation of emotional stress typically associated with discrimination case).

Plaintiff affirmatively identified [REDACTED]

[REDACTED]. Mayer Decl., Exh. C, Rog. No. 5. Similarly, Mr. Conforti’s Rule 26 disclosures identified Dr. Ian Tang and Ms. Batista as individuals with knowledge of Plaintiff’s gender dysphoria diagnosis. Mayer Decl., Exh. B, at p.

3. Plaintiff's contrived effort to now evade his own discovery responses is unavailing. See Dahdal v. Thorn Americas, Inc., 1998 WL 37532, at *2 (D. Kan. Jan. 28, 1998) (plaintiff placed mental condition "in controversy" where in response to interrogatories, she identified psychiatrist and psychologist with whom she sought psychiatric consultation) (Pl.'s Opp. at p. 8).

The medical records of Mr. Fitzgerald and Ms. Batista further indicate that Plaintiff's mental health condition is greater than mere "garden variety" emotional distress, and includes physical manifestations. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Mayer Decl., Exh. F, BATISTA26-34. [REDACTED]

[REDACTED]

[REDACTED] see id. at BATISTA61, [REDACTED]

[REDACTED]

[REDACTED] See Mayer Decl., Exh. E, FITZGERALD18. Clearly, there is no support for his claim that Plaintiff has garden variety emotional distress.

Plaintiff's promise that he will not offer the testimony of any expert in support of his claim for emotional distress damages (Pl.'s Opp. at 8-9), does not undercut Defendants' right to a mental examination under Rule 35, which is a permissible discovery tool and necessary for Defendants to refute Plaintiff's emotional distress damages claim. See Dahdal, 1998 WL 37532, at *2; Laney v. Hosp. Bd. of Directors, 2010 WL 5161367, *3 (M.D. Fla. 2010) (in granting Rule 35 motion, the court noted that "Defendant should have the opportunity to challenge Plaintiff's [emotional distress] claim and testimony through an expert witness even if Plaintiff does not intend to offer expert testimony"). Moreover, Plaintiff's promise to not offer an expert does not eliminate the possibility that he may rely upon the testimony of his treating physicians.

ii. **Plaintiff Alleges A Specific Mental Or Psychiatric Injury Or Disorder And Attributes His Alleged Anxiety And Depression To Defendants' Conduct.**

Plaintiff claims specific psychiatric injuries—deep depression and great anxiety—as a *result* of Defendants' alleged discriminatory conduct. See Pl.'s Compl. at ¶¶ 9, 10, 72, 73. The court in Turner recognized that courts will order plaintiffs to undergo mental examinations where the cases involve, in addition to emotional distress claims, “allegations of a specific mental or psychiatric injury or disorder.” Turner, 161 F.R.D. at 95; see also Simon, 2010 WL 1418322, at *3 (satisfying “in controversy” requirement where plaintiff “testified that health conditions resulting from his underlying claims against Defendant included depression, anxiety and post traumatic stress disorder.”). The cases cited by Plaintiff are distinguishable. See Hernandez v. Simpson, 2014 WL 4090513, at *3 (C.D. CA. Aug. 18, 2014) (noting that plaintiff did not claim that defendant's actions caused her bipolar disorder); Karrani v. JetBlue Airways Corp., 2019 WL 2269818, at *3 (W.D. Wash. May 28, 2019) (noting that plaintiff “will not seek to prove or claim that Defendant proximately caused his heart condition or loss of ability to work”).

Nor may it be ignored that the medical records indicate that [REDACTED]

[REDACTED]. See, e.g., Mayer Decl., Exh. F. Plaintiff misconstrues Defendants' arguments with respect to the relevancy of the pre-existing and ongoing nature of his gender dysphoria disorder. (Pl.'s Opp. at 15). In Hodges v. Keane, 145 F.R.D. 332 (S.D.N.Y. 1993), relied upon by Plaintiff, the defendants contested the plaintiff's Section 1983 claims and asserted that the plaintiff's history of paranoid schizophrenia affected his perception of the events underlying his claims and could affect his testimony at trial. Id. at 334. The court granted the defendants' motion to compel pursuant to Fed. R. Civ. P. 35 because “the plaintiff's mental condition [was] relevant not only to the extent of his past pain and suffering, but to its cause—*i.e.*, to the very existence of the claimed Section 1983 violations.” Id. at 335.

Here, as in Hodges, Plaintiff's gender dysphoria disorder goes to the heart of his claims. By his own admissions in his Complaint, his disorder is key to why a sterilization procedure was sought at a Catholic hospital. His condition prompted him to take steps to align himself with his true sex, i.e., to transition in a manner consistent with his gender identity. See Pl.'s Compl. at ¶ 55. His condition also prompted him to explore the possibility of a total hysterectomy. See id. at ¶ 56. Plaintiff chose to seek this surgery from a Catholic hospital, SJUMC, but SJUMC could not accommodate Plaintiff's request for a hysterectomy because SJUMC is and was forbidden from performing a sterilization procedure under the Ethical and Religious Directives applicable to all Catholic hospitals. See Mayer Decl., Exh. A, at ¶¶ 139:15-141:2. It is undisputed that Plaintiff's inability to receive this surgery at SJUMC forms the basis of his substantive claims.

Moreover, as in Hodges, Plaintiff's condition may also be a contributing, if not the sole factor, causing his alleged anxiety, depression, and emotional distress which he attributes to Defendants' alleged discriminatory conduct. See Pl.'s Compl. at ¶ 3 (alleging that Plaintiff "had long struggled with depression and anxiety rooted in the need to align himself with his true sex[.]"); see id. at ¶ 34 ("If not properly treated, gender dysphoria may result in psychological distress, anxiety, depression, and even self-harm or suicidal ideation."). Indeed, a 2011 study entitled "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden" (reprinted on the website of the National Center for Biotechnology Information) shows that Plaintiff's alleged anxiety, depression and distress could be attributable to his being transgender even after obtaining the surgery he wanted:

Sex-reassigned persons had a higher risk of inpatient care for a psychiatric disorder other than gender identity disorder than controls matched on birth year and birth sex....

* * *

It should therefore come as no surprise that studies have found high rates of depression, and low quality of life, also after sex reassignment.

* * *

This study found substantially higher rates of overall mortality, death from cardiovascular disease and suicide, suicide attempts, and psychiatric hospitalisations in sex-reassigned transsexual individuals compared to a healthy control population. This highlights that post surgical transsexuals are a risk group that need long-term psychiatric and somatic follow-up.

[<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3043071/>]

Discovery into Plaintiff's gender dysphoria disorder post-surgery is clearly relevant to his claims and necessary to the defense of this case. As such, Plaintiff's reliance on Robinson v. HD Supply, Inc., 2013 WL 3815987 (E.D. Cal. July 19, 2013) is misplaced. (Pl.'s Opp. at 16, 18).

Furthermore, the assertion that Plaintiff's diagnosed depression or anxiety connotes "generalized" or "non-clinical" meaning contradicts his extensive medical history. (Pl.'s Opp. at 13-14). Karrani, supra, and Winstead v. Lafayette Cty. Bd. of Cty. Commissioners, 315 F.R.D. 612 (N.D. Fla. 2016) are distinguishable for this reason. Moreover, Plaintiff's assertions that his *ongoing* anxiety and depression are not attributable to Defendants' conduct contradict his own testimony. (Pl.'s Opp. at 15-16). Unlike the situations with the plaintiffs in Bowen v. Parking Authority of Camden, 214 F.R.D 188 (D.N.J. 2003) and Montana v. Cty. of Cape May Bd. of Freeholders, 2013 WL 5724486 (D.N.J. Oct. 18, 2013), Defendants' alleged wrongful conduct occurred in June 2015, [REDACTED]

[REDACTED] See Mayer Decl., Exh. A, at ¶¶ 162:4-22, 163:1-2. Most significantly, Plaintiff's medical records indisputably show that [REDACTED]

[REDACTED] See Mayer Decl., Exh. F, G. There is absolutely no evidence in this case, unlike the cases cited by Plaintiff, to suggest that he only seeks to recover for past emotional distress. See Hernandez, 2014 WL 4090513, at *4 (noting that in light of plaintiff's allegations of *ongoing* sexual harassment, her claims of emotional distress were those "normally associated with or attendant to" the alleged injury); O'Quinn v. New York Univ. Med. Ctr., 163 F.R.D. 226, 228 (S.D.N.Y. 1995) (denying motion to compel

where “counsel for the plaintiff now represents that O’Quinn will *not* be seeking compensation for ongoing mental harm at trial.”) (emphasis in original).

Plaintiff has clearly placed his mental condition “in controversy” within the meaning of Rule 35 and, as such, Plaintiff should submit to a mental examination by Defendants’ expert.

B. Good Cause Exists To Compel The Mental Examination Of Plaintiff.

For the reasons set forth in Defendants’ moving brief and briefly herein, Defendants have established “good cause” for the examination pursuant to Fed. R. Civ. P. 35(a)(2)(A) because Plaintiff’s mental condition, including his ongoing gender dysphoria, depression, and anxiety disorders, will play a “central role” in the case. See Eckman v. Univ. of R.I., 160 F.R.D. 431, 434 (D.R.I. 1994). In light of Plaintiff’s extensive medical history, and the relevancy of possible contributing or superseding factors, Defendants have substantial questions regarding the extent and causation of his mental and emotional injuries. See Mayer Decl., Exh. A, at ¶¶ 189:16-190:10 ([REDACTED]); Mayer Decl., Ex. F, BATISTA65, BATISTA72. Even the cases cited by Plaintiff recognize that Defendants are entitled to pursue discovery which tends to show if Plaintiff’s alleged emotional distress was caused by discrimination or by other experiences in his life. See Dahdal, 1998 WL 37532, at *2.

Likewise, good cause exists because Plaintiff seeks substantial, unspecified damages stemming from his alleged ongoing emotional distress, [REDACTED]

[REDACTED] Plaintiff cites to Diunugala v. Dep’t of Conservation, 2018 WL 6137595 (C.D. Cal. Jan. 31, 2018) (Pl.’s Opp. at 8) where the plaintiff alleged have suffered “emotional pain, humiliation, mental anguish, loss of enjoyment of life, and emotional distress” and damages “in an amount according to proof.” Id. at *2. Like the plaintiff in Diunugala, while

Plaintiff now attempts to characterize his emotional distress as “garden variety,” he cannot distance himself from his deposition testimony and the medical records where he seeks damages “in an amount to be established at trial.” See, e.g., Pl.’s Compl. at ¶ 90 (emphasis added). Defendants are entitled to explore the extent of his emotional distress damages which are alleged to be ongoing and severe in nature.

The principles of fairness and liberal pre-trial discovery bar Plaintiff from injecting his mental condition into this case while at the same time depriving Defendant of the essential opportunity to challenge and defend against his claims. See Jackson v. Chubb Corp., 193 F.R.D. 216, 225 (D.N.J. 2000). It is well-settled that “[o]nly if no additional relevant information could be gained by an examination of [plaintiff] should the motion for a psychiatric examination be denied.” Ragge v. MCA/Universal, 165 F.R.D. 605, 608 (C.D. Cal. 1995).

The deposition of Plaintiff has not provided a less intrusive means for Defendants to discover information about Plaintiff’s extensive history of emotional and mental health. As pointed out in his opposition, Plaintiff lacks the acumen to discuss at length the scientific foundation for his disorders or injuries and whether those disorders or injuries stem from Defendants’ conduct or another extenuating event. See E.E.O.C. v. Maha Prabhu, Inc., 2008 WL 2559417, at *2 (W.D.N.C. June 23, 2008) (“Where the average lay person would have difficulty evaluating the nature, extent, and cause of the claimant’s injuries, there is good cause for an independent medical evaluation.”). [REDACTED]

[REDACTED] See Mayer Decl., Exh. A, at ¶ 259:4-6.

The medical records also fail to afford Defendants a less intrusive means because they lack substantive detail as to the cause and extent of his alleged injuries. Plaintiff’s reliance on McLaughlin v. Atl. City, 2007 WL 1108527 (D.N.J. Apr. 10, 2007) is misplaced. (Pl.’s Opp. at 21). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See

Mayer Decl., Exh. F, at BATISTA32-35. [REDACTED]

[REDACTED] Plaintiff's arguments are further undermined by his

own motion practice seeking to preclude Defendant from conducting depositions of his treating physicians, who possess firsthand expert knowledge of Plaintiff's diagnoses and injuries.

The foregoing clearly establishes that good cause exists to compel Plaintiff to submit to a mental examination by Defendants' expert, pursuant to Fed. R. Civ. P. 35.

C. Plaintiff's Privacy Interests Do Not Outweigh Defendants' Right To Conduct A Rule 35 Mental Examination In This Case.

Contrary to Plaintiff's assertions, an independent mental examination is warranted in this discrimination case and should not be precluded simply because he is transgender. (Pl.'s Opp. at 22-23). Even the cases cited by Plaintiff acknowledge that where, as here, the requirements of Rule 35 are satisfied, a court may compel a party to attend a mental examination. See Cody v. Marriott Corp., 103 F.R.D. 421, 423 n. 4 (D. Mass. 1984) ("...[T]his Court does not suggest that a plaintiff could *never* place his or her mental or physical condition "in controversy" in an employment discrimination case.") (emphasis in original).

Indeed, this case hardly constitutes the "routine" discrimination case wherein a Rule 35 mental examination may be prohibited. See Benham v. Rice, 2007 WL 8042488, at *2 (D.D.C. Sept. 14, 2007) (citing Hodges, 145 F.R.D. at 335). The requested mental examination is narrowly tailored to address the nuanced issues in this matter, including Plaintiff's claimed emotional distress, including the cause and extent of his distress, as well as Plaintiff's claimed gender dysphoria and the impact on the dysphoria symptoms of the hysterectomy that Plaintiff underwent at a different hospital. Plaintiff's fears that the examination invades his privacy

interests as a transgender individual is overcome by the narrowly tailored scope of the examination and the existence of the Discovery Confidentiality Order entered by the Court. Cauley, 216 F.R.D. at 244.

CONCLUSION

For the reasons set forth in Defendants' moving papers and above, Defendants respectfully submit that Plaintiff should be compelled to appear for an independent mental examination within 30 days of the Court's Order pursuant to Fed. R. Civ. P. 35.

Respectfully submitted,
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Dated: August 12, 2019