

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
AUSTIN DIVISION

2002 AU -2 AM 11:49

WESTERN DISTRICT OF TEXAS
U.S. CLERK'S OFFICE

BY: [Signature]
DEPUTY

EQUAL EMPLOYMENT OPPORTUNITY §
COMMISSION §
V. §
REGIS CORPORATION §

A-01-CA-551 JN

ORDER

Before the Court are Defendant's Motion for Court-Ordered Mental Examination filed on July 15, 2002 (Clerk's Docket No. 34), Defendant's Motion for Leave to Re-Depose Michael Sean Hayes and Jack Robert Kelly filed on July 18, 2002 (Clerk's Docket No. 37), and the Office of Attorney General's Motion for Protective Order and to Quash Subpoena Duces Tecum filed on July 23, 2002 (Clerk's Docket No. 42). The District Court referred the above motions to the undersigned Magistrate Judge for a determination pursuant to 28 U.S.C. §636(b) and Rule 1(c) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. On August 1, 2002, the Magistrate Court heard oral arguments on all of these motions. The Court made certain oral rulings on the motions at the conclusion of that hearing, and those rulings, and the rationales expressed therefore, are hereby incorporated into this Order. This Order also includes several rulings on matters taken under advisement at the hearing.

I. Defendant's Motion for Leave to Re-Depose Michael Hayes and Jack Kelly

Defendant seeks leave of Court to re-depose class members Michael Hayes and Jack Kelly with regard to a number of issues regarding the participants' veracity. After having considered the briefs, the relevant rules, and oral argument, Defendant's Motion to Re-Depose Michael Sean Hayes

and Jack Robert Kelly is HEREBY GRANTED IN PART and DENIED IN PART (Clerk's Docket No.37).

As the Court stated on the record during the hearing, Defendant has failed to present good cause to re-depose Mr. Kelly. Defendant has already obtained ample discovery concerning Mr. Kelly, and had a full opportunity to thoroughly depose Mr. Kelly on the relevant issues in this lawsuit. Accordingly, the Court HEREBY DENIES Defendant's request to re-depose Jack Kelly.

However, the Court finds that the Defendant should be permitted to re-depose Michael Hayes with regard to his knowledge of Mr. Kelly, one of the other class participants in this lawsuit. In his original deposition, Mr. Hayes testified that he did not know Mr. Kelly before the filing of this lawsuit. However, Mr. Kelly testified in his deposition that he was in fact acquainted with Mr. Hayes, and that Mr. Hayes encouraged Mr. Kelly to make a charge of harassment with the EEOC. Because Defendant was not aware of this inconsistency until after Mr. Hayes' deposition, the Court will allow Defendant to re-depose Mr. Hayes with regard to this issue. Accordingly, the Court GRANTS Defendant's Motion to Re-Depose Michael Hayes as to the limited issues of: (1) whether Mr. Hayes had knowledge of Mr. Kelly before the filing of this lawsuit, and (2) what conversations took place between Mr. Hayes and Mr. Kelly regarding the filing of Mr. Kelly's charge of discrimination, and the claims which led his participation in this lawsuit. The Court ORDERS the deposition of Mr. Hayes to be scheduled before August 31, 2002. Defendant shall have one hour to examine Mr. Hayes at the deposition. All other relief not expressly granted above is DENIED.

II. Defendant's Motion for Court-Ordered Mental Examination

Defendant requests that the Court order mental examinations of the class participants Michael Hayes, Jack Kelly, and Helio Arizola, pursuant to Federal Rule of Civil Procedure 35(a). Defendant argues that because each class participant is seeking damages for mental or emotional injuries allegedly caused from the hostile work environment at Regis Corporation, the mental state of each class participant is now at issue. Additionally, Defendant contends that the class participants in this case have multiple and significant personal and legal issues unrelated to the alleged discrimination which may have caused or contributed to any emotional or mental distress that they may have experienced.

The Court does not write on a clean slate on this issue, in that it has previously decided similar motions.¹ Federal Rule of Civil Procedure 35(a) provides:

When the mental . . . condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a . . . mental examination by a suitably licensed or certified examiner The order may be made only on motion for good cause shown

FED. R. CIV. P. 35(a). Three requirements are necessary to enable a court to order a Rule 35 exam:

(1) the party's physical or mental condition must be in controversy; (2) the expert must be either a physician or a psychologist; and, (3) good cause must be shown. *Acosta v. Tenneco Oil Co.*, 913 F.2d 205, 208 (5th Cir. 1990). In analyzing Rule 35, the Supreme Court has held :

Sweeping examinations of a party who has not affirmatively put into issue his own mental or physical condition are not to be automatically ordered merely because the person has been involved in an accident . . . and a general charge of negligence is lodged. Mental and physical examinations are only to be ordered upon a discriminating application by the district judge of the limitations prescribed by the

¹See, e.g., Order on Motion for Order Compelling Psychiatric Examinations, *Pearson v. City of Austin*, No. A-99-CA-434 JN (W.D. Tex. May 12, 2000).

Rule. To hold otherwise would mean that such examinations could be ordered routinely in automobile accident cases. The plain language of Rule 35 precludes such an untoward result.

Schlagenhauf v. Holder, 379 U.S. 104, 121-122, 85 S. Ct. 234, 244 (1964). The *Schlagenhauf* Court noted that a plaintiff in a negligence action who asserts mental or physical injury clearly places her mental condition in controversy. However, in applying *Schlagenhauf*, Texas federal courts have held that the routine request for damages for mental anguish or emotional distress, as opposed to causes of action based upon emotional distress, does not place a party's mental condition in controversy. See, e.g. *Burrell v. Crown Central Petroleum, Inc.*, 177 F.R.D. 376, 380 (E.D. Tex. 1997). The *Burrell* Court reasoned that routine claims of mental anguish do not place the mental condition in controversy, so long as they are ordinary, garden variety claims that an objective fact-finder can evaluate. *Id.* (citing *Lahr v. Fulbright & Jaworski, L.L.P.*, 164 F.R.D. 204 (N.D. Tex. 1996)).

In the instant case, the EEOC has not pled emotional distress or mental anguish as a separate cause of action in this lawsuit; rather, it has merely requested damages for alleged mental anguish and emotional distress. Defendant nevertheless argues that it should be entitled to examine the class participants because it will be difficult to determine whether the alleged mental anguish was caused by the alleged harassment, as opposed to unrelated personal and legal issues which occurred during the same time-frame. Further, Defendant contends that the manner in which the Plaintiffs have described their emotional distress in their depositions, and the manner in which the EEOC described the damages sought in the Rule 26 initial disclosures, makes these claims more than what is normal contained in a "garden variety" Title VII case.

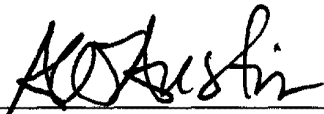
As this Court determined in the *Pearson* case, merely moving for mental anguish damages does not place the plaintiff's mental condition in controversy. The Court does not find that the

damages sought in this case are unusual in a Title VII case alleging sexual harassment. Importantly, the EEOC has not designated any expert witnesses to testify as to the mental anguish of the class participants in this case. Based upon the extensive discovery that has already taken place on these issues, the Court finds that the Defendant is more than adequately prepared to cross-examine the class participants on their claims of emotional distress. The Court also finds that a jury is capable of evaluating the Plaintiffs' claims for mental anguish damages without the assistance of an expert. Taking to heart the Supreme Court's admonition to compel psychiatric examinations judiciously, the Defendant's Motion for Court-Ordered Mental Examination of Class Participants (Clerk's Docket No. 34) is DENIED.

III. The AG's Motion for Protective Order

On July 23, 2002, the Office of the Attorney General's filed a Motion for Protective Order and to Quash Subpoena Duces Tecum (Clerk's Docket No.42). However, the Parties have notified the Court that Defendant is recalling the subpoenas at issue in the motion. Accordingly, the Court HEREBY DENIES the Motion for Protective Order and to Quash Subpoena Duces Tecum (Clerk's Docket No.42) as MOOT.

SIGNED this 2nd day of August, 2002.



ANDREW W. AUSTIN
UNITED STATES MAGISTRATE JUDGE