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Pursuant to Rule 35(a) of both the *West Virginia Rules of Civil Procedure* and the *Federal Rules of Civil Procedure*, when the mental or physical condition of a party is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner. The order may be made only on motion for good cause shown.

It is common to find allegations of emotional distress in a complaint arising out of alleged wrongful termination, hostile work environment, sexual harassment, and other employment-related claims. In fact, in some such cases, there may be no "damages" for which plaintiff seeks to recover other than emotional damages. Thus, in defending an employment litigation claim, it may be prudent for counsel to request that the plaintiff submit to a psychological IME for the purpose of determining the veracity and scope of the plaintiff's alleged emotional damages. However, whereas plaintiff's counsel in a personal injury case arising out of a motor vehicle accident, for example, will frequently voice no objection to a physical IME of his or her client, counsel for the plaintiff in an employment case may vigorously oppose the defendant's request for a psychological IME.

As noted above, a defendant is not entitled as a matter of right in employment cases to conduct an IME of the plaintiff. Rather, if the defendant cannot obtain from the plaintiff a stipulation or agreement regarding the examination, a motion to compel must be brought, and the court can order such an examination only upon a showing of good cause, and only where the court finds the mental condition of plaintiff is in controversy.

Pursuant to West Virginia law, prior to entering an order which compels an independent medical examination pursuant to Rule 35, the court must find that the movant has demonstrated good cause with regard to the need for such examination. Syl pt. 1, *State ex rel. Letts by Letts v. Zakaib*, 189 W.Va. 616, 433 S.E.2d 554 (1993). The good cause requirement of Rule 35 is not a mere formality. The requirement is not met by mere conclusory allegations of the pleadings nor by mere relevance to the case, but requires an affirmative showing by the movant that each condition as to which the examination is sought is genuinely in controversy and that good cause exists for ordering each particular examination. *Id.* at Syl pt. 2. Even when good cause is found to exist, the issue of ordering an independent medical examination remains within the court's discretion. *Id.*

Whether it is fear of the intrusive nature of a psychiatric examination and the unflattering information that may be revealed during such an examination, or fear that a psychiatric examination may reveal that the plaintiff suffers from no emotional distress or mental disorder attributable to his or her employment, plaintiffs in all jurisdictions have been challenging – in some cases successfully challenging – the employer's right to conduct such an examination.

This article will discuss some of the challenges faced by employers who seek to compel a plaintiff to submit to an IME, with an emphasis on the employer's burden of demonstrating that plaintiff wants to recover more than "garden variety" emotional damages.

Where plaintiff in an employment case has asserted a claim for emotional distress, factors that may be examined by the court in determining whether there exists good cause to require plaintiff to submit to a psychological exam include whether (1) plaintiff has asserted a specific cause of action for intentional or negligent infliction of emotional distress; (2) plaintiff has alleged a specific mental or psychiatric injury or disorder; (3) plaintiff claims unusually severe emotional distress; (4) plaintiff

has offered expert testimony in support of his or her claim for emotional distress damages; or (5) plaintiff has conceded that his mental condition is "in controversy" within the meaning of Rule 35.

Regarding these factors, a common subject of litigation is whether plaintiff has alleged "severe" emotional distress, as opposed to typical "garden variety" emotional distress, so as to warrant a Rule 35 examination.

"Garden variety" emotional distress versus "severe" emotional distress

Compensatory damage claims in employment litigation can be viewed on a spectrum of severity. At one end are "garden variety" emotional distress claims, in which the plaintiff may claim that he suffers mental anguish and emotional distress by asserting that he suffers from symptoms such as loss of appetite, sleeplessness, humiliation, annoyance, anger, *et cetera*. At the opposite end of the emotional distress spectrum are the "severe" emotional distress claims, including those in which the plaintiff may claim to suffer from a mental disorder that has resulted in a diagnosis and which requires professional treatment.

"Garden variety" claims of emotional distress have been defined as those that do not require medical treatment, such as mild depression, weight loss, headaches, lack of appetite, sleep loss, loss of trust and disorientation. *See Luciano v. Olsten Corp*., 912 F.Supp. 663 (E.D.N.Y. 1996); *EEOC v. First Wireless Group, Inc.*, 2007 WL 586720.

In *Kankam v. Univ. of Kansas Hospital Authority*, 2008 WL 4369315 (D.Kan.), plaintiff alleged that her employer discriminated against her on the basis of race by terminating her employment in violation of Title VII of the Civil Rights of Act of 1964. As part of her Complaint,

plaintiff alleged that she suffered damages in the form of embarrassment, humiliation, loss of dignity, mental anguish, anxiety and inconvenience.

The Court considered the employer's motion for an order requiring plaintiff to submit to an independent medical examination, which the employer sought on the basis that plaintiff's claims went beyond "garden variety" damages. Specifically, the employer contended that, because plaintiff alleged during her deposition that she suffered from insomnia, had consulted with a physician to deal with the effects of her termination, had consulted with a mental health counselor to deal with the emotional pain of her termination, and had been diagnosed with Post Traumatic Stress Disorder, her claims were more than "garden variety" emotional distress claims.

The district court reviewed plaintiff's deposition testimony and ultimately determined that the plaintiff alleged only garden variety damages, as opposed to severe emotional distress. Specifically, the court noted that plaintiff declined to testify that she was depressed but only stated that she thought about what happened to her everyday. Plaintiff's testimony that she had seen a counselor twice in a six-week period was elicited only as a result of additional questioning by the defendant. The court also deemed it relevant that the plaintiff did not disclose any treating physicians in her initial disclosure and specifically objected to an interrogatory requesting information regarding her health care providers on the basis that she was seeking only garden variety damages. Thus, the employer's motion was denied.

Similarly, in *EEOC v. The Vail Corp*., 2008 WL 4489256, the District Court of Colorado refused to grant an employer's motion seeking plaintiff's psychological IME where plaintiff asserted an emotional distress claim against her former employer for "mental anguish, humiliation, inconvenience, pain and suffering, and loss of enjoyment of life." Plaintiff testified that she suffered

from nightmares and otherwise characterized her mental condition as "loss of self-confidence, not sleeping, stressed out, trust issues, tired all the time, and always looking over your shoulder," which the district court found did not rise above the level of garden variety emotional distress. Although plaintiff had been diagnosed with PTSD and depression, the court accepted plaintiff's averment that she did not intend to present any evidence relative to treatment by mental health professionals, including any diagnoses or testimony from those professionals.

Conversely, a mental examination was ordered in *Thiessen v. General Electric Capital Corp.*, 178 F.R.D. 568 (D.Kan. 1998), where the district court found plaintiff's mental condition "inextricably intertwined with the full story which is expected to unfold at trial." There, plaintiff asserted in his deposition testimony that he suffered from specific physical and mental injuries allegedly caused, at least in part, by his employer's conduct, including congestive heart failure, water in his lungs, lack of sleep, trouble with his fiancee and great sadness and depression. The plaintiff argued that a Rule 35 exam was improper because he had never been treated by a health care provider for any emotional distress arising from his employer's misconduct, and because he would not offer any expert or medical testimony at trial in support of his claim for emotional distress damages.

The court concluded that excerpts from plaintiff's deposition regarding his health problems revealed that his claim for emotional distress was not simply a "garden variety" claim. The court rejected plaintiff's contention that his decision to refrain from presenting expert or medical testimony with respect to his emotional distress claim precluded the employer from requesting a Rule 35 exam.

Finally, in *E.E.O.C. v. Grief Bros. Corp.*, 218 F.R.D. 59 (W.D.N.Y. 2003), the court granted an employer's motion to require plaintiff to submit to a Rule 35 examination. The EEOC alleged

in its complaint a mental distress injury on behalf of the defendant's former employee and asserted in response to the employer's written discovery that the employer's violations of Title VII resulted in "emotional pain and suffering endured by [the employee], including but not limited to severe humiliation, anxiety, depression, loss of self-esteem, sleeplessness and weight gain."

In granting the motion, the court considered it relevant that following his termination of employment with the defendant, the employee consulted with a social worker regarding his emotional condition, and subsequently consulted with a psychiatrist. Further, the employee was later prescribed an anti-depressant by his general physician.

The EEOC opposed the Rule 35 examination, in part, on the basis that although the employee suffered " serious emotional distress" it did not incapacitate the employee, did not prevent him from working, and did not cause any unusual medical injuries as contemplated by Rule 35. The court rejected the EEOC's position, ruling that Rule 35 does not require a showing that as a result of the alleged mental condition at issue, the requested party had suffered such debilitating consequences.

These cases represent only a sampling of those in which the courts have either granted or denied an employer's motion to compel a psychological IME based on an analysis of the severity of the emotional damages claimed by the plaintiff. A determination as to where plaintiff's alleged emotional damages fall on the "severity spectrum" will require an in depth factual inquiry in each case.

"Be careful what you wish for"

As every defense attorney has experienced, fighting for and winning a motion for a Rule 35 examination does not always end well. Whereas there is scant West Virginia case law on psychological IMEs, the West Virginia Supreme Court has addressed clearly and emphatically the

handling of any report resulting from physical Rule 35 examinations generally. As discussed above, Rule 35(a) governs the process by which defendants can obtain IME access to the plaintiff. Rule 35(b) instructs that,

> [i]f requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examining physician or other qualified expert setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that such party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if the physician or other qualified expert fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

W. Va. R. C. P. Rule 35(b)(1). While Rule 35 has undergone revisions since *Luster v. Brown*, 182 W.Va. 122, 386 S.E.2d 489 (1989), nonetheless *Luster*'s guidance remains compelling authority today.

In *Luster,* the Court considered suit arising from an automobile accident, as a result of which accident, plaintiff alleged onset of temporomandibular joint (TM joint) problems. In the process of discovery, defendant retained a consulting medical expert to conduct an IME of the plaintiff. When the parties reached the pretrial, still no IME report had been produced. When defendant received the report, it turned out that the examiner's findings were more favorable to plaintiff than plaintiff's own treater's had been and were clearly disfavorable to the defense. By the Court's instruction, the plaintiff was provided a copy of the report and expressed the intention of calling the IME physician to trial. Defendant moved to preclude plaintiff from calling what the defense now identified as a non-testifying consultant (*a la* Rule 26(b)(4)). The trial court ruled that the plaintiff would be allowed

to call the examining physician at trial. The matter went before the Supreme Court on certified questions.

Championing the free exchange of ideas and information, and finding that the "defendant cannot obtain a report, initially stating that it may be used at trial, and then change his mind once the report is received, pretending it never occurred," the Supreme Court distinguished between retained Rule 26 non-testifying consultants and Rule 35 examiners, finding that Rule 26 envisions a situation where a consultant may be involved as nothing more than trial preparation; Rule 35 does not. The Supreme Court, however, emphasized Rule 35's precise terms that require plaintiffs to reciprocate by disclosing related reports, encouraging both parties to be forthright in their discovery practices (but noting how easy it would be for a plaintiff to be tested and receive a report without defendant knowing it - given that plaintiff's counsel has access to the plaintiff at all times).

In sum, the art of Rule 35 is, first, identifying the best scenarios for psychological evaluations, second, winning the motion to gain psychological IME access, and, third, making the best of the outcomes of steps one and two.