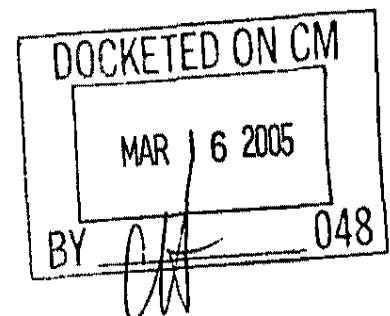


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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT	)	CASE NO. CV 03-7023-GAF (JTL)
OPPORTUNITY COMMISSION,	)	
	)	ORDER RE DEFENDANTS' MOTION TO
Plaintiff,	)	COMPEL MENTAL EXAMINATION OF
	)	FRANK DAVIS
v.	)	
	)	
UNIVERSAL PICTURES and VIVENDI	)	
UNIVERSAL ENTERTAINMENT LLLP	)	
and DOES 1-10,	)	
	)	
Defendants.	)	



The Court, after having read and considered the Joint Stipulation Re: Universal's Motion to Compel Mental Examination of Frank Davis, as well as the Supplemental Memorandum filed by defendants and the attached declarations,¹ rules as follows:

¹ Plaintiff has filed a Request to Strike and Objections to the Declaration of Dr. Stefanie D. Peters filed in support of defendants' Supplemental Memorandum of Law. Plaintiff's Request is DENIED. The Court, however, notes that the declaration of Stefanie Peters has been submitted solely for purposes of defendants' motion to compel the mental examination of Frank Davis. The parties should not construe the Court's consideration of the declaration in this limited context as an extension of time for deadlines previously set by the district judge. With respect to plaintiff's remaining objections, it is within the Court's discretion to determine how much weight to give to the declaration.

1 Defendants seek an order requiring Frank Davis, the charging
2 party in this case who alleges he was fired by defendants based on his
3 race, to undergo a mental examination pursuant to Fed. R. Civ. P. 35.
4 Defendants argue that Davis has placed his mental and emotional
5 condition at issue because he claims that he should be compensated for
6 "emotional pain, suffering, inconvenience, loss of enjoyment of life,
7 and humiliation." (First Amended Complaint, ¶12). Plaintiff responds
8 that defendants are not entitled to require Davis to undergo a mental
9 examination because plaintiff has made only a "garden variety" claim
10 of emotional distress and does not make a claim for intentional or
11 negligent infliction of emotional distress.
12

13 Fed. R. Civ. P. 35(a) provides that a court may order a party to
14 submit to a mental examination where the mental condition of a party
15 is in controversy and upon a showing of good cause. The examination
16 must be directly related to the specific injury or condition that is
17 the subject of the litigation. A plaintiff puts his or her mental
18 condition "in controversy" by claiming injury thereto resulting from
19 defendant's acts. See Schlagenhauf v. Holder, 379 U.S. 104, 118
20 (1964). The party seeking to compel the evaluation bears the burden
21 of affirmatively establishing the "in controversy" and "good cause"
22 requirements. Ford v. Contra Costa County, 179 F.R.D. 579 (N.D. Cal.
23 1998). Although the Ninth Circuit has not specifically determined
24 whether a claim for emotional and mental distress places a plaintiff's
25 mental condition in controversy for purposes of Rule 35(a), the
26 majority of reported case law demonstrates that a claim for emotional
27 distress damages, by itself, is not sufficient to place the
28

1 plaintiff's mental condition in controversy for purposes of Rule
2 35(a). As the district court in Turner v. Imperial Stores, 161 F.R.D.
3 89, 95 (S.D. Cal. 1995) found, the cases suggest that the moving party
4 must demonstrate an additional element in the form of one or more of
5 the following: (1) the plaintiff has pleaded a cause of action for
6 intentional or negligent infliction of emotional distress; (2) the
7 plaintiff has alleged a specific mental or psychiatric injury; (3) the
8 plaintiff has pleaded a claim of unusually severe emotional distress;
9 (4) the plaintiff intends to offer expert testimony to support a claim
10 of emotional distress; and/or (5) the plaintiff has conceded that his
11 or her mental condition is "in controversy" for purposes of Fed. R.
12 Civ. P. 35(a). Turner, 161 F.R.D. at 95, 98. See also Ford, 179
13 F.R.D. at 580; Houghton v. M & F Fishing, Inc., 198 F.R.D. 666, 668-69
14 (S.D. Cal. 2001).

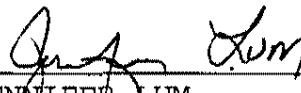
16 Here, the First Amended Complaint does not include a claim for
17 intentional or negligent infliction of emotional distress. And
18 plaintiff's request for damages appears to be based on only a general
19 claim for emotional distress. There is nothing extraordinary or
20 unusually compelling about plaintiff's emotional distress claim.

21 In their Supplemental Memorandum, defendants argue that the
22 record shows that Davis is claiming he is suffering from severe and
23 ongoing emotional distress as a result of defendants' actions.
24 Therefore, defendants argue that under Turner, Davis is required to
25 undergo a mental examination. Upon review of the transcript from
26 Davis's deposition, which defendants submitted in support of their
27 motion, the Court does not find that the record supports defendants'
28

1 contention. Although Davis claims he suffered loss of weight, loss of
 2 sleep, and loss of appetite, there is nothing unusually severe about
 3 plaintiff's symptoms. Furthermore, plaintiff has not sought any
 4 psychiatric or other professional counseling or medical treatment.
 5 Although defendants argue that Davis has sought counseling from his
 6 church, the extent of the help he sought from his church was going to
 7 church to pray, talking to an Elder in the church, and asking to be
 8 placed on the prayer list. (Khamis Decl., Exh. A at 17).²

9
 10 Based on the foregoing, this Court finds that Davis has not
 11 placed his mental condition "in controversy" and defendants have not
 12 made a sufficient showing of good cause to warrant a mental
 13 examination under Fed. R. Civ. P. 35(a). Accordingly, defendants'
 14 Motion to Compel Mental Examination is DENIED.

15 DATED: March 15, 2005

16
 17 
 18 JENNIFER LUM
 19 UNITED STATES MAGISTRATE JUDGE

20
 21 ² Plaintiff relies on numerous cases, which this Court finds
 22 distinguishable. See, e.g., Ragge v. MCA/Universal Studios, 165
 23 F.R.D. 605 (C.D. Cal. 1995) (plaintiff made claim for intentional
 24 infliction of emotional distress); Duncan v. Upjohn Co., 155 F.R.D.
 25 23 (D. Conn. 1994) (complaint specifically alleged that "[a]s a
 26 direct and proximate result of the defendant's unreasonably
 27 dangerous and defective product, the plaintiff became
 28 psychologically unstable and was forced to incur extensive medical,
 psychological and psychiatric treatment.... [His] entire personality
 changed.... [T]he plaintiff became totally disabled and
 institutionalized.... [T]he plaintiff will experience permanent
 medical, psychological and/or psychiatric impairment."); Lahr v.
Fulbright and Jaworski LLP, 164 F.R.D. 204 (N.D. Tex. 1996)
 (plaintiff claimed intentional infliction of emotional distress).