

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 HENRY T. TANG,

9 Plaintiff,

10 v.

11 CITY OF SEATTLE,

12 Defendant.

Cause No. C19-2055RSL

ORDER GRANTING MOTION TO
COMPEL RULE 35 EXAMINATION

13
14
15 This matter comes before the Court on the “City of Seattle’s Motion to Allow FRCP 35
16 Psychiatric Examination of Plaintiff.” Dkt. # 21. Plaintiff alleges that defendant City of Seattle,
17 his former employer, discriminated against him because of his race and/or disability, retaliated
18 against him for taking medical leave, failed to reasonably accommodate his disability, and
19 terminated him without due process. He asserts that defendant’s conduct caused him to incur
20 medical expenses for treatment (Dkt. # 1-2 at 6-7) and non-economic harm of “\$1,000 per day
21 for combined humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety,
22 and anguish” (Dkt. # 27 at 9). In his initial disclosures, plaintiff identified three physicians with
23 discoverable information regarding the impact defendant’s conduct had on him, two of whom
24 could address its emotional impacts. Dkt. # 27 at 7-8 (identifying Drs. Warth, Gustafson, and
25 Bailey).

26
27
28 ORDER GRANTING MOTION TO
COMPEL RULE 35 EXAMINATION - 1

1 Federal Rule of Civil Procedure 35(a) authorizes the Court to order a party to submit to a
2 psychiatric or medical examination “[w]hen the mental or physical condition (including the
3 blood group) of a party . . . is in controversy” and the moving party has shown “good cause.” A
4 showing of relevance is insufficient. The relevance requirement is already imposed by Fed. R.
5 Civ. P. 26(b) such that the additional requirements of Rule 35 indicate “that there must be a
6 greater showing of need under [that rule] than under the other discovery rules.” *Schlagenhauf v.*
7 *Holder*, 379 U.S. 104, 118 (1964) (quoting *Guilford Nat’l Bank of Greensboro v. Southern Ry.*
8 *Co.*, 297 F.2d 921, 924 (4th Cir. 1962)). The party seeking a psychiatric or medical examination
9 must make “an affirmative showing . . . that each condition as to which the examination is
10 sought is really and genuinely in controversy and that good cause exists for ordering each
11 examination.” *Schlagenhauf*, 379 U.S. at 118.
12
13

14 Defendant argues that plaintiff’s psychiatric condition is “in controversy” because (1) the
15 jury will have to determine whether plaintiff’s underlying psychiatric condition rendered him
16 unable to perform the essential duties of his position (or any full-time equivalent position) even
17 with reasonable accommodations and (2) plaintiff seeks to recover damages for the emotional
18 distress caused by defendant’s conduct. Dkt. # 21 at 7-8. “Once an employer becomes aware of
19 the need for accommodation, that employer has a mandatory obligation under the ADA to
20 engage in an interactive process with the employee to identify and implement appropriate
21 reasonable accommodations. . . . Employers[] who fail to engage in the interactive process in
22 good faith[] face liability for the remedies imposed by the statute *if a reasonable accommodation*
23 *would have been possible.*” *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1137-38 (9th Cir.
24 2001) (emphasis added). Defendant seeks to have a psychiatrist, Jean N. Dalpé, M.D., M.B.A.,
25
26
27

1 conduct a 90 minute examination/interview to assess “plaintiff’s psychiatric condition, the cause
2 of that condition, its nature and extent, its severity, the necessity of treatment, whether plaintiff
3 has reached maximum medical improvement and if so, when that occurred.” Dkt. # 21-1 at 2.
4 This information is key to an issue in controversy, namely whether a reasonable accommodation
5 would have been possible. Although defendant makes no effort to explain how a psychiatric
6 evaluation of plaintiff performed at the tail end of 2020 (or the beginning of 2021) will shed
7 light on plaintiff’s condition or capabilities between November 2017 (when plaintiff requested
8 an unpaid leave of absence as an accommodation for his disability) and April 2018 (when he was
9 terminated), whether Dr. Dalpé’s opinions will ultimately be admissible is not currently before
10 the Court. *See Eldredge v. City of St. Paul*, 809 F. Supp.2d 1011 (D. Minn. 2011) (considering
11 *Daubert* challenge to expert opinions that were based, in part, on Rule 35 examinations of the
12 plaintiff).
13
14

15 With regards to plaintiff’s claim for emotional distress damages, where the litigation
16 involves a “garden variety” claim of emotional distress involving the kinds of emotional injuries
17 a lay person would associate with discriminatory/retaliatory treatment and/or a wrongful
18 discharge, plaintiff’s psychiatric condition is not “in controversy” and “does not justify a
19 potentially invasive independent psychiatric examination under Rule 35(a).” *Rispoli v. King Cty.*,
20 No. C04-1500RSL, 2005 WL 8172251, at *1 (W.D. Wash. June 13, 2005). *See also Turner v.*
21 *Imperial Stores*, 161 F.R.D. 89 (S.D. Cal. 1995); *Curtis v. Express, Inc.*, 868 F. Supp. 467, 468-
22 69 (N.D.N.Y. 1994). Courts will, however, order a litigant to undergo a psychiatric examination
23 where something more is at issue, such as: (1) a separate cause of action for intentional or
24 negligent infliction of emotional distress; (2) a claim of unusually severe emotional distress or a
25
26
27

1 specific mental or psychiatric injury/disorder; (3) plaintiff relies on expert testimony to support
2 the claim of emotional distress; and/or (4) plaintiff concedes that his mental condition is “in
3 controversy” for purposes of Rule 35(a). *Fitzgerald v. Cassil*, 216 F.R.D. 632, 637-38 (N.D. Cal.
4 2003); *Turner*, 161 F.R.D. at 95.

5
6 The first and fourth considerations do not apply here. With regards to the severity or
7 specificity of the emotional harm at issue, plaintiff specifically seeks damages associated with
8 the medical costs he incurred “as a result of the stress and panic attacks he suffered” as well as
9 general damages “for mental anguish, emotional distress, and pain and suffering.” Dkt. # 1-2 at
10 ¶ 3.18 and pp. 6-7. Defendant asserts that plaintiff’s medical records show that his doctors have
11 made DSM-V diagnoses of mental conditions (Dkt. # 26 at 5), but it is unclear whether these
12 diagnoses relate to the underlying serious medical condition for which he sought accommodation
13 or are related to emotional distress resulting from defendant’s conduct. Regardless, the fact that
14 plaintiff sought medical care (and incurred medical costs) suggests that the level of distress he
15 experienced was severe and beyond the garden variety emotional injuries a lay person would
16 associate with discriminatory/retaliatory treatment and/or a wrongful discharge. The second
17 *Turner* factor suggests that a Rule 35 examination is appropriate.

18
19
20 Plaintiff argues that the third factor - whether he will rely on expert testimony to support
21 his emotional distress claim - does not support a Rule 35 examination because he has not
22 identified any experts in this matter. The parties recently agreed to continue the case
23 management deadlines, including the expert disclosure deadline which had already passed, so
24 the fact that plaintiff has not yet identified any experts does not mean he will not. As defendant
25 points out, if plaintiff hopes to have his treating physicians provide an opinion regarding
26

1 causation that would not otherwise have been formed as part of the treatment, there is at least an
2 argument that an expert report is necessary. The combination of severe distress/specific mental
3 conditions and the possibility that experts will be used to establish the fact and extent of the
4 distress leads the Court to the conclusion defendant should be permitted an opportunity to
5 develop a defense to the anticipated testimony of plaintiff and his treating physicians regarding
6 both the availability of a reasonable accommodation and the cause/extent of any emotional
7 distress arising from defendant's conduct.
8


9 In the circumstances of this case, the Court finds that plaintiff's psychiatric condition -
10 past and present - is "in controversy" and that defendant has shown good cause for a 90 minute
11 examination/interview conducted by Dr. Dalpé. Plaintiff has not objected to the scope or terms
12 of the proposed examination.¹
13

14
15 For all of the foregoing reasons, defendant's motion to compel is GRANTED. The above-
16 described psychiatric evaluation shall be conducted by Dr. Dalpé at one of her offices (Everett,
17 Seattle, or Federal Way) on a date and at a time to be agreed upon by the parties. The
18 examination will be no longer than 90 minutes, and its scope is limited to the assessment of
19 plaintiff's psychiatric condition, the cause of that condition, its nature and extent, its severity, the
20 necessity of treatment, whether plaintiff has reached maximum medical improvement, and, if so,
21 when that occurred. No testing shall be performed. Plaintiff shall not record the examination,
22 and no persons other than plaintiff and Dr. Dalpé shall be present during the examination. If Dr.
23
24

25 ¹ Plaintiff's counsel asserts that the "impact on [p]laintiff of a psychiatric examination at this late
26 stage of discovery is significant," but offers no details, no evidence, and no indication that the impact
27 would be negative. Dkt. # 23 at 8.

1 Dalpé records the examination, a copy of the recording shall be provided to plaintiff’s counsel.
2 Defendant shall bear the costs of the examination. No follow-up questioning will be permitted
3 without further order of the Court.
4

5
6 Dated this 29th day of December, 2020.

7 
8 _____
9 Robert S. Lasnik
10 United States District Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27