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[Hirschheimer v. Associated Minerals & Minerals Corp.](#)

United States District Court for the Southern District of New York

December 12, 1995, Dated ; December 12, 1995, FILED

94 Civ. 6155 (JKF)

Reporter

1995 U.S. Dist. LEXIS 18378 *

ERNEST HIRSCHHEIMER, Plaintiff, - against -
ASSOCIATED MINERALS & MINERALS
CORPORATION, ASOMA CORPORATION,
Defendants.

Core Terms

testing, psychiatric examination, psychological test, sessions, courts, psychologist, special circumstance, emotional distress, psychological, recorded, good cause, attendance, tape

Case Summary

Procedural Posture

Defendant ex-employer filed a motion for an order to compel plaintiff ex-employee to submit to psychological examination and testing pursuant to [Fed. R. Civ. P. 35\(a\)](#) in ex-employee's action that alleged that ex-employer unlawfully terminated his employment based upon his age and disability.

Overview

Defendant ex-employer filed a motion for an order to compel plaintiff ex-employee to submit to psychological examination and testing. Ex-employer sought the examination pursuant to [Fed. R. Civ. P. 35\(a\)](#) after ex-employee had filed an action that alleged ex-employer unlawfully terminated his employment based upon his age and disability. Ex-employee did not oppose the examination but requested that the examination be conducted while his attorney observed, or in the alternative, that the examination be tape recorded. Ex-employee also requested that he not be subject to a battery of psychological tests and that the examination be limited in time to four hours. The court partially granted the motion and determined that ex-employee had no presumptive right to have his attorney present at

the examination pursuant to [rule 35](#). The court determined that ex-employee failed to demonstrate any special circumstances that would have warranted his attorney's attendance at the examination or the taping of the examination. The court held that ex-employee's request to reduce the examination time was reasonable because ex-employer's request for six hours of examination was excessive.

Outcome

The court granted defendant ex-employer's motion for an order to compel plaintiff ex-employee to submit to psychological examination and testing in ex-employee's action that alleged that ex-employer unlawfully terminated his employment based upon his age and disability. The court held that ex-employee did not have a sufficient reason to have his attorney present during the examination and testing.

LexisNexis® Headnotes

Civil Procedure > ... > Discovery > Methods of
Discovery > Mental & Physical Examinations

Civil Procedure > ... > Discovery > Methods of
Discovery > General Overview

HN1 **Methods of Discovery, Mental & Physical Examinations**

[Fed. R. Civ. P. 35\(a\)](#) provides that when the mental or physical condition of a party is in controversy, the court may order the party to submit to a physical or mental examination. 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.

Civil Procedure > ... > Discovery > Methods of Discovery > Mental & Physical **Examinations**

HN2 **Methods of Discovery, Mental & Physical Examinations**

In order to justify an order for a mental **examination**, **Fed. R. Civ. P. 35** requires that a defendant, who usually invokes the rule, affirmatively show that the plaintiff has placed his or her mental condition in controversy, and that good cause exists for such an order. **Rule 35** also permits the **court** to include in its order such protective conditions as are deemed appropriate. The good cause and in controversy requirements must be determined on a case-by-case basis.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Protective Orders

Civil Procedure > Discovery & Disclosure > Discovery > Undue Burdens in Discovery

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN3 **Discovery, Methods of Discovery**

Fed. R. Civ. P. 26(c) permits the **court** to issue protective orders to relieve a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Psychological **examinations** are by their nature intrusive and implicate sensitive matters. However, the plaintiff must still sustain the burden of proving that there exists good cause for a protective order; broad allegations of harm unsubstantiated by specific examples will not suffice.

Civil Procedure > ... > Discovery > Methods of Discovery > Mental & Physical **Examinations**

Criminal Law & Procedure > Counsel > Right to

Counsel > General Overview

Governments > **Courts** > **Court** Personnel

HN4 **Methods of Discovery, Mental & Physical Examinations**

A plaintiff has no presumptive right to have his lawyer **attend** a **Fed. R. Civ. P. 35 examination**. Most **courts** decline to accommodate such a request unless **special circumstances** are present.

Civil Procedure > ... > Discovery > Methods of Discovery > Mental & Physical **Examinations**

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

HN5 **Methods of Discovery, Mental & Physical Examinations**

Most **courts** analyze a request for a tape recording of a mental or physical **examination** in the same way that they evaluate a motion to permit the presence of an attorney.

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For ASSOCIATED MINERALS & MINERALS CORPORATION, ASOMA CORPORATION, Defendants: Laura B. Hoguet, White & Case, NY, NY.

Judges: JAMES C. FRANCIS IV, UNITED STATES MAGISTRATE JUDGE, Judge John F. Keenan

Opinion by: JAMES C. FRANCIS IV

Opinion

MEMORANDUM AND ORDER

JAMES C. FRANCIS IV

UNITED STATES MAGISTRATE JUDGE

This is an employment discrimination case in which the plaintiff, Ernest Hirschheimer, contends that he was

terminated from his job on the basis of age and disability. The defendants Associated Metals and Minerals Corporation and ASOMA Corporation (collectively referred to as "ASOMA") have moved for an order to compel the plaintiff to submit to a psychological **examination** and testing pursuant to [Rule 35\(a\) of the Federal Rules of Civil Procedure](#).

Background

Mr. Hirschheimer commenced this suit on August 26, 1994. He alleges that he was discriminated against on the basis of age and disability by his former employer, ASOMA. In particular, Mr. Hirschheimer claims that he was unlawfully terminated because of his advancing age and previous heart attack. He further alleges that ASOMA discharged [*2] him in retaliation for his vocal opposition to ASOMA's policy of replacing older management employees with younger ones. ASOMA denies these charges, and contends that Mr. Hirschheimer was instead fired for insubordination after he wrote an ultimatum to the company Chairman, opposing the promotion of a colleague to the position of Executive Vice President.

Mr. Hirschheimer's Complaint sets forth four causes of action. He contends that ASOMA has violated the Age Discrimination and Employment Act of 1967, as amended, [29 U.S.C. § 621 et seq.](#); the Fair Labor Standards Act, [29 U.S.C. § 216 et seq.](#); the Americans with Disabilities Act, [42 U.S.C. § 12101 et seq.](#); and New York common law. (Complaint P 1). This last cause of action incorporates a claim of intentional infliction of emotional distress. Mr. Hirschheimer charges that ASOMA engaged in "extreme and outrageous" conduct (Complaint P 51), that "intentionally and recklessly caused [him] severe emotional distress and anguish" (Complaint P 52), including "depression, anxiety, . . . and loss of sleep." (Complaint P 53). In addition, Mr. Hirschheimer seeks an award of damages of no less than \$ 2,000,000 for mental pain and [*3] suffering. (Complaint, Request for Relief P v).

The current dispute arose when ASOMA sought a psychological **examination** of Mr. Hirschheimer. The parties were unable to come to an agreement as to the scope of the evaluation, and as a result ASOMA moved for an order to compel the **examination** under [Rule 35\(a\)](#). While the plaintiff does not oppose an **examination**, he requests that it be subject to the following conditions: (1) that his attorney be present at the **examination** as an observer, or in the alternative,

that the session be tape recorded; (2) that he not be subject to a "battery of psychological tests;" and (3) that the **examination** be limited in time to four hours. The plaintiff also requests that in the event he is compelled to submit to psychological testing, copies of the raw data and any other related documents be produced to him. In prior discussions with ASOMA, the plaintiff had also demanded that an independent psychological examiner be present and that the subject matter of the inquiry be limited, but he has since abandoned these requests.

ASOMA, in turn, seeks an order permitting Mr. Hirschheimer be **examined** by its expert, Dr. Robert Cancro, without restriction, in three [*4] sessions of two hours each. ASOMA also asks that the plaintiff undergo a half-day of psychological testing that would include the MMPI-II (Minnesota Multiphasic Personality Inventory), administered by Dr. Carol Maxfield. In the event that the **Court** imposes restrictions on the defendants' psychological **examination** and testing of Mr. Hirschheimer, ASOMA requests that the plaintiff be subject to the same restrictions when he is **examined** by his own expert. In this regard, ASOMA has pointed out that the plaintiff has received psychological counseling and anticipates offering testimony from a psychological expert at trial.

Discussion

[HN1](#) [↑] [Rule 35\(a\)](#) reads, in relevant part:

when the mental or physical condition . . . of a party . . . is in controversy, the **court** . . . may order the party to submit to a physical or mental **examination** 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.

[HN2](#) [↑] In order to justify an order for a mental **examination**, the rule requires that [*5] the defendant (who usually invokes the rule) affirmatively show that the plaintiff has placed his or her mental condition "in controversy", and that "good cause" exists for such an order. [Bridges v. Eastman Kodak Co., 850 F. Supp. 216, 221 \(S.D.N.Y. 1994\)](#). The rule also permits the **court** to include in its order such protective conditions as are deemed appropriate. See [Schlagenhauf v. Holder, 379 U.S. 104, 117, 13 L. Ed. 2d 152, 85 S. Ct.](#)

[234 \(1964\)](#) ([Rule 35](#) is limited by requirements of [Rule 26\(b\)](#) and Rule 30(b)); [Hodges v. Keane, 145 F.R.D. 332, 335 \(S.D.N.Y. 1993\)](#) (defendants required to pay costs of **examination** for indigent plaintiff); [Swift v. Swift, 64 F.R.D. 440, 442-43 \(E.D.N.Y. 1974\)](#) ([Rule 35](#) subject to provisions of [Rule 26\(c\)](#) permitting **court** to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense").

The "good cause" and "in controversy" requirements must be determined on a case-by-case basis. [Schlagenhauf, 379 U.S. at 118-19](#). Both of these requirements have been met in this case. Here, the plaintiff is not merely alleging emotional distress in a boilerplate discrimination claim. See [O'Quinn v. New York University \[*6\] Medical Center, 163 F.R.D. 226, 228 \(S.D.N.Y. 1995\)](#) cf. [Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D. 525, 531 \(N.D. Fla. 1988\)](#) (finding plaintiff's mental condition not at issue in Title VII action where plaintiff merely sought lost wages for absence due to stress of hostile work environment). Rather, he pleads both a separate tort claim for emotional distress (Complaint P 52), and a claim of continuing emotional injury (Pl.'s Answer to Interrogatory #6). Where the plaintiff has asserted such claims, both the "good cause" and "in controversy" requirements are satisfied. See [Bridges, 150 F.R.D. at 222](#) ("most cases where mental **examinations** have been allowed have either involved a separate tort claim for emotional distress [citing cases], or an allegation of ongoing severe mental injury"). In addition, since the plaintiff plans to present testimony from his own psychological expert, ASOMA must be given an opportunity to rebut any such evidence. See [Tirado v. Erosa, 158 F.R.D. 294, 299 \(S.D.N.Y. 1994\)](#); [Tomlin v. Holecek, 150 F.R.D. 628, 630 \(D. Minn. 1993\)](#) (defendants allowed to inquire into plaintiff's claim of psychological injury where plaintiff intends [*7] to prove it through expert testimony).

Although a psychological **examination** is therefore warranted, the question remains whether the **Court** should place any conditions on that procedure. [HN3\[↑\]](#) [Rule 26\(c\)](#) permits the **court** to issue protective orders to relieve "a party or person from annoyance, embarrassment, oppression, or undue burden or expense." [Fed. R. Civ. P. 26\(c\)](#). Psychological **examinations** are by their nature intrusive and implicate sensitive matters. [Jansen v. Packaging Corp. of America, 158 F.R.D. 409, 410 \(N.D. Ill. 1994\)](#). However, the plaintiff must still sustain the burden of proving that there exists good cause for a protective order; "broad

allegations of harm unsubstantiated by specific examples" will not suffice. [Bridges, 850 F. Supp. 216, 223](#).

The plaintiff's first request is to have his attorney present during the **examination**. In general, federal **courts** have found that [HN4\[↑\]](#) a plaintiff has no presumptive right to have his lawyer **attend a Rule 35 examination**. [Tirado, 158 F.R.D. at 297](#) ("weighing the conflicting considerations present in each case, **courts** have reached different results on different fact patterns"). Most **courts** decline to accommodate such a request [*8] unless **special circumstances** are present. [Id. at 299](#); cf. [Di Bari v. Incaica Cia Armadora, S.A., 126 F.R.D. 12, 14 \(E.D.N.Y. 1989\)](#) (allowing a **court** reporter to be present at **examination** because of plaintiff's difficulty with the English language). This reluctance to allow counsel's attendance is supported by two factors. First, the presence of an attorney at the **examination** would tend to impair its effectiveness and render it adversarial. [Id. at 13](#). Second, an attorney who is present at an **examination** becomes a potential witness in the client's trial, thus raising conflict of interest problems. [Id. at 14](#). These considerations fully apply to this case. ASOMA has submitted an affidavit by Dr. Cancro which expresses his concern that the presence of a third-party in the **examination** would interfere with his ability to assess the patient accurately (Affidavit of Dr. Robert Cancro dated Sept. 15, 1995 ("Cancro Aff."), P 9). In contrast, the plaintiff has failed to demonstrate any **special circumstances** that would warrant his attorney's attendance at the **examination**. The plaintiff has advanced three primary reasons for having his counsel present: (1) Mr. Hirschheimer does not [*9] "believe" in psychiatrists and is generally uncomfortable with them; (2) the attendance of counsel will not affect the already adversarial nature of the **examination**; and (3) since Mr. Hirschheimer previously testified about his emotional distress in his deposition, the presence of his attorney will not affect his answers but would simply provide emotional support, protect him from improper questioning, and facilitate communication with the psychologist.

The first rationale advanced by the plaintiff fails to constitute a **special circumstance** in several respects. Although Mr. Hirschheimer has testified that he is not comfortable with psychologists and does not believe in their profession, he voluntarily submitted to an **examination** by a psychologist at least once and intends to retain one as an expert witness. If Mr. Hirschheimer is willing to undergo psychological treatment in order to advance his own case, he can

hardly seek to limit the defendants' psychological **examination** by invoking his distrust of psychologists. See *Ziemann v. Burlington County Bridge Comm'n*, 155 F.R.D. 497, 502 (D.N.J. 1994) ("plaintiff's apparent difficulty with the adversary process cannot form the basis [*10] for precluding the defense from appropriate discovery"). The plaintiff's second reason also lacks any merit. There is no basis for Mr. Hirschheimer's contention that the presence of his attorney would have no effect on the **examination**. While the psychiatric **examination** may by nature contain some element of hostility, the presence of the attorney would only exacerbate the adversarial tenor of the procedure, as Dr. Cancro and several **courts** have noted. (Cancro Aff., PP 9-10). See, e.g., *Tirado*, 158 F.R.D. at 297; *Tomlin*, 150 F.R.D. at 631-32, 634. The third reason advanced by the plaintiff also fails to constitute a **special circumstance**. While the presence of the attorney at the **examination** may give Mr. Hirschheimer moral support, this would be true in all cases involving a mental **examination** of this type. It thus does not distinguish this case from others or constitute a **special circumstance**. *Tirado*, 158 F.R.D. at 296.

The plaintiff has asked for permission to tape the session with Dr. Cancro as an alternative to his attorney **attending** the **examination**. This request is also denied. **Courts** have generally permitted the tape recording of **examinations** only where they have held [*11] that there is a right to have an attorney present at an **examination**, or where **special circumstances** have been shown. See, e.g., *Di Bari*, 126 F.R.D. at 14. **HN5** [↑] Most **courts** analyze a request for recording in the same way that they evaluate a motion to permit the presence of an attorney. *Tirado*, 158 F.R.D. at 299; *Tomlin*, 150 F.R.D. at 630. In *Tomlin*, for example, the **court** concluded that while tape recording is less intrusive than permitting a third party to be present, it would still impede one-on-one communication between the patient and psychologist and tend to undermine the psychologist's evaluatory technique. *Id.* at 631-34. The **court** implied that subjecting the **examination** to such close scrutiny is inimical to the necessity of providing for personal interchange. *Id.* at 631-32. In addition, the **court** concluded that the purpose of **Rule 35** is to provide a "level playing field". *Id.* at 632. Allowing the defendants' **examination** to be tape recorded would thus give the plaintiff an unfair advantage, since the plaintiff's **examination** by his own treating physician or psychologist is not memorialized. *Id.* at 633. Just as he failed to prove **special circumstances** [*12] in his request to have his attorney present at the

examination, the plaintiff has also failed to meet this standard in connection with his request to record the **examination**.

A similar balancing of the parties' interests leads to the conclusion that the plaintiff's request to preclude all psychological testing should also be denied. **Courts** generally permit psychological testing as an adjunct to **Rule 35 exams**. See, e.g., *Chaparro v. IBP, Inc.*, Civ. A. No. 93-2200- **GTV**, 1994 U.S. Dist. LEXIS 18438, *12, 1994 WL 714369, at *3 (D. Kan. Dec. 7, 1994) (permitting psychological testing in a **Rule 35 examination**); *Swift*, 64 F.R.D. at 443 (same); *but see Usher v. Lakewood Engineering & Mfg. Co.*, 158 F.R.D. 411, 413 (N.D. Ill. 1994) (testing prohibited because plaintiff demonstrated inadequacy of tests in question). The plaintiff objects to psychological testing in this case because ASOMA has not identified which tests will be administered, and because the tests would be irrelevant to the **examination**. Some **courts** have allowed psychological testing that the physician deems appropriate without requiring that those tests be previously identified. See, e.g., *Chaparro*, 1994 U.S. Dist. LEXIS 18438, at 12, 1994 WL 714369, at *4. (psychologist can administer [*13] standard interviewing and testing techniques). However, requiring Mr. Hirschheimer to undergo unidentified testing would deprive him of the opportunity to seek an order precluding those tests that may be irrelevant to this litigation. For this reason, ASOMA shall be limited to administering the one test that it has specifically identified, the MMPI-II. This test is not, as the plaintiff contends, irrelevant to his psychological **examination**. The MMPI-II is a well-established psychological test, see, e.g., *Burger v. Litton Industries, Inc.*, No. 91 Civ. 0918 (WK), 1995 U.S. Dist. LEXIS 8362, *6, 1995 WL 363741, *2 (S.D.N.Y. June 19, 1995) (directing that defendant's psychiatrist administer MMPI-II to plaintiff) and will provide Dr. Cancro with a starting point for evaluating Mr. Hirschheimer. (Cancro Aff. P 8). Even if the MMPI-II is, as the plaintiff asserts, only a "snap-shot" of an individual's personality at the time the test is taken, it is still useful as part of a psychological **examination**.

The plaintiff has also requested copies of the raw data of the test and related documents. Under **Rule 35(b)(1)**, Dr. Cancro is required to submit to the plaintiff a "detailed written report of the examiner setting out [*14] the examiner's findings, including results of all tests made, diagnoses and conclusions." Furthermore, pursuant to **Rule 26(a)(2)(B)**, ASOMA is required to disclose the raw data from the MMPI-II if it intends to call either Dr. Cancro or Dr. Maxfield as a witness at

trial, since the data forms part of the basis for their expert testimony. Accordingly, ASOMA shall produce this information once it is available.

December 12, 1995

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The plaintiff's last request, to reduce the proposed **examination** time, is reasonable. In comparison to other instances where **courts** have compelled psychiatric **examinations**, the defendants' request for a half-day session of testing and six hours of **examination** appears excessive. See, e.g., [Burger, 1995 U.S. Dist. LEXIS 8362](#), *6, 1995 WL 363741, at *2 (allowing three-hour **examination** in addition to time to administer MMPI-II); [Lowe v. Philadelphia Newspapers Inc., 101 F.R.D. 296, 300 \(E.D. Pa. 1983\)](#) (ordering **examination** consisting of two sessions each no longer than 90 minutes); [Tomlin, 150 F.R.D. at 634](#) (**examination** consisting of 2-hour interview). This is especially true since Dr. Cancro's **examination** should be made more efficient by his use of the MMPI-II results, and he can use the deposition testimony [*15] to acquaint himself with Mr. Hirschheimer. Accordingly, the plaintiff has shown good cause for restricting the **examination** time allotted to two ninety-minute sessions with Dr. Cancro, together with the time necessary for administration of the MMPI-II. If ASOMA demonstrates that additional **examination** time is necessary, this limitation can be revisited.

Conclusion

For the reasons set forth above, Mr. Hirschheimer is ordered to present himself for psychological **examination** consisting of two ninety-minute sessions with Dr. Robert Cancro at his offices at the New York University **Medical** Center, as well as for MMPI-II testing to be administered by Dr. Carol Maxfield, also at New York University **Medical** Center. The parties shall set a mutually agreeable date and time for these sessions. No one shall be present except for the examiner and the plaintiff, and the sessions shall not be recorded. Following the **examination**, Dr. Cancro shall submit a report of his evaluation consistent with [Rule 35\(b\)\(1\)](#) together with the raw data and related documents from the MMPI-II.

SO ORDERED.

JAMES C. FRANCIS IV

UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York