IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

THERESA HENSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 07-2660-DKV
	)	
	)	
CHARLIE SCIARA & SON PRODUCE CO., INC. and PETER C. SCIARA,	)	
	)	
	)	
Defendants.	)	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO COMPEL A RULE 35 MENTAL EXAMINATION OF PLAINTIFF

Before the court is the June 9, 2008 motion of the defendants, Charlie Sciara & Son Produce Co., Inc., and Peter C. Sciara (collectively "the Defendants"), seeking an order compelling the plaintiff, Theresa Henson ("Henson"), to submit to a mental examination under Rule 35(a) of the Federal Rules of Civil Procedure. The Defendants also ask for an extension of the deadline for them to disclose their Rule 26 expert. Henson filed a response in opposition to the motion on June 30, 2008. The Defendants filed a reply on July 15, 2008, and Henson subsequently filed a sur-reply on July 25, 2008. The parties have consented to a jury trial before the undersigned United States Magistrate Judge. For the following reasons, the Defendants' motion to compel a mental examination is granted in part and denied in part.

BACKGROUND

This is a race discrimination case arising under 42 U.S.C. § 1981 in which Henson alleges that the Defendants "discriminated against her on the basis of race by virtue of her association and relationship with a black person." (Pl.'s Resp. 2.) She alleges that she was harassed at her job and eventually terminated because of her association with an African-American. (Compl. ¶¶ 7-13, Doc. No. 1, Oct. 16, 2007.) Henson claims that the Defendants' actions caused her to suffer "deep pain, humiliation, anxiety, and emotional distress." (Pl.'s Resp. 2.) During her deposition on February 13, 2008, Henson stated that the mental injuries she sustained as a result of the Defendants' actions caused her severe depression and to contemplate suicide. (Defs.' Mem. Ex. 1 at 8.) She claims to have been receiving treatment and medication for her depression and anxiety over the past three or four years. (*Id.* at 12.)

In its present motion, the Defendants request that Henson be required to submit to a mental examination and "one or two" psychological tests. (Defs.' Mem. 4.) They propose that a psychiatrist, Dr. Joel Reisman, conduct the interview and administer the tests. (*Id.*) A combination of only two tests would be selected from the following tests: the Minnesota Multiphasic Personality Inventory 2 (MMPI-2), the Rorschach test, the Millon Multiaxial Clinical Inventory 3 (MCMI-3), or the 16 Personality

Factor. (Defs.' Reply 5.) The Defendants suggest that the interview will take up to four hours and that, including the tests and excluding breaks, the total time required of Henson will not exceed seven hours. (*Id.*)

In asking the court to compel the requisite mental examinations under Rule 35, the Defendants argue that Henson has clearly placed her mental condition in controversy. (Defs.' Mem. 4.) They also contend that good cause exists as required by Rule 35. (*Id.*) Specifically, the Defendants claim that Rule 35 is satisfied on multiple grounds because Henson (1) makes allegations that the Defendants intentionally caused her emotional injuries, (2) makes allegations of specific mental disorders, and (3) makes a claim for severe emotional distress that goes beyond a "garden variety" claim of emotional distress. (*Id.* at 4-7.) In addition to the above factors, the Defendants also assert that good cause exists for an independent mental examination because of Henson's extensive mental health care records and the inconsistencies contained amongst them. (*Id.* at 7-8.) Further, they claim that if the court orders a mental examination, it is reasonable to extend the Rule 26 expert deadline until sixty days after the entry of such an order so as to allow sufficient time to schedule the examination and allow Dr. Reisman to subsequently prepare his report. (Defs.' Reply 8-9.)

In their reply, the Defendants address several issues raised

by Henson as relevant if a mental examination is ordered. They argue that limiting any possible mental examination to a single two to three hour interview session, as Henson suggests, is unreasonable and impractical. (*Id.* at 5.) They also claim that Henson has failed to show any special need or good reason that would permit an audio recording of her mental examination. (*Id.* at 6.) Lastly, the Defendants ask the court to strike Henson's Exhibit 1 contained in her initial response to the present motion ("Exhibit 1") because it is irrelevant to the current matter. (*Id.* at 9.)

In opposition to the motion, Henson argues that the Defendants have not made an affirmative showing that her mental condition is "in controversy" as required under Rule 35. (Pl.'s Resp. 5.) She also asserts that the "good cause" requirement has not been met because the Defendants can obtain all relevant information through less intrusive means. Specifically, she claims that they could use the extensive medical documents coupled with cross-examination of her and expert witness testimony to develop the same information they would obtain through an "intrusive" mental examination. (*Id.* at 6-7.)

If the court orders a mental examination, Henson argues that certain limits and conditions should be put in place. She asks that the examination be limited to no more than a single two to three hour session, the scope of questioning be confined to matters

relevant to the harm she sustained as a result of her termination, and that any psychological tests be prohibited. (*Id.* at 7; Pl.'s Sur-reply 2.) She claims that these limitations are reasonable in light of the voluminous medical records available and her previous seven-hour deposition. Henson also requests that the examination be recorded by audio device to protect the integrity of the examination and to prevent the Defendants from "run[ning] wild." (Pl.'s Resp. 7-8.) Specifically, Henson argues that the Defendants' expert is not an impartial observer and that no proof has been offered to show that such a recording would interfere with the examination. (Pl.'s Sur-reply 4-5.) Henson further requests that the court permit her to call a rebuttal expert if a mental examination is ordered. (Pl.'s Resp. 8.) Lastly, Henson argues that Exhibit 1 was needed to provide necessary background information and should not be stricken. (Pl.'s Sur-reply 5-6.)

ANALYSIS

The Federal Rules of Civil Procedure recognize the possibility that parties in a civil suit might need to address their physical or mental conditions for a variety of reasons, including establishing liability or fixing the amount of damages. *See* FED. R. CIV. P. 35(a)-(b). Rule 35 provides that:

> The court where the action is pending may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. . . .
>
> The order: (A) may be made only on motion for good cause

> and on notice to all parties and the person to be examined; and (B) must 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). Rule 35 is unique from other discovery rules in that it contains both "in controversy" and "good cause" requirements. *See Schlagenhauf v. Holder*, 379 U.S. 104, 117 (1964). These requirements can only be met when the movant affirmatively shows "that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." *Id.* at 118. While some cases may require an evidentiary hearing to satisfy the requirements, affidavits or the pleadings alone may be sufficient in other cases. *See id.* at 118-19. The decision on whether to issue a Rule 35 order for a mental examination "lies soundly within the court's discretion." *Hodges v. Keane*, 145 F.R.D. 332, 334 (S.D.N.Y. 1993) (citations omitted). In the present case, the parties dispute the satisfaction of both the "in controversy" and "good cause" requirements of Rule 35.

A. <u>"In Controversy" Requirement</u>

Henson emphasizes her argument that the Defendants have the burden of making an affirmative showing that her mental condition is in controversy and that they may not simply rely on conclusory allegations in the pleadings or a showing of mere relevance. (Pl.'s Resp. 4.) She states that "just because [she] has made a claim for emotional distress damages does not mean that her mental

condition is in controversy." (*Id.*) The Defendants argue that Henson's pleadings have gone far beyond conclusory allegations by alleging specific mental conditions that the Defendants' actions caused, thus placing her mental condition in controversy.

A person's mental condition can be placed in controversy simply on the pleadings alone. *Schlagenhauf*, 379 U.S. at 118-19. In *Turner v. Imperial Stores*, the court conducted an extensive analysis of cases that had ordered mental examinations and found that more than a simple claim of emotional distress was required for an examination to be ordered. *Turner v. Imperial Stores*, 161 F.R.D. 89, 92-95 (S.D. Cal. 1995). The court found that cases ordering mental examinations involved:

> 1) a cause of action for intentional or negligent infliction of emotional distress; 2) an allegation of a 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).

Id. at 95. Courts have refused to find a plaintiff's mental condition in controversy and order mental examinations when the plaintiff makes only a "garden-variety" claim of emotional distress and fails to allege any specific mental or psychiatric disorders resulting from the alleged actions of a defendant. *See id.* at 98 (finding that plaintiff's mental condition was not in controversy when she merely claimed damages for emotional distress); *Sabree v. United Bhd. of Carpenters & Joiners of Am., Local No. 33*, 126

F.R.D. 422, 426 (D. Mass. 1989)(finding plaintiff's mental condition not in controversy when only garden-variety emotional distress alleged); *Cody v. Marriott Corp.*, 103 F.R.D. 421, 423 (D. Mass. 1984)(finding that a plaintiff's mental condition is in controversy when a plaintiff refers to specific mental and psychiatric injuries).

In the present case, Henson has made claims that the Defendants' actions caused her specific mental injuries such as severe depression, anxiety, and suicidal thoughts. Furthermore, her claims of "severe" depression and contemplated suicide involve injuries that rise above any "garden-variety" claim of emotional distress. Because Henson claims specific and severe mental injuries, she has placed her mental condition in controversy as required for a Rule 35 mental examination.

B. Good Cause Requirement

Having decided that Henson's mental condition is in controversy, it must be determined whether the Defendants' have established good cause for the requested mental examination. Good cause is established by demonstrating both relevance and need. *Pearson v. Norfolk-Southern Ry. Co.*, 178 F.R.D. 580, 582 (M.D. Ala. 1998)(citations omitted). It must be determined on a case by case basis, with "the ability of the movant to obtain the desired information by other means" taken into consideration. *See Schlagenhauf*, 379 U.S. at 118.

In the present case, it is unquestionable that the information sought, i.e., information regarding Henson's alleged mental injuries and condition, would be relevant to her claim that her extensive, severe mental injuries were caused by the Defendants. The question then becomes whether the Defendants can obtain that information from other sources. Henson argues that her "past and present mental condition can be readily established by reference to her medical records and cross-examination of [her]." (Pl.'s Resp. 6.) She claims that the Defendants have virtually all of her medical and psychological records and that they have failed to offer any substantive reasons why those documents are insufficient.

While it is true that they are in possession of Henson's medical records, the Defendants assert that there are inconsistencies in the records that would prevent their expert from reaching an accurate conclusion without conducting his own independent examination of Henson. The court agrees that inconsistencies in Henson's medical records will lessen the Defendants' expert's ability to form an accurate opinion about the contributing factors to Henson's injuries, an issue that is central to her damages claim in this case. Therefore, it is necessary for the Defendants to obtain information outside of those records by other means, such as an independent mental examination. Accordingly, good cause exists to order a mental examination of Henson.

C. Time, Place, and Conditions of the Exam

Henson has requested that any examination that may be ordered be limited to a single two to three hour session. She also asks that any psychological testing be prohibited and that she be allowed to record the examination with an audio device. The Defendants argue that all of their proposed conditions for the examination are both reasonable and necessary.

This court does not find the four hours requested by the Defendants for Dr. Reisman to examine Henson to be unreasonable. Indeed, it is only one hour more than the time period suggested by Henson herself. The scope of the examination should be limited to discovering information for the purposes of clarifying any inconsistencies in Henson's medical records and establishing the factors which impacted her past and present mental condition. Dr. Reisman is a professional, and this court has no reason to believe that he will take any more time than necessary to gather the needed information from Henson.

Furthermore, this court finds no reason to prohibit Dr. Reisman from conducting two psychological tests. Henson cites the case of *Usher v. Lakewood Engineering & Manufacturing Co.*, 158 F.R.D. 411 (N.D. Ill. 1994), as evidence that courts have denied requests to conduct psychological testing when the tests were found to be unreliable and states that the Defendants have done nothing

to show that their proposed tests are reliable. That case, however, is distinguishable from the present case in that the court only entered a protective order prohibiting certain psychological tests after the plaintiff "adduced substantial information demonstrating the inadequacy of the correlation factors and the validity factors of" the tests in question. *Usher*, 158 F.R.D. at 413. Henson has made no showing that the tests Dr. Reisman intends to administer are unreliable for achieving his intended results, and, once again, the court has no reason to believe that Dr. Reisman would administer tests that he knew to be unreliable or unhelpful in this type of mental examination. Therefore, the court will allow Dr. Reisman to conduct two of the four proposed psychological tests. The examination and tests should not, however, exceed a total of seven hours, excluding breaks, and must be conducted in the same or consecutive days.

Lastly, the court sees no reason to allow the examination to be recorded. The court agrees with the *Tomlin v. Holecek* court in that "the presence of third parties[, either physically or by tape-recording,] would lend a degree of artificiality to the interview technique which would be inconsistent with applicable, professional standards." *See Turner v. Holecek*, 150 F.R.D. 628, 632 (D. Minn. 1993). Henson's only reasons for suggesting that the examination be recorded are to protect the integrity of it and to prevent the Defendants from "running wild." She has offered no proof that Dr.

Reisman uses questionable or unreasonable examination techniques. Absent a showing that there is a special need or a good reason to record the examination, this court sees no reason to record it. *See Zantello v. Shelby Twp.*, No. 06-CV-10745-DT, 2007 WL 737723, at *2 (E.D. Mich. Mar. 7, 2007)(refusing to allow a third party observer or recording when plaintiff failed to identify any special need or reason specific to the physician administering the test); *Lahar v. Oakland County*, No. 05-72920, 2006 WL 2269340, at *8 (E.D. Mich. Aug. 8, 2006)(finding that majority of federal courts decline to allow recording absent a showing of special need or good reason). Additionally, the court notes that there is no indication by either party that there are audio recordings from tests and examinations by Henson's doctors in her medical history. The Defendants must look at the results and records and address any inconsistencies with the physicians that may testify. Similarly, Henson may review the results of this examination in the report issued by Dr. Reisman, and she may address any concerns about its integrity during Dr. Reisman's cross-examination.

D. Henson's Request to Call a Rebuttal Witness

Because an examination is being ordered, Henson argues that fairness dictates that she be permitted to call a rebuttal expert. This argument is without merit. Henson's deadline for disclosure of her Rule 26 expert information was April 1, 2008. (Scheduling Order, Doc. No. 16, Dec. 14, 2007.) Notably, that deadline is over

two months before the Defendants' disclosure deadline of June 17, 2008, for their Rule 26 expert information. (*Id.*) Henson did not disclose any expert information prior to her deadline, and she cannot now decide to use an expert because the Defendants will present one. The Defendants filed the present motion before the expiration of their deadline. Their decision to seek to use an expert *after* the expiration of Henson's Rule 26 disclosure deadline could not have influenced Henson's decision to not use an expert *before* the expiration of her deadline. As such, Henson's request to use a rebuttal expert because the Defendants will present an expert must be denied. The court notes that Henson is still free to call her own treating physicians to testify on her behalf.

E. Defendants' Request to Strike Exhibit 1

The Defendants ask the court to strike Exhibit 1 because it is irrelevant. While the court does agree that the material contained in Exhibit 1 is generally irrelevant to deciding whether to compel a Rule 35(a) mental examination, the Defendants' request to strike Exhibit 1 is not properly brought. The only provision within the Federal Rules of Civil Procedure which provides for striking an item is Rule 12(f). That rule authorizes the court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f). Affidavits and/or attached exhibits accompanying memoranda in support of motions, or the memoranda themselves for that matter,

however, are not among the documents identified as "pleadings" by the Federal Rules. *See* FED. R. CIV. P. 7(a). This court has held on several occasions that a motion to strike is therefore not the proper procedural device for countering exhibits or affidavits attached to memoranda in support of motions. Thus, the Defendants' request to strike Exhibit 1 is denied.

CONCLUSION

For the reasons stated above, the Defendants' motion to compel a mental examination of Henson is GRANTED. Henson is ordered to appear for a mental examination under the terms and conditions as described above. The examination shall take place at the office of Dr. Reisman, and the Defendants must disclose their expert and his report within sixty (60) days of the date of entry of this order. The scheduling order is hereby modified so as to comport with the terms of this order.

The Defendants' request to strike Exhibit 1 is DENIED.

IT IS SO ORDERED this 14th day of August, 2008.

s/ Diane K. Vescovo
DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE