

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

**UNITED STATES EQUAL  
EMPLOYMENT OPPORTUNITY  
COMMISSION,**

**Plaintiff,**

**-vs-**

**Case No. 6:05-cv-1452-Orl-28KRS**

**FLTVT, LLC,**

**Defendant.**

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**ORDER**

This cause came on for consideration without oral argument on the following motion filed herein:

**MOTION: DEFENDANT FLTVT, LLC'S MOTION TO COMPEL  
PLAINTIFFS FRED RIVERS AND SEYMOUR SMALL  
TO SUBMIT TO A PSYCHOLOGICAL EVALUATION  
PURSUANT TO RULE 35 (Doc. No. 32)**

**FILED: May 4, 2007**

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Frederick Rivers and Seymour Small were granted leave to file an Intervenor's Complaint in this case. In that complaint, they allege that they were terminated and/or demoted by Defendant FLTVT, LLC (FLTVT) due to their race. They allege that as a result of FLTVT's conduct, they "have suffered . . . medical expenses, emotional pain, suffering, . . . [and] loss of enjoyment of life and humiliation." Doc. No. 17 ¶¶ 36, 46.

FLTVT now asks the Court to compel Rivers and Small to submit to a psychiatric examination pursuant to Federal Rule of Civil Procedure 35. Doc. No. 32. Rivers and Small oppose the motion. Doc. No. 33. Rivers agrees to stipulate that he will not introduce any evidence regarding his emotional pain and suffering except his own testimony, and he agrees not to testify that he contemplated suicide as a result of his termination. Doc. No. 33 at 2. Small indicates that he did not seek medical treatment for his emotional pain and suffering, and he testified during his deposition that his symptoms lasted only six or seven weeks. Doc. No. 33 at 3. As such, Rivers and Small argue that this is an instance of “garden variety” emotional damages that does not support a Rule 35 examination.

Federal Rule of Civil Procedure 35(a) provides as follows:

[w]hen the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control 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 or to produce for examination the person in the party’s custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Therefore, under Rule 35(a), the movant must establish that the other party’s mental condition or physical condition is “in controversy” and that there is “good cause” for the examinations. *Ali v. Wang Labs., Inc.*, 162 F.R.D. 165, 167 (M.D. Fla. 1995). The Rule “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 v. Holder*, 379 U.S. 104, 118-19 (1964). These requirements “are necessarily related.” *Id.* “[T]he

movant must produce sufficient information, by whatever means, so that the [trial] judge can fulfill his [or her] function mandated by the Rule.” *Id.* at 19.

“The majority of courts have held that plaintiffs do not place their mental condition in controversy merely by claiming damages for mental anguish or ‘garden variety’ emotional distress.” *Stevenson v. Stanley Bostitch, Inc.*, 201 F.R.D. 551, 553 (N.D. Ga. 2001). Courts have, however, authorized Rule 35 examinations when, among other things, “an allegation of a specific mental or psychiatric injury . . . is made,” or “a claim of unusually severe emotional distress is made.” *Id.* at 554. The record is sufficient to show that Small has not asserted a specific mental or psychiatric injury that would support the need for a Rule 35 examination. A plaintiff does not place his mental condition in controversy merely by alleging that his psychological well-being was undermined by a defendant’s behavior. *See Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525, 531 (M.D. Fla. 1988).

In contrast, as to Rivers, FLTVT correctly argues that the proposed stipulation about his testimony is too nonspecific to permit FLTVT or the Court fairly to gauge whether Rivers has sufficiently limited his claims for emotional distress to make a Rule 35 examination unnecessary, particularly in light of Rivers’ deposition testimony that his current emotional condition is the result of both the alleged discrimination by FLTVT and an earlier, apparently unrelated episode of discrimination. Moreover, the motion is not sufficient for the Court to assess whether the proposed examination is appropriate because it does not detail the “manner, conditions and scope of the examination.” *See* Rule 35(a).

Accordingly, Defendant FLTVT, LLC'S Motion to Compel Plaintiffs Fred Rivers and Seymour Small to Submit to a Psychological Evaluation Pursuant to Rule 35 (Doc. No. 32) is **DENIED** as to Small and **DENIED without prejudice** as to Rivers. Before filing a renewed motion with respect to Rivers, counsel shall confer in a good faith effort to determine the scope of the testimony that Rivers intends to provide at trial. In any renewed motion, FLTVT shall state the length of time of the proposed examination, the scope of the examination, the manner of the examination (clinical interview, testing, etc.), and any other conditions of the examination.

**DONE** and **ORDERED** in Orlando, Florida on May 18, 2007.

*Karla R. Spaulding*

KARLA R. SPAULDING  
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Counsel of Record  
Unrepresented Parties