

FILED

IN THE DISTRICT COURT OF THE UNITED STATES APR 25 2001

FOR THE DISTRICT OF SOUTH CAROLINA LARRY W. PROPPS, CLERK
COLUMBIA, S.C.

COLUMBIA DIVISION

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

) Civil Action No. 1:00-373-22BC

Plaintiff,

VS.

**GRAVES ENVIRONMENTAL &
GEOTECHNICAL SERVICES, INC.**

Defendant.

Bette J. Kane,

Intervenor,

v.

Graves Environmental & Geotechnical Services, Inc., James K. Branch, Graves Construction Services, Inc., Graves Water Services, Inc., Graves Drilling Services, Inc., and Graves Engineering Services, Inc.,

Defendants.

ENTERED

4-26-01

ORDER

The Equal Employment Opportunity Commission (“EEOC”) brought this case on behalf of Bette Kane (“Kane”) and a class of similarly situated females who were employed by Graves Environmental & Geotechnical Services, Inc. (“Graves”). The allegation is sexual harassment¹ under Title VII. Plaintiffs seek compensation for, among other things, “emotional pain, suffering,

¹Kane has intervened and added a claim under the Age Discrimination in Employment Act (“ADEA”).

inconvenience, loss of enjoyment of life, and humiliation.” (Complaint, Prayer for Relief, ¶ E). Presently before the court is Graves’ motion for a mental evaluation² pursuant to Fed. R. Civ. P. 35. Graves has retained Dr. Harold Morgan, a local psychiatrist to perform the evaluation. Kane and the EEOC oppose the motion, and alternatively, if the motion is granted, seek a protective order.

Rule 35(a) states:

Order for Examination. When 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.

Pursuant to the rule, an independent evaluation may be ordered where the party’s mental condition is “in controversy” and where the party seeking the examination establishes “good cause.” Schlagenhauf v. Holder, 379 U.S. 104 (1964). The court is required to balance the safety of the party with the need for the information sought. Id. at 118.

Generally, a Title VII plaintiff does not place his or her mental condition in controversy by making a claim for emotional injury. Most courts require such a claim and the presence of one or more of the following factors before an examination will be ordered under Rule 35:

1. A separate claim for intentional infliction of emotional distress;

²At a hearing held April 19, 2001, Graves agreed that its motion was in error insofar as it sought a physical examination.

2. An allegation of a specific mental injury or psychiatric disorder;
3. A claim of unusually severe emotional distress;
4. An intention to offer expert testimony in support of the claim for emotional damages; and
5. Plaintiff's concession that his or her mental condition is in controversy under Rule 35.

Smith v. J. I. Case Corporation, 164 F.R.D. 229 (E.D.Pa. 1995) and Ricks v. Abbott Laboratories, 198 F.R.D. 647 (D.Md. 2001).

At the hearing of April 19, 2001, the parties agreed that factors one and five listed above were not present in this case. However, after reviewing the record,³ the undersigned finds that factors two, three and four listed above are present. Even though the complaints made a generic claim for emotional damages, more information has come to light during discovery. According to Kane, the stress of litigation, particularly her deposition and that of her daughter, triggered an episode which led her to be admitted to the Aiken Regional Medical Center under the care of a psychiatrist, Dr. David A. Steiner, from October 26 through October 29, 2000. She was diagnosed with "posttraumatic stress disorder with acute decompensation." In her deposition, Kane described her continuing emotional problems and the medications she was prescribed to control them. Plaintiffs have not listed Dr. Steiner as a witness, but have listed Kane's family doctor as a witness with respect to emotional damages. At the hearing, plaintiffs confirmed their intention to offer the evidence of Kane's emotional inquiries.

³At the request of the undersigned, defendants have furnished the court with a copy of Kane's deposition which shall be filed with this order.

Graves has established good cause under Rule 35 as it needs a mental evaluation to access Kane's claims. Lahr v. Fulbright & Jaworski, 164 F.R.D. 204 (N.D.Tx. 1996). Further, a meaningful examination should be conducted outside the presence of third parties. Holland v. United States, 182 F.R.D. 493 (D.S.C. 1998).

After reviewing the record and hearing the arguments of the parties, defendant's motion for mental evaluation pursuant to Fed. R. Civ. P. 35 is granted, and plaintiffs' motion for protective order is denied. The examination shall be conducted within the extended time for discovery by Dr. Harold C. Morgan in accord with his letter of January 29, 2001 (See Def. Reply Mem., Ex. A).

AND IT IS SO ORDERED.


JOSEPH R. McCROREY
UNITED STATES MAGISTRATE JUDGE

April 25, 2001

Columbia, South Carolina