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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

HONGWEI ZHANG,

vs.

UNITED TECHNOLOGIES  
CORPORATION, et al.,

Plaintiff,

Defendants.

CASE NO. 10cv0660 DMS (MDD)

ORDER ON JOINT MOTION FOR  
DETERMINATION OF DISCOVERY  
DISPUTE RE: RULE 35 MENTAL  
EXAMINATION

[DOC. NO. 51]

Background

On March 26, 2010, this case was removed to this Court by the Defendants. (Doc. No. 1). Plaintiff was employed in various capacities and locations by Defendants from 1997 until early 2008. Her last assignment was with Defendant Hamilton Sunstrand Power Systems, Inc., in San Diego, from 2006 until early 2008 when her employment was terminated. Plaintiff filed her complaint in the California Superior Court alleging wrongful termination, breach of contract, breach of implied covenant of good faith and fair dealing and intentional infliction of emotional distress. The instant motion stems from the desire of the Defendants to have Plaintiff submit to a mental examination pursuant to Fed.R.Civ.P. 35.

Discussion

Rule 35(a) provides, in relevant part:

1 When the mental or physical condition ...of a party... is in controversy, the court in  
2 which the action is pending may order the party to submit to a physical or mental  
3 examination by a suitably licensed or certified examiner .... The order may be made  
4 only on motion for good cause shown and upon notice to the person to be examined  
5 and to all parties and shall specify the time, place, manner, conditions, and scope of  
6 the examination and the person or persons by whom it is to be made.

7 Under FRCP 35, a party is entitled to conduct a mental examination of another party if the  
8 movant demonstrates that: (1) the plaintiff has placed her mental condition in controversy; and (2)  
9 good cause exists for the examination. *See, e.g., Schlagenhauf v. Holder*, 379 U.S. 104, 116-117  
10 (1964); *Turner v. Imperial Stores, et al.*, 161 F.R.D. 89, 92 (S.D.Cal. 1995). Although there is a  
11 constitutional right to privacy, that right is “conditional rather than absolute” and “is waived when  
12 a plaintiff raise[s] before the court issues concerning her mental and emotional condition and seeks  
13 damages for mental and emotional injuries.” *Enwere v. Terman Assoc., LP, et al.*, 2008 U.S. Dist.  
14 LEXIS 101901 at\*5 (N.D.Cal. 2008)(citing *Caesar v. Mountanos*, 542 F.2d 1064, 1066-70 (9th  
15 Cir. 1976). Rule 35 is to be “construed liberally to allow the examination.” *Tan v. City and  
16 County of San Francisco, et al.*, 2009 U.S. Dist. LEXIS 21639 at \*5 (N.D. Cal. 2009).

17 The initial inquiry in this case is whether Plaintiff has placed her mental condition  
18 sufficiently in controversy. A plaintiff puts her mental state in controversy if one or more of the  
19 following aggravating factors are present: (1) a cause of action for intentional or negligent  
20 infliction of emotional distress; (2) an allegation of a specific mental or psychiatric injury or  
21 disorder; (3) a claim of unusually severe emotional distress; or (5) plaintiff concedes that her  
22 mental condition is “in controversy” within the meaning of Rule 35(a). *Turner*, 161 F.R.D. at 98;  
23 *Houghton v. M & F Fishing, Inc*, 198 F.R.D. 666, 668 (S.D. Cal. 2001). Although mental state  
24 may not be “in controversy” where only “garden variety” emotional distress damages are claimed,  
25 presence of one of these factors is sufficient to place mental state in controversy. *Houghton*, 198  
26 F.R.D. at 668.


27 There can be little question that the Plaintiff has placed her mental condition in  
28 controversy. She specifically alleged a cause of action for intentional infliction of emotional  
distress, has alleged that the emotional distress has been severe and continuing and has sought  
significant consequential monetary damages. (Doc. No. 1, § 120). The first part of the test has



1 Minnesota Multiphasic Personality Inventory-2 (MMPI-2); the Millon Clinical Multiaxial  
2 Inventory-III (MCMIII) test; the Beck Depression Inventory (BDI); Beck Anxiety Inventory  
3 (BAI); Western Psychological Services (WPS); and the Symptoms Validity Test (TOMM). The  
4 examination is limited to a clinical mental interview and psychological testing. There will be no  
5 invasive or physical examination. Dr. Glaser may ask and Plaintiff shall answer questions  
6 regarding the events that are the subject of this action only to the extent necessary for Dr. Glaser  
7 properly to evaluate Plaintiff's mental condition. No persons other than Plaintiff, Dr. Glaser and  
8 necessary staff to assist Dr. Glaser may attend. The examination may be recorded. To the extent  
9 that forms or questionnaires are required to be completed, they shall be completed by Plaintiff  
10 without assistance.

11 **IT IS SO ORDERED.**

12 DATED: September 2, 2011

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15 Hon. Mitchell D. Dembin  
16 U.S. Magistrate Judge  
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