The Availability of Rule 35 Mental Examinations in Employment Discrimination Cases

Richard A. Bales and Priscilla Ray, M.D.*

Table of Contents

---

* Richard Bales is a Visiting Professor of Law at Southern Methodist University Law School. Dr. Ray is a psychiatrist in private practice in Houston, Texas. She obtained her B.A. at Vassar College and her M.D. at Baylor College of Medicine, where she currently is a clinical professor of psychiatry. She frequently serves as a psychiatric expert witness in both employment and other cases for both plaintiffs and defendants.

I. Introduction

Rule 35 of the Federal Rules of Civil Procedure permits a party to a pending action to obtain a court order forcing another party whose mental condition is in controversy to submit to a mental examination by a doctor or psychiatrist, often the movant's expert. Whether a court will grant such an order usually depends on the extent to which the party's condition is in controversy. In many cases, the determination is easy, such as where a plaintiff sued a drug manufacturer claiming that he suffered ongoing psychiatric harm from taking a tranquilizer,[1] or where the plaintiff in an age discrimination case made no claim for mental or emotional damages.[2]

Such cases, however, are the exception rather than the rule; most employment discrimination plaintiffs put their mental condition at issue at least to some degree. In federal sexual harassment cases, for example, a plaintiff alleging a hostile environment must show that she subjectively perceived the work environment to be abusive, though she need not necessarily show a severe effect on her psychological well-being.[3] Most employment discrimination cases are accompanied by a state law claim of intentional infliction of emotional distress,[4] which by itself may be enough to put the plaintiff's mental condition at issue. The Civil Rights Act of 1991, by explicitly permitting recovery for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses"[5] in cases arising under Title VII,[6] the Americans with Disabilities Act,[7] and the Rehabilitation Act,[8] similarly

---

1. Duncan v. Upjohn Co., 155 F.R.D. 23, 24 (D. Conn. 1994).

2. Acosta v. Tenneco Oil Co., 913 F.2d 205, 209 (5th Cir. 1990).

3. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993); *see also* Kent D. Streseman, Note, *Headshrinkers, Manmunchers, Moneygrubbers, Nuts & Sluts: Reexamining Compelled Mental Examinations in Sexual Harassment Actions Under the Civil Rights Act of 1991*, 80 CORNELL L. REV. 1268, 1288 (1995).

4. For a discussion of this tort, see Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387 (1994).

5. 42 U.S.C. § 1981a(b)(3) (Supp. V 1993).

6. 42 U.S.C. § 2000e-2 (1994) (prohibiting workplace discrimination on the basis of race, color, religion, sex, or national origin).

7. 42 U.S.C. §§ 12101-213 (1994) (prohibiting workplace discrimination on the basis of disability).

encourages plaintiffs to seek such relief and thereby to put their mental condition at issue.[9]

Courts are inconsistent regarding whether, and under what circumstances, a defendant is entitled to obtain a mental examination of an employment discrimination plaintiff. This article reviews the competing policies behind Rule 35, the case law, and the psychiatric literature relevant to the issue. It proposes that courts abandon the current approach of utilizing bright-line tests that bear no relation to the underlying policy objectives of Rule 35; instead, courts should focus directly on those policy objectives, such as the plaintiff's right to privacy and the defendant's right to discover relevant information.

II. Background

A. The Rule and its Interpretation by the Supreme Court

Rule 35 of the Federal Rules of Civil Procedure, in relevant part, provides:

> ORDER FOR EXAMINATION. 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 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.[10]

The Advisory Committee Note of the 1970 Amendment to Rule 35 emphasizes that "before a court order may issue[,] the relevant physical or mental condition must be shown to be 'in controversy' and 'good cause' must be shown for the examination."[11]

---

8. 29 U.S.C. §§ 701-797b (1994) (providing equal opportunities to persons with disabilities).

9. 105 Stat. 1071, P.L. 102-166 (Nov. 21, 1991).

10. FED. R. CIV. P. 35(a).

11. *Id.* at Advisory Committee's Note.

The only Supreme Court case construing the scope of Rule 35 is *Schlagenhauf v. Holder.*[12] In *Schlagenhauf*, the plaintiffs were passengers injured when their bus collided with a truck. The defendant truck company, in answer to a cross-claim by the co-defendant bus company, charged that the bus driver had not been "mentally or physically capable" of driving the bus safely.[13] The truck company moved for an order directing the bus driver to submit to both a mental and physical examination. The district court ordered the driver to submit to examinations in internal medicine, ophthalmology, neurology, and psychiatry.[14]

Upon petition by the bus company, the Supreme Court granted certiorari.[15] In the Court's view, the record contained only the conclusory assertion in the pleadings that the bus driver's vision might have been impaired and some indications from discovery that this might be true.[16] While conceding that this might be sufficient to establish relevancy, the Court nevertheless held that the "good cause" and "in controversy" requirements of Rule 35 imposed a greater burden than relevancy.[17] The Court also stated that these limitations are more than "a mere formality" and further wrote:

> [These limitations] are not met by mere conclusory allegations of the pleadings - nor by mere relevance to the case - but require an affirmative showing by the movant 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. Obviously, what may be good cause for one type of examination may not be so for another. The ability of the movant to obtain the desired information by other means is also relevant.[18]

The Court recognized that at times the pleadings may be sufficient to put mental or physical condition in controversy, as when a plaintiff in a negligence action alleges mental or physical injury.[19] However, when a party has not put her own condition at issue, the

---

12. 379 U.S. 104,114-22 (1964). In Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) the Court held that Rule 35 was constitutional and that it did not violate the restrictions imposed on rulemaking by the Enabling Act, 28 U.S.C. § 2072.

13. *Id.* at 107.

14. *Id.*

15. Schlagenhauf v. Holder, 375 U.S. 983 (1964).

16. Schlagenhauf, 379 U.S. at 120.

17. *Id.* at 118.

18. *Id.*

19. *See id.* at 119.

court must decide whether the movant has made an adequate showing. The Court observed:

> This does not, of course, mean that the movant must prove his case on the merits in order to meet the requirements for a mental or physical examination. Nor does it mean that an evidentiary hearing is required in all cases. This may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a hearing. It does mean, though, that the movant must produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the Rule.[20]

In *Schlagenhauf*, the Court determined that the bus driver had not asserted his mental condition either in support or defense of the claim and that the general charge of negligence failed to put his mental state into controversy.[21] *Schlagenhauf* therefore stands for the proposition that one party's unsubstantiated allegation cannot put into controversy the mental state of another.

B. Competing Policy Considerations

As pointed out by the Supreme Court in *Union Pacific Railway Co. v. Botsford*,[22] a party's request for a Rule 35 examination forces courts to balance the rights of civil litigants to discover relevant facts against the privacy interests of persons subject to discovery. For example, in *Vinson v. Superior Court of Alameda County*,[23] the defendants to a sexual harassment suit filed a Rule 35 motion requesting the court to require plaintiff to submit to a mental examination unencumbered by substantial restrictions on its scope.[24] The plaintiff complained that a mental examination would be excessively intrusive, particularly if the defendants were permitted to probe into her sexual history.[25]

The plaintiff in *Vinson* advanced two separate policy reasons for denying the mental examination or, in the alternative, restricting its scope. First, she argued that it would invade her protected sphere of privacy.[26] A mental examination by its nature intrudes into a

---

20. *Id.*
21. Schlagenhauf, 379 U.S. at 119-22.
22. 141 U.S. 250, 251.
23. 740 P.2d 404 (Cal. 1987).
24. *Id.* at 410.
25. *Id.*
26. *Id.*

person's thoughts and thought processes, particularly when the examination centers on issues concerning sexuality. Second, the plaintiff argued that permitting unrestricted mental examinations of sexual harassment plaintiffs would discourage persons with meritorious claims from reporting and pursuing their claims, because they would be justifiably wary of subjecting themselves to further intrusion into their personal lives.[27] The same argument would apply, though with somewhat less force, in other types of discrimination cases; plaintiffs might be less likely to pursue claims if they knew that the cost of doing so included subjecting themselves to a mental examination by defendant's expert. A third reason for restricting the applicability or scope of Rule 35 examinations is that the examinations themselves may exacerbate a plaintiff's emotional distress, thereby contributing to the very problem which the plaintiff seeks to remedy by filing a discrimination claim.[28]

The defendants in *Vinson* argued that the plaintiff had waived her privacy interests when she put her emotional condition at issue by alleging emotional distress. It would be unfair, they argued, to permit the plaintiff to bring them into court and accuse them of causing her emotional distress without permitting them to rebut this accusation by proffering expert testimony as to whether and to what extent the plaintiff had been emotionally damaged, and as to whether the damage was caused by the defendants, by a preexisting condition, or by some other cause.[29] If the plaintiff were to use an expert at trial to provide evidence supporting her version of these issues, trial of the emotional damages issues would largely become a "battle of the experts."[30] The defendant's experts would be

---

27. *Id.*; *see also* Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D. 525, 531 (M.D. Fla. 1988) ("Plaintiffs in these cases would face sexual denigration in order to secure their statutory right to be free from sexual denigration.").

28. *See, e.g.*, Ziemann v. Burlington County Bridge Comm'n, 155 F.R.D. 497, 499, 501 (D.N.J. 1994) (discussing plaintiff's claim in a sexual harassment case that a mental examination would adversely affect plaintiff's health and ability to work); *but see* Stinchcomb v. United States, 132 F.R.D. 29, 31 (E.D. Pa. 1990) ("It would not be fair to permit a plaintiff routinely to rely on the very conditions of which he complains to defeat a defendant's ability to prove that he did not cause that condition.").

29. *Vinson*, 740 P.2d at 408-10.

30. *See* Postell v. Amana Refrigeration, Inc., 87 F.R.D. 706, 709 (N.D. Ga. 1980).

seriously disadvantaged if they were denied an opportunity, always enjoyed by the plaintiff's expert, to examine the plaintiff.[31] It is for this reason that courts frequently state that Rule 35 should be liberally construed in favor of granting discovery.[32]

The *Vinson* court agreed with the defendants that they were entitled to have their expert examine the plaintiff, and that the expert could inquire into matters relating to both the magnitude and the possible alternate causes of the plaintiff's emotional distress.[33] However, the court restricted the scope of the examination to deny the defendants the latitude to inquire into the plaintiff's sexuality because the defendants had failed to establish specific facts justifying inquiry into that subject.[34] Rule 35 gives trial courts wide discretion over decisions to order mental examinations.[35] This discretion, combined with judges' understandable reluctance to order invasive mental examinations of plaintiffs who claim to have been emotionally damaged by defendant's discriminatory conduct, may explain the disparate standards courts have announced to explain their Rule 35 decisions. Part III reviews the case law and discusses the standards courts have used to determine whether to order Rule 35 mental examinations.

III. Review of Cases

Unlike the bus driver in *Schlagenhauf*, who had a controversy thrust upon him, most employment discrimination plaintiffs explicitly put their mental condition at issue by claiming mental or emotional damages or the independent tort of intentional infliction of emotional distress. At first glance, such plaintiffs would appear ipso facto to have put their mental condition at issue, as did the negligence plaintiffs in *Schlagenhauf*, whom the Court describes as "clearly"

---

31. *See* Olcott v. LaFiandra, 793 F. Supp. 487, 492 (D. Vt. 1992).

32. *See, e.g., Postell*, 87 F.R.D. at 707.

33. *Vinson*, 740 P.2d at 408-10.

34. *Id.* at 412.

35. *See* Bucher v. Krause, 200 F.2d 576, 584 (7th Cir. 1952), *cert. denied*, 345 U.S. 997 (1953); Teche Lines v. Boyette, 111 F.2d 579, 581 (5th Cir. 1940); *Stinchcomb*, 132 F.R.D. at 30; Hardy v. Riser, 309 F. Supp. 1234, 1241 (D. Miss. 1970).

putting their mental condition at issue by asserting mental injury.[36] However, courts have distinguished employment discrimination cases from negligence cases,[37] almost always without accompanying analysis,[38] and often with the statement that to rule otherwise would require every employment discrimination plaintiff to submit to a mental examination.[39]

The result is that the case law is widely divergent on the issue of whether, and under what circumstances, a defendant may compel the mental examination of an employment discrimination plaintiff. Courts apply inconsistent standards; even those courts applying consistent standards often obtain different results. This section develops a framework from which to analyze the cases.

A. The Easy Cases

As discussed in Part I, extreme cases yield the most predictable outcomes. For example, in *Vinson v. Superior Court*,[40] the plaintiff brought suit for sexual harassment and intentional infliction of emotional distress, asserting that her emotional damages were continuing and likely would continue into the future.[41] The California Supreme Court held that under these circumstances, where the plaintiff had "hailed defendants into court and accused them of causing her various mental and emotional ailments . . . [,] the existence and extent of her mental injuries [were] indubitably in

---

36. *Schlagenhauf*, 379 U.S. at 119.

37. *See* Cody v. Marriott Corp., 103 F.R.D. 421, 422-23 (D. Mass. 1984).

38. *See Id.*

39. *See, e.g., id.* at 422; Hodges v. Keane, 145 F.R.D. 332, 335 (S.D.N.Y. 1993) (stating that allowing mental examination in cases in which plaintiff does not assert ongoing pain and suffering would "open the floodgates" to routine mental examinations in discrimination cases); Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D. 525, 531 (M.D. Fla. 1988) (decrying the possibility that sexual harassment plaintiffs might be forced to face sexual denigration at the hands of a psychiatric examiner as the price for securing their statutory right to be free from sexual denigration in the workplace).

40. 740 P.2d 404 (Cal. 1987).

41. *Id.* at 407, 409.

dispute."[42] The court thus affirmed the trial court's order permitting a mental examination of the plaintiff.[43]

At the other side of the spectrum is *Acosta v. Tenneco Oil Co.*,[44] an age discrimination case in which Acosta, the plaintiff, alleged neither mental or emotional damages nor an independent tort of intentional infliction of emotional distress. The issue of a mental examination arose in response to Tenneco's affirmative defense that Acosta had failed to mitigate damages by failing to exercise reasonable diligence in seeking comparable employment.[45] In response, Acosta hired a vocational rehabilitation expert to evaluate the reasonableness of his efforts to secure substitute employment.[46] As part of the evaluation, the expert interviewed Acosta to provide a context by which he could interpret the personality tests he had administered, to evaluate Acosta's intelligence, and to elicit information regarding Acosta's education and work history.[47]

Tenneco moved under Rule 35 to compel Acosta to submit to an examination by a vocational rehabilitation expert of its own.[48] The magistrate and trial court granted the motion, explaining that Acosta's employability was relevant to the issue of damages.[49] The Fifth Circuit reversed. Noting that Acosta had neither sought nor alleged mental or emotional damages, the court held that Tenneco's inquiry into the reasonableness of Acosta's efforts to secure

---

42. *Id.* at 409.

43. The court modified the order, however, to foreclose examination of the plaintiff's sexual history because the defendants had not made any showing regarding why inquiry on that subject would be relevant. 740 P.2d at 412.

44. 913 F.3d 205 (5th Cir. 1990).

45. *Id.* at 207.

46. *Id.*

47. *Id.*

48. *Acosta*, 913 F.2d at 207. The Acosta court did not address non-physician or non-psychologist examinations. Until the 1991 amendments, Rule 35 permitted a mental examination only by a physician or a psychologist. The purpose of the 1991 amendment, which permitted examination by a "suitably licensed or certified examiner," was to include other certified or licensed professionals such as dentists or occupational therapists. FED. R. CIV. P. 35(a) and 1991 amendment notes. As an alternative basis for reversing the trial court's order permitting an examination, the Fifth Circuit in *Acosta* held that Tenneco had not made the requisite showing that its vocational rehabilitation expert was either a physician or a psychologist. *Acosta*, 913 F.2d at 209.

49. *Id.* at 207.

substitute employment "cannot be construed as placing into controversy Acosta's mental or physical condition."[50] To do so, noted the court, would sanction a mental examination in every age discrimination case and would render meaningless Rule 35's express limitations.[51]

Vinson was an easy case because the plaintiff alleged both ongoing emotional injuries and an independent tort for emotional distress. *Acosta* was an easy case because the plaintiff made no claim for emotional damages, past or present. Between the two extremes, however, there is a wide gulf of conflicting authority over whether, and under what circumstances, a defendant can compel a Rule 35 mental examination. The next sections discuss the tests that have been announced by courts when deciding this issue.

B. Mere Allegation of Mental/Emotional Damages

Many courts have held that a plaintiff's mere allegation that the defendant's discriminatory acts caused her to suffer mental or emotional damages is enough to put her mental condition "in controversy" so as to trigger the defendant's right to obtain a Rule 35 mental examination.[52] In *Smedley v. Capps, Staples, Ward,*

---

50. *Id.* at 209.

51. *Id.*

52. *See, e.g.*, Galieti v. State Farm Mutual Auto. Ins. Co., 154 F.R.D. 262, 263 (D. Colo. 1994) (finding that a Rule 35 examination was appropriate in wrongful discharge lawsuit brought by a former supervisor who claimed that he had been falsely accused of sexual harassment and wrongfully terminated, because plaintiff's emotional condition was at issue); Usher v. Lakewood Eng'g & Mfg. Co., 158 F.R.D. 411, 412 (N.D. Ill. 1994) (declaring Rule 35 examination appropriate because plaintiff in sex discrimination case put her mental state in controversy by asserting "intangible" emotional damages and by seeing a psychiatrist for her depression); Smedley v. Capps, Staples, Ward, Hastings & Dodson, 820 F. Supp. 1227, 1232 (N.D. Cal. 1993) (discussed in text); Shepherd v. American Broadcasting Co., Inc., 151 F.R.D. 194, 212 (D.D.C. 1993) (ruling that in a state law race discrimination case, Rule 35 examination was appropriate because the plaintiffs "placed their mental conditions in controversy by demanding damages to compensate them for emotional distress"); Zabkowicz v. West Bend Co., 585 F. Supp. 635, 636 (E.D. Wis. 1984) (holding that in Title VII case, Rule 35 examination was appropriate because plaintiffs put their mental condition in controversy by claiming they suffered emotional distress as a result of sexual harassment suffered by one plaintiff at her place of employment); Lowe v. Philadelphia Newspapers, Inc., 101 F.R.D. 296, 299 (E.D. Pa. 1983) (finding in 42 U.S.C. § 1981 case that Rule 35 examination was appropriate because plaintiff put her

Hastings & Dodson,[53] the plaintiff claimed she had been wrongfully terminated in violation of a California statute prohibiting employers from interfering with employees' political activities. In response to the defendant's Rule 35 motion for a psychological examination, the plaintiff voluntarily dismissed her claim of intentional infliction of emotional distress.[54] She also stipulated that she would not present at trial any expert testimony regarding her past or present emotional distress and that she would not seek damages for medical expenses incurred relating to psychological injury.[55] The plaintiff, however, stated that she still intended to present evidence of "normal" emotional distress.[56] The court held that this alone was sufficient to justify a Rule 35 examination because the defendants would need such an examination to refute the plaintiff's claim of emotional distress damages.[57]

Other courts, however, have expressly held that a mere allegation of emotional damages is not sufficient to justify a Rule 35 examination.[58] In *Cody v. Marriott Corp.*,[59] the plaintiff claimed as an element of damages in her employment discrimination case that she had suffered emotional distress.[60] When the defendant moved for a Rule 35 examination, the court denied it, explaining that the plaintiff had not placed her mental condition "in controversy" merely

---

mental and emotional state at issue by seeking damages for emotional distress).

53. 820 F. Supp. 1227 (N.D. Cal. 1993).

54. *Id.* at 1231.

55. *Id.* at 1232.

56. *Id.*

57. *Id.* at 1232.

58. *See, e.g.*, Turner v. Imperial Stores, 161 F.R.D. 89, 97 (S.D. Cal. 1995) (denying Rule 35 examination where plaintiff's only claim was that she suffered "garden-variety" emotional distress arising from her wrongful discharge); O'Quinn v. New York Univ. Med. Ctr., 68 Fair Empl. Prac. Cas. (BNA) 1798 (S.D.N.Y. 1995) (disallowing Rule 35 examination because plaintiff had withdrawn her claim that the emotional distress she allegedly suffered as a result of defendant's sex discrimination was ongoing); Bridges v. Eastman Kodak Co., 850 F. Supp. 216, 220-22 (S.D.N.Y. 1994) (refusing Rule 35 examination because plaintiff did not allege an independent tort for emotional distress, a psychiatric disorder, or continuing emotional distress); Curtis v. Express, Inc., 868 F. Supp. 467, 469 (N.D.N.Y. 1994) (denying Rule 35 examination because plaintiff did not allege either an independent tort for emotional distress or that the emotional distress was continuing).

59. 103 F.R.D. 421.

60. *Id.* at 423.

by asserting a claim of damages for emotional distress.[61] The court qualified its decision, however, by stating that although the plaintiff's mental condition was not "in controversy" in the instant case, "this . . . does not suggest that a plaintiff could *never* place his or her mental or physical condition 'in controversy' in an employment discrimination case."[62] In a similar case, *Robison v. Jacksonville Shipyards, Inc.*,[63] the court held that the plaintiff did not place her mental condition in controversy, even though she claimed back pay for days lost due to stress and alleged a serious effect on her psychological well-being.[64]

If a plaintiff's emotional distress damage is confined to an allegation of subjectively hurt feelings, then a psychiatric examination adds nothing to what the plaintiff could testify to on her own. The jurors can decide for themselves whether the plaintiff's hurt feelings are worthy of credence and compensation. Employment plaintiffs, however, rarely confine their emotional distress allegations to hurt feelings. Such claims usually are accompanied by allegations of other symptoms such as insomnia, panic attacks, impaired concentration, irritability, mood swings, personality changes, and a variety of physical ailments such as ulcers and headaches. Such symptomology may indicate the presence of a psychiatric disorder, raising three issues for which psychiatric expertise may be needed.

The first issue is whether the plaintiff is experiencing or has experienced a diagnosable psychiatric disorder. A specific diagnosis is far more objective, independently verifiable, and useful for a jury than a vague allegation of emotional distress.

The second issue is whether, and to what extent, the symptomology and/or disorder is causally traceable to the defendant. The plaintiff's symptoms may be unrelated to the employment trauma she is alleging in her lawsuit if, for example, her headaches are caused by an impending rupture of a cerebral aneurysm, exposure to toxic chemicals, or migraines. A thorough psychiatric and physical examination could reveal whether a plaintiff is at risk from these sources. A plaintiff's emotional distress might be caused by other stressors in her life, such as divorce. A psychiatric

---

61. *Id.* at 422.
62. *Id.* at 423 n.4.
63. 118 F.R.D. 525 (M.D. Fla. 1988).
64. *Id.* at 531.

examination would be more useful than a deposition for ascertaining whether and to what extent other stressors might contribute to a plaintiff's emotional condition. Similarly, a plaintiff's preexisting emotional condition could significantly affect both the way she perceives certain incidents in the workplace and their effects on her.[65]

The third issue for which a psychiatric expert may be useful concerns the severity of plaintiff's emotional damages. If the plaintiff is experiencing a specific psychiatric disorder, is it treatable? If so, how can it be treated, and at what cost (emotional or monetary) to the plaintiff? How long can the disorder be expected to last? How does plaintiff's condition compare to lesser traumas and disappointments that everyone suffers at various times throughout their lives? How has the plaintiff coped with similar—and different—traumas before?

These three issues—diagnosis, causation, and damages—can arise in and be relevant to a jury's determination of *any* emotional distress claim. To characterize an emotional distress claim as "normal" or "garden-variety," as the *Smedley* court did, merely begs the harder questions which a psychiatric expert may be able to answer.

C. *Allegation of Ongoing Mental or Emotional Distress*

As discussed above, some courts have granted Rule 35 examinations based exclusively on whether the plaintiff was alleging mental or emotional damages. Many courts, however, have stated that this is too broad a standard and have imposed different tests for deciding

---

65. *See, e.g.*, Sarah P. Feldman-Schorrig, *Special Issues in Sexual Harassment Cases*, *in* MENTAL AND EMOTIONAL ISSUES IN EMPLOYMENT LITIGATION (James J. McDonald, Jr. & Francine B. Kulick eds.) 332, 343-64 (1994) (discussing the role of childhood in sexual harassment cases); J. Hamilton, *Emotional Consequences of Victimization and Discrimination in "Special Populations" of Women*, 12 PSYCHIATRIC CLINICS N. AM. 35, 42 (1989) (finding previous rape or victimization likely to increase sensitivity to threats or harassment); Lowe v. Philadelphia Newspapers, Inc., 594 F. Supp. 123, 125 (E.D. Pa. 1984) (admitting into evidence a psychiatrist's testimony that the plaintiff was oversensitive and may have overreacted to events on the job); Davis v. United States Steel Corp., 539 F. Supp. 839 (E.D. Pa. 1982) (ruling that plaintiff inaccurately perceived legitimate criticism and discipline as racial harassment because of emotional disorder).

when a Rule 35 examination is justified.[66] One such test is whether the plaintiff claims that the mental or emotional distress caused by the defendant continues to the present.[67]

In *Hodges v. Keane*,[68] a prison inmate brought an action under 42 U.S.C. § 1983, alleging that prison officials racially harassed and discriminated against him.[69] He sought damages for the emotional injuries he allegedly had suffered from his "repeated and unlawful placement in restrictive confinement," but did not claim that these emotional injuries resulted in ongoing pain and suffering.[70] The court held that normally this would not suffice to justify a Rule 35 examination, because that would "open the floodgates to requests for mental examinations whenever a plaintiff alleged past pain and suffering."[71] Instead, the court asserted, the proper test for determining the propriety of a Rule 35 mental examination was whether the alleged emotional distress was ongoing. The court wrote: "Had plaintiff elected to assert the existence of an ongoing mental illness resulting from defendants' acts or omissions, defendant would undoubtedly be entitled to an order under Rule 35(a) entitling them to conduct a psychiatric evaluation to determine the

---

66. O'Quinn v. New York Univ. Med. Ctr., 163 F.R.D. 226, 227-28 (S.D.N.Y. 1993).

67. *See* Coca-Cola Bottling Co. of Puerto Rico v. Negron Torres, 255 F.2d 149, 153 (1st Cir. 1958) (rejecting motion for Rule 35 examination because the plaintiff was not seeking damages for present suffering but only for past physical injury and emotional disturbance); Jansen v. Packaging Corp. of Am., 158 F.R.D. 409, 410 (N.D. Ill. 1994) (ordering Rule 35 examination where plaintiff asserted continuing harm); Hodges v. Keane, 145 F.R.D. 332, 334 (S.D.N.Y. 1993) (holding that a Rule 35(a) examination is within the court's discretion where plaintiff alleged past, not present, pain and suffering); *see also* O'Quinn v. New York Univ. Med. Ctr., 68 Fair Empl. Prac. Cas. (BNA) 1798, 1801 (S.D.N.Y. 1995) (withholding grant of Rule 35 examination because plaintiff had withdrawn her claim that the emotional distress she allegedly suffered as a result of defendant's sex discrimination was ongoing); Bridges v. Eastman Kodak Co., 850 F. Supp. 216, 222 (S.D.N.Y. 1994) (denying Rule 35 examination because plaintiff did not allege an independent tort for emotional distress, a psychiatric disorder, or continuing emotional distress); Curtis v. Express, Inc., 868 F. Supp. 467, 469 (N.D.N.Y. 1994) (refusing Rule 35 examination because plaintiff did not allege either an independent tort for emotional distress or continuing emotional distress).

68. 145 F.R.D. 332.

69. *Id.* at 334-35.

70. *Id.* at 334.

71. *Id.* at 335.

existence of such a condition."[72] However, in this case the court found that a Rule 35 mental examination was warranted even though plaintiff had not alleged an ongoing emotional injury, because the defendants had proffered "compelling documentary evidence" that the plaintiff suffered from paranoid-schizophrenia and a mental examination was appropriate to ascertain whether this allegation was true.[73]

The rationale for conditioning a Rule 35 mental examination on a plaintiff's assertion of ongoing mental or emotional damages is that a mental examination is not likely to be as useful for ascertaining past pain and suffering as it is for ascertaining a plaintiff's present condition. For example, in *Coca-Cola Bottling Co. of Puerto Rico v. Torres*,[74] a plaintiff sued Coca-Cola for the emotional distress he allegedly suffered as the result of his discovery of the putrified body of a small mouse in a bottle of Coca-Cola from which he was drinking.[75] Before trial, Coca-Cola moved for a Rule 35 examination of the plaintiff. The trial court denied the motion, and the First Circuit affirmed, stating that because plaintiff was seeking damages only for past emotional disturbance, an examination "would be useless since it would not show the extent of the injury he had suffered in the past from which he had wholly recovered."[76]

This rationale, however, is predicated on a misperception of the diagnostic capability of modern psychiatry. Past conditions are diagnosed every day by psychiatrists and other physicians. The same issues raised by an allegation of present distress, such as diagnosis, causation, and severity, arise in an allegation of past distress. The principle that psychiatric examinations are useless in

---

72. *Id.* at 334.
73. *Id.* at 335.
74. 255 F.2d 149 (1st Cir. 1958).
75. *Id.* at 150.
76. *Id.* at 153. Similarly, another federal court commented:

> [H]ad plaintiffs asserted the existence of an ongoing mental illness, there might have been a sufficient basis to allow defendants' request on the grounds that plaintiffs' mental condition was in controversy. . . . However, because plaintiffs allege past, not present pain and suffering, that basis for granting a Rule 35(a) order too does not exist.

Bridges v. Eastman Kodak Co., 850 F. Supp. 216, 222 (S.D.N.Y. 1994) (citations omitted).

evaluating injuries from which one has recovered is inconsistent with common practice in medical evaluations, which, for example, permits the diagnosis of a migraine headache from which the plaintiff is not suffering at the time of the examination.

Perhaps for this reason, not all courts agree with *Torres*. In *Reise v. Board of Regents*,[77] the Seventh Circuit refused to consider the appeal[78] of a trial court's order requiring a plaintiff alleging race and sex discrimination to undergo a Rule 35 mental examination, despite the plaintiff's stipulation that "because he [was] over his distress and [was] not seeking damages on account of his *current* mental condition, an examination would reveal nothing of value."[79]

A plaintiff's claim of continuing emotional damage appears to be per se a sufficient justification for a court to grant a Rule 35 mental examination. There are no reported employment cases in which a court discusses the ongoing nature of a plaintiff's emotional distress claim but nevertheless denies a defendant's Rule 35 motion. However, the existence of a claim of continuing emotional damage does not appear to be *necessary* in order for a court to grant a Rule 35 motion. For example, in *Everly v. United Parcel Serv., Inc.*,[80] the court held that the fact that plaintiff appended to her sex discrimination claim a separate tort of intentional infliction of emotional distress was sufficient, without more, to justify a Rule 35 mental examination.[81] The court did not discuss whether plaintiff's claim of emotional distress was ongoing. Thus, a plaintiff's allegation of ongoing emotional distress is a sufficient, but not a necessary, precondition for the order of a Rule 35 mental examination.

---

77. 957 F.2d 293 (7th Cir. 1992).

78. The Seventh Circuit held that a trial court's decision to grant a Rule 35 examination is not interlocutorily appealable under the collateral order doctrine. *Reise*, 957 F.2d at 295-96. Only one other circuit court has considered this issue. In Acosta v. Tenneco Oil Co., 913 F.2d 205, 207-08 (5th Cir. 1990), the Fifth Circuit held that such a decision is interlocutorily appealable. In addition to obtaining review under the collateral order doctrine, a party may seek a writ of mandamus. *See* Schlagenhauf v. Holder, 379 U.S. 104, 112 (1964); In re Mitchell, 563 F.2d 143, 143 (5th Cir. 1977); Winters v. Travia, 495 F.2d 839, 841 (2d Cir. 1974).

79. 957 F.2d at 294.

80. No. 89-C1712, 1991 Westlaw 18429 at *1 (N.D. Ill. Feb. 5, 1991).

81. *Id.*

D. *Allegation of an Independent Tort of Intentional Infliction of Emotional Distress*

In *Everly*, discussed above, the court held that a plaintiff's allegation of an independent tort claim of emotional distress can justify a Rule 35 mental examination.[82] In *Robinson v. Jacksonville Shipyards, Inc.*,[83] the court refused to order a Rule 35 mental examination because plaintiff had not brought such a tort claim. After reviewing several cases applying Rule 35 to employment cases, the court concluded that "[t]he distinction between tort claims for damages stemming from emotional and mental damage and Title VII claims explains those instances in which courts have ordered mental examinations."[84] The court did not discuss whether the plaintiff's allegation of mental and emotional damages was ongoing, nor the effect, if any, that such an allegation would have on whether a Rule 35 mental examination should be compelled.

The *Everly* and *Robinson* decisions, however, merely beg the question of what precisely *is* the difference between a tort claim for emotional distress and a Title VII claim for emotional damages. Perhaps these courts are assuming that, because the standards for proving the tort are so stringent,[85] tort claims necessarily will involve distress allegations of greater severity than Title VII claims. This may or may not empirically be true. Even if it is, however, this has no effect on the value of a psychiatric examination, which is not dependent for its utility on the severity of the distress alleged. With the exception of the plaintiff whose only distress allegation is hurt feelings, the same issues—such as diagnosis, causation, and damages—arise whether the plaintiff alleges that his distress is extremely severe or merely mild, and whether the allegation of distress is made in the guise of a tort claim or a Title VII claim.

---

82. *Id.*; *see also* Lahr v. Fulbright & Jaworski, L.L.P., 164 F.R.D. 204, 209 (N.D. Tex. 1996) (noting that magistrate judge did not err in holding that Lahr's claim for intentional infliction of emotional distress placed her mental condition in controversy, thereby satisfying the "in controversy" requirement of Rule 35).

83. 118 F.R.D. 525 (M.D. Fla. 1988).

84. *Id.* at 528.

85. To prove the tort of intentional infliction of emotional distress, a plaintiff must prove, among other things, conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

Like the allegation of ongoing emotional distress, a plaintiff's allegation of an independent tort of intentional infliction of emotional distress in an employment case appears to be a sufficient, though not a necessary, precondition for the order of a Rule 35 mental examination. There are no reported employment cases in which a court discusses the plaintiff's allegation of an independent tort of emotional distress but nonetheless denies the defendant's Rule 35 motion. Several courts, however, have held that a Rule 35 mental examination is appropriate despite the fact that no independent emotional distress tort was alleged.[86]

E. Allegation of Either Independent Tort or Ongoing Emotional Distress

Consistent with the cases cited in sections C and D above, several courts have indicated that a plaintiff's allegation of either an independent tort or ongoing emotional distress will suffice to justify the order of a Rule 35 mental examination.[87] However, this approach does not explain the cases discussed in section B in which a Rule 35 mental examination was ordered without discussion of whether an independent tort or ongoing emotional distress was alleged.

F. Plaintiff's Intention to Introduce at Trial Expert Testimony Regarding Her Mental or Emotional Distress

Another approach commonly taken by courts faced with a motion for a Rule 35 mental examination is to focus on whether the

---

86. *See* Ziemann v. Burlington County Bridge Comm'n, 155 F.R.D. 497 (D.N.J. 1994) (ordering Rule 35 mental examination despite the apparent absence of an independent tort claim for emotional distress); Shepherd v. American Broadcasting Cos., 151 F.R.D. 194, 212-13 (D.D.C. 1993) (court may order plaintiffs to submit to mental examinations under Rule 35 despite the apparent absence of an independent tort claim for emotional distress), *vacated on other grounds*, 62 F.3d 1949 (1995); Smedley v. Capps, Staples, Ward, Hastings & Dodson, 820 F.Supp 1227, 1232 (N.D. Cal. 1993) (ordering Rule 35 mental examination despite plaintiffs' voluntary dismissal of her independent emotional distress tort claim).

87. O'Quinn v. New York Univ. Medical Ctr., 68 Fair Empl. Prac. Cas. (BNA) 1798, 1800 (S.D.N.Y. 1995) (denying a Rule 35 mental examination because the plaintiff neither alleged an independent tort nor pursued claims for ongoing emotional distress); Bridges v. Eastman Kodak Co., 850 F. Supp. 216, 222 (S.D.N.Y. 1994); Curtis v. Express, Inc., 868 F. Supp. 467, 469 (N.D.N.Y. 1994).

plaintiff will introduce at trial expert testimony regarding her mental or emotional distress. For example, in *Ziemann v. Burlington County Bridge Comm'n*,[88] the defendant, whose psychiatric expert already had examined plaintiff at the beginning of discovery, sought a second examination before trial due to plaintiff's alleged "serious deterioration of her emotional state" subsequent to the first examination.[89] The court, after reviewing several cases discussing the availability of Rule 35 mental examinations, concluded that "[t]he decisions sanctioning evaluation by defense experts have generally entailed the plaintiff's introduction of psychiatric testimony at trial, which the defense is then permitted to rebut by testimony as to its own mental evaluation."[90] Because plaintiff had designated a psychiatric expert and apparently intended to introduce such testimony at trial, the court permitted the defendant to conduct the second examination.[91]

Other cases similarly have stressed that Rule 35 examinations are appropriate whenever plaintiff intends to introduce at trial expert testimony regarding her mental or emotional distress. In *Cody v. Marriott Corp.*,[92] the court, though denying defendant's Rule 35 motion, stated that it would reconsider its decision if the plaintiff should subsequently utilize the services of a psychiatrist or a psychologist for use at trial.[93] These cases reflect courts' apparent concern that it would be unfair to deny a defendant's expert the opportunity to examine the plaintiff if the plaintiff will proffer at trial the testimony of her own expert, who undoubtedly has had an opportunity to examine the plaintiff.

---

88. 155 F.R.D. 497 (D.N.J. 1994).

89. *Id.* at 501.

90. *Id.* at 501 n.1.

91. 155 F.R.D. at 502.

92. 103 F.R.D. 421, 423 (D. Mass. 1984); *See* discussion supra section B.

93. *Id.*; *see also* Jansen v. Packaging Corp. of Am., 158 F.R.D. 409, 410-11 (N.D. Ill. 1994) (granting defendant's Rule 35 motion but designating an independent expert, rather than defendant's expert, because plaintiff did not intend to call a mental health expert); Shepherd v. American Broadcasting Cos., 151 F.R.D. 194, 212 (D.D.C. 1993) (permitting a Rule 35 mental examination and noting that plaintiff had offered the text of an expert's deposition as support for plaintiff's claim that she had suffered emotional distress); Lowe v. Philadelphia Newspapers, Inc., 101 F.R.D. 296, 298 (E.D. Pa. 1983) (allowing a Rule 35 mental examination and observing that plaintiff would attempt at trial to prove her emotional distress through her own testimony and that of physicians and psychiatrists).

While a defendant's expert should never be denied the opportunity to examine a plaintiff where the plaintiff intends to introduce expert testimony at trial, the plaintiff's stated intention should not be a precondition for a defendant's expert examination. The plaintiff's trial tactics do not determine whether a psychiatric evaluation could answer relevant questions of diagnosis, causation, and damages. Such an approach presupposes that the plaintiff or his attorney can discern the psychiatric significance of the plaintiff's emotional distress and that their assessment of the cause of the plaintiff's emotional distress is accurate. This rationale, if extended to medical evaluations, would disqualify a neurological examination in a case in which a plaintiff, declining to introduce neurologic testimony, alleges that his seizures were caused by an automobile accident and were not preexisting. It similarly would disqualify a cardiological examination of a plaintiff who, planning not to introduce testimony by a cardiologist, claims that his new fainting spells are caused by a blow to the head and not by cardiac disease.

G. Plaintiff's Allegation of a Specific Psychiatric Disorder

Other courts have focused on whether the plaintiff has alleged a specific psychiatric disorder. In denying a defendant's motion for a Rule 35 mental examination, the court in *Cody* noted that "[p]laintiff merely has made a claim of emotional distress, not a claim of a psychiatric disorder requiring psychiatric or psychological counseling."[94] Other courts similarly have noted the absence of the allegation of a specific psychiatric disorder as a factor in their denial of Rule 35 motions.[95]

Few courts have discussed the basis for holding that an allegation of a specific psychiatric disorder is a prerequisite to, or a factor in, the grant or denial of a Rule 35 motion. One of the exceptions

---

94. 103 F.R.D. 421, 423 (D. Mass. 1984). *See* discussion *supra* section B.

95. *See* Bridges v. Eastman Kodak Co., 850 F. Supp. 216, 222 n.3 (S.D.N.Y. 1994) (emphasizing that plaintiffs were not claiming to have suffered from a psychiatric disorder); Curtis v. Express, Inc., 868 F. Supp. 467, 468 (N.D.N.Y. 1994); *see also* Sabree v. United Brotherhood of Carpenters & Joiners of Am., Local No. 33, 126 F.R.D. 422, 426 (D. Mass. 1989) (holding that plaintiff in race discrimination case had not placed his mental condition at issue because he had made "a 'garden-variety' claim of emotional distress, not a claim of psychic injury or psychiatric disorder resulting from the alleged discrimination.").

is *Tomlin v. Holecek.*[96] In that case, plaintiff alleged that he suffered "severe and permanent physical and emotional injuries," including a psychological injury which manifested itself through sexual dysfunction, as a result of an attack by union sympathizers on an encampment of non-unionized construction workers.[97] The court asserted that the term "mental" in Rule 35(a) referred to "mental disorders and psychiatric aberrations,"[98] and held that to put his mental condition in controversy, a plaintiff must assert a claim of mental or psychiatric injury.[99] The plaintiff's allegations were apparently specific enough to meet this test, as the court had "no difficulty in concluding" that a Rule 35 examination was warranted.[100]

Courts which focus on whether the plaintiff has alleged a specific psychiatric disorder seem to be using such an allegation as a proxy for the severity of the alleged emotional distress. The argument seems to be that if the emotional distress is severe enough to rise to the level of a specific psychiatric disorder, it is severe enough to warrant a Rule 35 examination. There is no discussion, however, about whether "normal" emotional distress is any less severe than emotional distress with a specific diagnosis, or whether the plaintiff's ability to pin a specific label on her distress at this stage of the litigation is relevant to the court's decision of whether to impose a Rule 35 mental examination. Like some of the other methods courts have used to decide Rule 35 issues, this one merely begs the harder questions related to diagnosis, causation, and damages.

An alternate basis for focusing on whether a plaintiff has alleged a specific psychiatric disorder is that specific disorders may be easier to diagnose than vague allegations of emotional distress, making a mental examination more useful when a specific disorder is alleged.

---

96. 150 F.R.D. 628 (D. Minn. 1993).

97. *Id.* at 629.

98. *Id.* at 630 (citing Lee v. Gulf Fleet Marine Corp., 110 F.R.D. 307 (E.D. La. 1986), *overruled on other grounds*, Soudelier v. Tug Nan Serv., Inc., 116 F.R.D. 429 (E.D. La. 1987)).

99. *Tomlin*, 150 F.R.D. at 630 (citing Cody v. Marriott Corp., 103 F.R.D. 421, 422 (D. Mass. 1984); *see also* Turner v. Imperial Stores, 161 F.R.D. 89, 97 (S.D. Cal. 1995) (concluding that "emotional distress" is not synonymous with the term "mental injury" for purposes of ordering a Rule 35 mental examination)).

100. *Tomlin*, 150 F.R.D. at 630.

The cases do not discuss this, however, and there is nothing in the psychiatric literature to suggest that specific disorders are in fact easier to diagnose. Moreover, the imposition of such a standard would reward plaintiffs who make vague accusations of emotional distress while penalizing (by subjecting them to a mental examination by defendant's expert) plaintiffs who set forth more specific accusations, thereby frustrating the litigation goals of broad discovery and factual veracity.

IV. The Efficacy of Rule 35 Mental Examinations in Employment Discrimination Cases

The purpose of psychiatric examinations in employment discrimination cases, like neurological examinations in automobile injury cases, varies. Just as a neurological examination may help to ascertain whether the driver suffered from narcolepsy or seizures at the time of the accident and/or to determine the extent of the head injury and its effects on his life, his ability to earn a living, and his need for future medical care, a psychiatric examination may be used for similar purposes of diagnosis, causation and damages. Factors such as previous traumatic experiences, personality type, recent or historical stressors, and the presence or absence of a mental illness may affect the plaintiff's perception of workplace incidents. These factors may also affect the severity of the emotional injury and the plaintiff's ability to overcome it.

The value of a psychiatric examination, like the value of a medical examination, must be balanced against the legitimate concerns for the plaintiff's privacy. Psychiatric examinations generally consist of wide-ranging questions designed to obtain as accurate a picture as possible of the patient's psychiatric status, personality, cognitive functioning, the relevance of certain stressors, and of the plaintiff's reactions to them. Psychiatric examinations, like medical examinations (and depositions and courtroom testimony), undoubtedly introduce some stress, but for most patients and plaintiffs, this can be reduced by the examiner. A psychiatric examination, performed by a courteous examiner, in which the plaintiff is told of the nonconfidentiality of the examination and reminded of his choice in answering any question, may be no more

stressful than medical examinations in which a patient may have to reveal very personal information and even to disrobe.

Many of the tests courts have used to determine whether to order Rule 35 mental examinations poorly balance relevance and privacy. Questions of whether a plaintiff's distress is ongoing, whether a plaintiff elects a tort or statutory label for the claim, whether a plaintiff intends to introduce expert testimony at trial, and whether a plaintiff alleges a specific psychiatric disorder, are largely irrelevant to the more important issues of diagnosis, causation, and damages. Similarly, they provide little insight regarding whether a defendant's need to discover relevant information outweighs a plaintiff's desire for privacy.

Moreover, these tests reflect erroneous stereotypes about the diagnostic ability of psychiatry. Psychiatry has long been considered a "voodoo science." This view in large part is based on concerns that diagnoses are subjective and not independently verifiable.[101] An implicit, and often unconscious, comparison is made to the more objective diagnoses of "physical" medicine. It is, for example, difficult to argue with a diagnosis of a compound bone fracture when presented with an X-ray, but it is impossible to verify a borderline personality disorder with a simple test.

This supposed contrast between psychiatry and "physical" medicine is not as vivid as some would assume. First, it is the rare medical diagnosis that is entirely objective or easily verifiable. Most medical diagnoses are educated guesses based partly on objective data and partly on the patient's explication of his symptoms, which may itself be colored by the patient's psychiatric condition or extraneous motives.

Second, psychiatric diagnoses are far less subjective than some would imagine. For example, based upon a literature review, reanalysis of data, and field trials, criterion A of post-traumatic stress disorder was changed in 1994 to enhance objectivity.[102] The former requirement of "an event outside the range of normal human

---

101. JAY ZISKIN AND DAVID FAUST, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 1, 4-5, 45 (4th ed. 1988).

102. *Compare* AMERICAN PSYCHIATRIC ASS'N, DSM—III—R: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 427 (4th ed. 1994) [hereinafter DSM—III—R], *with* AMERICAN PSYCHIATRIC ASS'N, DSM—IV: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 427 (4th ed. 1994).

experience"[103] was changed to a requirement that (1) the person must have experienced, witnessed, or have been confronted with events that involved actual or threatened death or serious injury, or a threat to the physical integrity of the person or others, and that (2) the person's response involved intense fear, helplessness, or horror.[104] This progression toward formal criteria for specific psychiatric disorders has significantly improved concurrence in the diagnosis of psychiatric disorders.[105]

Any field of medicine contains differences—sometimes wide differences—of opinion, even among competent diagnosticians. The legal system, which, by its nature, is based upon finding truth in the crucible of opposing positions, might harbor at times widely differing opinions about many topics, including medical diagnoses; these differences often are left for the judge and jury to sort out. This diversity of opinion, however, is no more true of psychiatric experts than it is of virtually any kind of expert that testifies in judicial proceedings.

V. A New Proposed Standard

The tests discussed in Part III of this article poorly balance the factors that the Supreme Court has stated should inform a court's decision of whether to order a mental examination: the defendant's need to discover relevant information and the plaintiff's desire for privacy. Courts should eschew these tests and instead should balance the Supreme Court's factors in light of the facts of each case.

The weight a court accords a plaintiff's desire for privacy will depend on the type of the case and the scope of the desired mental examination. A plaintiff's need for privacy is greatest, for example, in a sexual harassment case where the defendant's mental expert wants to inquire into the plaintiff's sexual history, preferences, and practices. Privacy concerns are significantly less potent in, for example, situations such as an age discrimination case where the

---

103. DSM—III—R at 250.

104. AMERICAN PSYCHIATRIC ASS'N, DSM-IV: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 427 (4th ed. 1994).

105. Charles E. Holzer, II et al., *Reliability of Diagnoses in Mental Disorders*, 19 THE PSYCHIATRIC CLINICS OF NORTH AMERICA 73 (1996).

plaintiff attributes her nervousness and agitation to the alleged discrimination.

The weight that should be accorded a defendant's need for discovery will depend on the extent to which a mental examination could yield useful information about diagnosis, causation, and damages. A mental examination is not particularly useful for evaluating a plaintiff's claim of subjectively hurt feelings, but it can be extremely useful for making (or rebutting) specific diagnoses, for ascertaining whether the symptoms of which a plaintiff complains are causally related to the alleged employment trauma, and for evaluating the extent to which a plaintiff has been damaged by the alleged trauma. Courts should focus on these issues when deciding whether a mental examination will likely yield discoverable information.

Moreover, a court's decision should be informed by an accurate assessment of psychiatric capabilities. Courts should not assume, for example, that psychiatrists are incapable of diagnosing past psychiatric conditions, that the utility of a mental examination is dependent on the severity of the alleged trauma, or that psychiatric diagnoses are any more subjective than most medical diagnoses.

Because many current Rule 35 cases have been based upon courts' erroneous assumptions that devalue the utility of mental examinations, the proposed approach will likely increase the proportion of cases in which a request for a mental examination is ordered. This is not, however, the product of giving any less weight to the need to protect a plaintiff's privacy. It simply reflects the fact that many courts are underestimating the value of mental examinations. Judicial decisions should be made on the basis of an accurate assessment of the capabilities of modern psychiatry.

VI. Conclusion

Courts have adopted several different and often mutually exclusive tests for determining whether, and under what circumstances, a defendant is entitled to obtain a mental examination of an employment discrimination plaintiff who is alleging mental distress damages. Although these cases genuflect to the competing policies at issue—the plaintiff's right to personal privacy versus the defendant's right to discover relevant information—most of the tests employ bright-line criteria which are unrelated to the underlying

policies. Rather than relying on these criteria, courts should focus on whether a Rule 35 examination is likely to yield evidence relevant to the plaintiff's emotional distress claim. This inquiry should center on issues related to the diagnosis, cause, and severity of a plaintiff's alleged emotional distress.