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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD GIDDENS,
Plaintiff,
v.
CITY OF SUISUN, et al.,
Defendants.

No. 2:14-cv-0943 TLN AC

ORDER

Pending before the court is defendants’ Motion to Compel a Mental Examination of pro se plaintiff Richard Giddens, pursuant to Fed. R. Civ. P. 35(a). ECF No. 83. The parties filed a Joint Statement including plaintiff’s objection to the examination as well as defendants’ reason for filing the Motion. ECF No. 87. This discovery matter was referred to the undersigned by E.D. Cal. R. (“Local Rule”) 302(c)(1).

I. BACKGROUND

Plaintiff filed his complaint on May 23, 2016, alleging multiple causes of action against several defendants. ECF No. 1. Plaintiff’s second amended complaint (“SAC”) was adopted by this court as the operative complaint. ECF No. 44. The SAC alleges ongoing hostility by defendants against plaintiff, an illegal arrest, assault and battery, false prosecution, and both intentional and negligent infliction of emotional distress. ECF No. 39 at 2.

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1 Plaintiff alleges that as a result of defendants’ conduct, he is currently “under the care of
2 Air Force Doctors including an Air Force Neurologist for his still occurring concussive symptoms
3 – dizziness, headaches, tinnitus, memory loss, sensitivity and pain from noise along with
4 nightmares as a result of the severe emotional distress brought from the acts of Defendants Mattos
5 and Urlab.” Id. at 8, ¶ 53. Plaintiff claims to suffer, as a result of defendants’ conduct, “physical
6 and emotional injuries, great pain and suffering” and alleges he was “subjected to great fear and
7 terror, personal humiliation, degradation” and he “continues to suffer physical pain and severe
8 emotional distress.” Id. at 19, ¶ 132. Plaintiff seeks damages for intentional and negligent
9 infliction of emotional distress, asserting that he has experienced “documented suffering, anguish,
10 fright, horror anxiety, depression, withdrawal, fear, humiliation, worry, and shame.” Id. at 33,
11 ¶230, see also ¶¶ 228-240.

12 On June 19, 2017, defendants filed a motion to compel a mental examination of plaintiff
13 pursuant to Federal Rule of Civil Procedure 35. ECF No. 83 at 1. The parties filed a joint
14 statement regarding the discovery disagreement on July 5, 2017. ECF No. 87. The joint
15 statement indicates that the parties adequately engaged in the meet and confer process, and
16 describes their efforts in sufficient detail. Id. at 2-3. Plaintiff filed a separate opposition to the
17 motion to compel on July 11, 2017. ECF No. 95. The court held a hearing on the motion on July
18 12, 2017. ECF No. 96. At the hearing, the court informed the plaintiff that it would disregard his
19 opposition to the motion to compel as procedurally improper under Local Rule 251.

20 II. DISCUSSION

21 a. Rule 35 Mental Examination

22 Plaintiff makes specific allegations regarding emotional distress and ongoing psychiatric
23 symptoms and distress, and therefore a mental health examination is warranted. Rule 35 of the
24 Federal Rules of Civil Procedure allows a court, upon motion and for good cause, to order a
25 mental examination by a suitably licensed or certified examiner of a party whose mental
26 condition is “in controversy.” Fed. R. Civ. P. 35(a); (1964). The requirements “are not met by
27 mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an
28 affirmative showing by the movant that each condition as to which the examination is sought is

1 really and genuinely in controversy and that good cause exists for ordering each particular
2 examination.” Schlagenhauf, 379 U.S. at 118.

3 To establish that a mental condition is “in controversy,” the moving party should
4 demonstrate one or more of the following factors:

- 5 (1) a cause of action for intentional or negligent infliction of emotional distress;
- 6 (2) an allegation of a specific mental or psychiatric injury or disorder;
- 7 (3) a claim of unusually severe emotional distress;
- 8 (4) plaintiff’s offer of expert testimony to support a claim of emotional distress; and/or
- 9 (5) plaintiff’s concession that his or her mental condition is “in controversy” within the
10 meaning of Rule 35(a).

11 Turner v. Imperial Stores, 161 F.R.D. 89, 95 (S.D.Cal.1995).

12 Although Rule 35 “is to be construed liberally in favor of granting discovery,” “garden-
13 variety” emotional distress is insufficient to put plaintiff’s mental state in controversy. Turner,
14 161 F.R.D. at 96; see also Schlagenhauf, 379 U.S. at 118. “Garden-variety” emotional distress
15 related claims have been characterized as “claims of generalized insult, hurt feelings, and
16 lingering resentment’ that ‘do not involve a significant disruption of the plaintiff’s work life and
17 rarely involve more than a temporary disruption of the claimant’s personal life.” Ortiz v. Potter,
18 2010 WL 796960, at *3 (E.D.Cal. Mar.5, 2010) (quoting Javeed v. Covenant Medical Center Inc.,
19 218 F.R.D. 178, 179 (N.D. Iowa, Apr.3, 2001). Other courts have distinguished “garden-variety”
20 emotional distress from claims of “psychic injury or psychiatric disorder.” Houghton v. M & F
21 Fishing, Inc., 198 F.R.D. 666, 668 (S.D. Cal. Jan.10, 2001).

22 Here, plaintiff’s mental condition is plainly “in controversy.” Plaintiff specifies in the
23 SAC that his concussive symptoms are still present and he is still under the care of Air Force
24 medical staff. ECF No. 39 at 8, ¶ 53. Though some of his allegations may involve garden-variety
25 emotional distress, symptoms such as memory loss and nightmares are significantly more serious.
26 Id. at ¶53. As detailed above, plaintiff alleges specific forms of psychiatric impairment that
27 significantly disrupt his life and that he attributes to defendants’ actions. See, e.g., ECF No. 39 at
28 ¶¶ 53, 132. Therefore, plaintiff’s mental condition is “in controversy.”

1 Additionally, defendants have shown good cause to compel the mental health
2 examination. “To establish ‘good cause’ exists for the [mental health examination], the moving
3 party generally must offer specific facts showing the examination is necessary and relevant to the
4 case.” Nguyen v. Qualcomm Inc., No. CIV. 09-1925-MMA WVG, 2013 WL 3353840, at *3
5 (S.D. Cal. July 3, 2013). However, “regardless of whether the ‘good cause’ requirement is met, it
6 is within the Court’s discretion to determine whether to order an examination.” Id. In this case,
7 defendants have offered ample facts to establish good cause. A mental examination is necessary
8 for this case because it is the only way to determine whether plaintiff has actually experienced the
9 emotional and psychological injuries alleged. There are very few ways, if any, to obtain
10 information about plaintiff’s emotional and psychological injuries besides a mental examination.
11 Therefore, defendants’ motion to compel plaintiff to undergo a mental health examination will be
12 GRANTED.

13 b. Presence of ADA Advocate During Mental Examination

14 Plaintiff has insisted that his “ADA Advocate” be permitted to remain with him in the
15 exam room during the examination. Defendant seeks an order excluding the advocate. Since the
16 presence of “[t]hird party observers may, regardless of their good intentions, contaminate a
17 mental examination,” they are usually not allowed in the exam room. Ragge v. MCA/Universal
18 Studios, 165 F.R.D. 605, 609-10 (C.D. Cal. 1995). The majority of federal courts have prohibited
19 third parties – whether attorneys, stenographers, videographers, or other observers – from
20 attending Rule 35 medical and psychiatric examinations. See Holland v. United States, 182
21 F.R.D. 493, 495 (D.S.C. 1998) (collecting cases). For the reasons that follow, plaintiff’s request
22 is denied and defendants’ motion is granted.

23 As a preliminary matter, the court addresses plaintiff’s contention that defendants are
24 violating prior orders of this court by refusing to agree to the presence of his advocate. This
25 contention is based on a fundamental misunderstanding. Plaintiff’s portion of the Joint Statement
26 refers to the presence of his advocate as a “Court ordered Accommodation,” and repeatedly
27 asserts that the undersigned has “already granted the Plaintiff’s ADA right to reasonable
28 accommodations” by approving the assistance of his “ADA Advocate.” See ECF No. 87 at 9, 10.

1 The court has made no such ruling. The court has permitted, as a courtesy and solely for the
2 purpose of appearances in the undersigned's courtroom, plaintiff's "ADA Advocate" to sit next to
3 him at counsel table. The court has not found that plaintiff has any legal entitlement to the
4 assistance of an advocate as an accommodation. Indeed, the court has not previously addressed
5 that question.

6 In opposition to the motion to compel, plaintiff maintains that he has a legal right under
7 the ADA to the assistance of a "certified ADA Advocate" as an accommodation, both in general
8 and in relation to the Rule 35 examination.¹ He has produced no authority for this proposition,
9 and the court has identified none.² Plaintiff argues that the advocate is necessary for his
10 participation due to his disability, and that excluding her would be analogous to banning a
11 wheelchair or "seeing eye" dog from the exam room. The court rejects this analogy. Ms. Hagan
12 is plaintiff's advocate rather than an aide, and she is a person rather than an inanimate object or an
13 animal. Neither mobility assistance devices nor service animals perform an advocacy function or
14 are likely to affect the exam by their presence.

15 When asked at hearing to explain how the presence of his advocate would accommodate
16 his disability, plaintiff explained that she helps him to calm down when distressed. Plaintiff's
17 mental and emotional state is the subject of the examination. Third parties are excluded from
18 forensic mental examinations, as a general rule, precisely because their presence can contaminate
19 the exam. Ragge, 165 F.R.D. at 609-10; see also ECF No. 87-1 (Declaration of Mary Ann Yaeil
20 Kim, Ph.D.).³ Plaintiff's own reason for wanting his advocate in the room demonstrates why she

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22 ¹ Plaintiff has provided no information regarding the nature of the "certification," or his
assistant's background and training.

23 ² Plaintiff relies on general accommodation principles. The court's research has identified no
24 statutory or regulatory authority requiring the provision of "ADA Advocates" as an
accommodation, and no case law permitting (or even specifically addressing) the presence of an
25 "ADA Advocate" or "ADA Assistant" at a Rule 35 exam.

26 ³ Dr. Kim, the Rule 35 examiner, declares: "In my more than 30 years of clinical experience, I
27 have never permitted the presence of a third party in the examination room while the interview
and examination are being conducted. The presence of a third party would inhibit the
28 examination. The presence of a third party, regardless of the intention of that third party, impacts
and alters the results of the testing. The presence of a third party could render much of the testing
invalid." ECF No. 87-1 at 3.

1 may not be – her presence is likely to affect plaintiff’s emotional state, which is the subject of the
2 evaluation. Accordingly, the advocate’s presence would create doubts about the validity of the
3 exam. That would defeat the purposes of Rule 35.

4 Because the presence of a third party would adversely affect the evaluation, the court
5 agrees with those many district courts which have excluded observers from Rule 35 mental
6 examinations. See, e.g., Ragge, supra; Tomlin v. Holecek, 150 F.R.D. 628, 631-32 (D. Minn.
7 1993); Galiati vs. State Farm Mutual Automobile Ins. Co., 154 F.R.D. 262, 265 (D. Colo. 1994);
8 Ashley v. San Francisco, 2013 WL 2386655, *3-4 (N.D. Cal. May 30, 2013); Ayat v. Societe Air
9 France, 2007 WL 1120358, * 7 (N.D. Cal. Apr. 16, 2007).⁴ Accordingly, defendants’ request that
10 plaintiff’s advocate be barred from the exam room during the examination is GRANTED.
11 Plaintiff’s advocate will be permitted to accompany plaintiff to his appointment and be present in
12 the waiting room during the examination, but she may not enter the exam room.

13 c. Request for Recording Mental Examination

14 Plaintiff also requests that the examination be video recorded or, in the alternative, audio
15 recorded. Videography of a mental examination is inappropriate for the same reason that the
16 assistance of an “ADA Advocate” is impermissible – it involves the presence of a third party,
17 which would undermine the purposes of the examination. See Holland, 182 F.R.D. at 496.
18 Plaintiff’s request for video recording is therefore denied.

19 Defendants have agreed as a courtesy, and in the spirit of cooperation, to permit audio
20 recording of the examination with limitations that are addressed below. The court will order the
21 procedures for audio recording that were agreed to by the parties at oral argument. The court
22 makes no finding that plaintiff is legally entitled to audio recording, but will enforce the
23 agreement of the parties regarding how it shall proceed.⁵

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25 ⁴ Plaintiff contends that the opinions of other district courts do not constitute legal authority.
26 Plaintiff is incorrect. While only authority from the U.S. Supreme Court and Ninth Circuit Court
27 of Appeals is binding on this court and *must* be followed, a federal court may rely on and
28 extrapolate from other district court decisions as persuasive authority.

⁵ The court recognizes that plaintiff continues to assert entitlement to the presence of his
advocate and to video recording.


1 Defendants agree to audio-recording of the examination, with the exception of those
2 portions involving proprietary testing (i.e., the administration of psychometric testing instruments
3 that constitute protected intellectual property). At hearing, plaintiff expressed understanding of
4 and agreement to this limitation. Accordingly, the parties are directed to meet and confer and
5 determine who will provide the recording device. Regardless of who provides the recording
6 equipment, the examiner will conduct and have sole control over the recording during the
7 examination. Only the examiner may start and stop the recording. The examiner may stop the
8 recording only during portions of the exam involving the use of proprietary tests. Both parties
9 will be able to access or receive a copy of the recording after completion of the examination. The
10 recording will be subject to the terms of the Protective Order in place in this case.

11 III. CONCLUSION

12 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 13 1. Defendants' Motion to Compel Mental Examination Pursuant to Fed. R. Civ. P. 35, ECF
14 No. 83, is GRANTED;
- 15 2. Defendants' request that plaintiff's "ADA Advocate" be barred from the exam room while
16 the mental health examination is conducted is GRANTED. However, the advocate may
17 accompany plaintiff to the location of the examination, and remain in the waiting room
18 during the examination.
- 19 3. The Rule 35 examination will be audio recorded, using a device provided by either of the
20 parties or by the examiner. The examiner will be in charge of starting and stopping the
21 recording pursuant to the terms set forth above. Both parties will have equal access to or
22 copies of the audio recording of the mental examination.

23 DATED: July 14, 2017

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25 ALLISON CLAIRE
26 UNITED STATES MAGISTRATE JUDGE
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