UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	:	
v.	:	C.A. No. 19-362WES
CITIZENS BANK, N.A., Defendant.	:	

MEMORANDUM AND ORDER

PATRICIA A. SULLIVAN, United States Magistrate Judge.

This enforcement action is brought by the Equal Employment Opportunity Commission ("EEOC") against Citizens Bank, N.A., ("Citizens") on behalf of a "charging party,"[1] Citizens' former employee, William Lescault. The EEOC contends that Citizens violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, *et seq*., when it responded to Mr. Lescault's request for the accommodation of job reassignment because of anxiety by offering him an opportunity to remain out on leave to treat the condition. The EEOC argues that this amounts to a refusal to accommodate, which forced Mr. Lescault to resign; among other relief, the EEOC seeks reinstatement for Mr. Lescault, as well as lost wages and compensatory and punitive damages. Citizens argues that its offer of continued leave was an appropriate accommodation. It also contends that Mr. Lescault's mental health impairment is not disabling as the EEOC contends or, if it was, that reassignment was not a reasonable accommodation.

[1] The "charging party" is the allegedly aggrieved individual on whose behalf the EEOC brings an action. The charging party files the initial complaint with the EEOC and, under specified circumstances, may then sue in court. However, the EEOC also may opt to bring the case. If it steps in, and the charging party does not intervene, it maintains control over all aspects of the legal strategy for the case, while seeking remedies on behalf of the charging party. Nevertheless, as the Supreme Court has made clear, the charging party's role in a case brought by the EEOC is profoundly more than that of a mere member of the public. EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 598 (1981).

Now pending before the Court is Citizens' motion to require Mr. Lescault to submit to a mental examination performed by a psychiatrist, Dr. Harold J. Bursztajn, pursuant to Rule 35(a) of the Federal Rules of Civil Procedure. ECF No. 33. The EEOC vigorously opposes the motion, arguing that it is categorically improper for a Rule 35(a) examination ever to be ordered in a case brought by the EEOC on behalf of a charging party. Alternatively, the EEOC opposes the motion because Mr. Lescault's mental condition is not in controversy and there is no good cause for such an examination in the circumstances of this case; it also argues that Dr. Bursztajn is not neutral and lacks the appropriate credentials, and that the tests to be administered during the proposed examination have not been disclosed. ECF No. 34. The motion has been referred to me for determination pursuant to 28 U.S.C. § 636(b)(1)(A).[2] For the reasons that follow, the motion is granted.

I. Factual Background[3]

Beginning in 2010, Mr. Lescault began working for Citizens in its customer call center. Compl. (ECF No. 1) ¶ 14. In June 2015, he was promoted to call center supervisor. Id. Between 2015 and 2018, Mr. Lescault became unhappy with his position and tried unsuccessfully to secure a different position at Citizens. Over this three-year period, he applied internally for twelve different positions. Lescault Dep. (ECF No. 33-1 at 3-5) at 39-40, 166. As a result of this effort, Mr. Lescault was able to secure only two or three interviews; none ripened into an offer. Id. at 40.

[2] During the hearing on the Rule 35(a) motion, the parties concurred that the motion should be addressed in a memorandum and order, and not by report and recommendation. Transcript of Hearing on Motion for Examination ("Tr.") (ECF No. 45) at 21, 60.

[3] This factual recital is not meant to contain any findings of fact, but rather to highlight the factual foundation for the disputes regarding Mr. Lescault's mental condition.

At a time not revealed by the record, Mr. Lescault began treating with a family nurse practitioner who had recently completed her education and whose work was still being reviewed by a Doctor of Nursing. Tr. 64, 67-68. This nurse practitioner diagnosed him as suffering from an anxiety disorder. ECF No. 33 at 3; see Tr. 41. Citizens contends that she had no specialized training in mental health disorders, as well as that she conceded in her deposition that her diagnosis was based on "'symptoms and conversations alone,'" and not on a clinical assessment grounded in the relevant diagnostic criteria. See Bursztajn Decl. (ECF No. 33-4) ¶ 8. The EEOC counters that a diagnosis of anxiety was within the scope of the nurse practitioner's license at the time she made the diagnosis and that she did not rely just on Mr. Lescault's subjective statements. Tr. 42-43. The diagnosis of anxiety was also endorsed by Mr. Lescault's primary care physician; however, Citizens argues that this physician similarly lacked specialized training in mental health disorders, as well as that his deposition established that he did nothing more than look over the nurse's notes. Tr. 64-66; Bursztajn Decl. ¶ 7. The EEOC vehemently disagrees, arguing that the physician made an independent diagnosis of anxiety. Tr. 42, 58, 67. Finally, Mr. Lescault received therapy from a social worker; the parties dispute whether the social worker diagnosed anxiety or simply relied on the diagnosis made by the nurse practitioner. Tr. 66-67. Throughout the period in issue, Mr. Lescault's mental health symptoms have never been evaluated by a physician with specialized mental health training; he has never been seen by a psychiatrist or psychologist. Also, throughout the period in issue, Mr. Lescault was suffering from significant physical diagnoses and no medical provider with specialized mental health training has ever assessed the degree to which these physical conditions may have impacted or even caused his reported psychiatric signs and symptoms. See Bursztajn Decl. ¶ 4.

In February 2018, Mr. Lescault took an unpaid medical leave of absence to address anxiety. Compl. ¶ 16. While on leave, Mr. Lescault asked Citizens for the accommodation of reassignment to a position that did not require him regularly to speak to customers on the phone. Id. ¶¶ 16-17. To "ascertain whether any reasonable accommodations exist that will enable [Mr. Lescault] to perform the essential functions of [his] position," Citizen's Leave Program Office submitted a form entitled "Request for Medical Information" to his medical provider. Smolik Decl. Ex. 1 (ECF No. 23-1 at 1). On March 22, 2018, Mr. Lescault's treating social worker filled in the form. Id. In relevant part, she wrote:

> Client suffers from severe anxiety, which is related to intensified physical conditions . . . . Client reports that answering phone and dealing with customer concerns intensifies symptoms.

Id. (ECF No. 23-1 at 2). In response to the question asking if any accommodations would enable Mr. Lescault to perform the essential functions of his position, the social worker wrote:

> Client would be able to perform a position where he is not on the phone. Client would be fine to perform administrative work. . . . If accommodations can not be made, client should not return. Client is attending twice-weekly therapy at the time to address this.

Id.; (ECF No. 23-1 at 3).

This form was received and reviewed by Laurie Francis of Citizen's Leave Program Office. Smolik Decl. Ex. 3 (ECF No. 23-3 at 4-5); Francis Dep. at 137, 142. Ms. Francis spoke to the employee in charge of the department in which Mr. Lescault worked; based on this conversation, she learned that talking on the phone is an essential function of all positions in the department and that there were no available positions in the department that did not involve phone calls. Francis Dep. at 144. Based on what the social worker had written, Ms. Francis understood that the other option was for Mr. Lescault to stay out on leave and continue treatment. Id. at 145. She testified that she did not do anything to find out whether Mr. Lescault

could be reassigned to a position outside of his department because "he could remain out to treat as his doctor said if we couldn't get a position that was off the phones . . . [I] assumed by looking at this that this was temporary, and he should stay out and continue to treat if he could not be given a position off the phones." Id. Based on the information filled in on the form by the social worker, Ms. Francis testified that she "believe[d] that Mr. Lescault had a disability."[4] Id. at 191.

After consulting with "legal" as Citizens required her to do in the case of a denial of a requested accommodation, Ms. Francis wrote to Mr. Lescault on April 20, 2018, advising him:

> [W]e are unable to reasonably accommodate this request [to return to work as long as you were off the phones] . . . otherwise you would remain out of work too [sic] continue treatment.

Smolik Decl. Ex 2 (ECF No. 23-2 at 2). Three days later, on April 23, 2018, Mr. Lescault resigned. Compl. ¶ 21. The EEOC's complaint alleges that he was forced to resign because he could not return to his position in the call center due to his disability and because he had received no proposals from Citizens for accommodations that would permit him to continue working for the company. Id. After Mr. Lescault resigned from Citizens, he promptly procured employment in late April 2018 with the United States Postal Service. However, he quit in less than a month because he did not like the aggressiveness of his supervisor. After that he worked as a school bus driver. Ultimately, in early 2019, he returned to working in a call center for CVS. ECF No. 33 at 4; EEOC Interrog. Answer (ECF No. 33-3 at 3).

Mr. Lescault filed a timely Charge of Discrimination with the EEOC, alleging ADA discrimination by Citizens. Compl. ¶ 8. After the EEOC made a determination of reasonable

[4] During the Francis deposition, the EEOC attorney asked Ms. Francis if she had formed "any opinion" as to whether Mr. Lescault "had a disability as that's defined by the ADA." Francis Dep. at 191. After an appropriate objection to the form of such a clearly objectionable question, Ms. Francis responded that her belief about Mr. Lescault's condition was entirely based on "what the healthcare provider had provided." Id.

cause to believe that Citizens had violated the ADA and engaged in a conciliation process, on July 2, 2019, the EEOC brought this ADA action against Citizens "on the basis of disability and to provide appropriate relief to [Mr. Lescault]." Compl. at 1. Regarding Mr. Lescault's diagnosis, the EEOC's complaint alleges that he "developed anxiety, a condition that caused him chest pains and, in its untreated form, substantially limited the major life activities of concentrating, communication, and interacting with others." Id. ¶ 15. According to the complaint, Mr. Lescault's "health care provider" submitted paperwork confirming that Mr. Lescault "suffered from anxiety, explaining that answering customer phone calls exacerbated Lescault's anxiety, requesting that Lescault be reassigned to another position without that task, and indicating that Lescault should not return to work until such an accommodation was put in place." Id. ¶ 18. The pleading alleges that Citizens responded by informing Mr. Lescault that it was "unable to reasonably accommodate" his request for reassignment but "would be happy" to review other "more reasonable" unspecified accommodations, provided that it would do so only after he was released to return to work as a call center supervisor. Id. ¶ 20. The complaint asserts that Mr. Lescault was unable to return to the call center because of disabling anxiety, and that, with no proposals from Citizens for accommodations despite the availability of vacant positions for which Mr. Lescault was qualified, he was forced to resign on April 23, 2018. Id. ¶¶ 21-24. The EEOC seeks a permanent injunction, as well as back pay, reinstatement if appropriate and compensatory and punitive damages for Mr. Lescault. Id. at 5-6.

Citizens' answer pleads that it is without knowledge or information sufficient to form a belief as to the truth of the EEOC's allegation that Mr. Lescault developed disabling anxiety. ECF No. 9 ¶ 15. It denies the complaint's characterization of the communications with Mr.

Lescault and his health care provider regarding an accommodation[5] and regarding the events leading to Mr. Lescault's resignation. Id. ¶¶ 18-27. For its second affirmative defense, Citizens pleads that "[t]he [c]omplaint fails because Plaintiff cannot show that Mr. Lescault was disabled, qualified, or requested a reasonable accommodation." Id. at 5.

II. Procedural Background

To develop its defenses, Citizens engaged an impressively credential Harvard-educated psychiatrist/forensic psychiatrist, Dr. Bursztajn. With his guidance, in April 2020, Citizens moved the Court to require the EEOC to produce seven years of Mr. Lescault's medical records, making clear that, depending on what this discovery revealed, it might also seek a medical examination pursuant to Rule 35(a). See ECF Nos. 19, 20, 24. In vigorously opposing the discovery motion, the EEOC argued that Citizens cannot dispute that Mr. Lescault was disabled by anxiety severe enough to impact his ability to work in a position requiring contact with customers because "the Citizens employee who made the decision to deny Mr. Lescault's request for a reasonable accommodation testified that, at the time the decision was made, the company believed that Mr. Lescault suffered from anxiety and that he was disabled under the ADA." ECF No. 22 at 2 (emphasis in original). The EEOC signaled its intent to oppose a motion for a medical examination for the same reason, as well as because Rule 35 applies only to "parties" and Mr. Lescault is not encompassed within its ambit. On June 22, 2020, based on "careful review," the Court rejected these arguments and granted Citizens' motion for discovery. Text Order of June 22, 2020.

[5] In its motion for a Rule 35(a) examination, Citizens alleges that the social worker's entries on the form she submitted may be interpreted as proposing alternative accommodations – reassignment or stay out on leave and continue treatment – and that its Leave Program Office employee chose the second option, so that Mr. Lescault received the second of his two requested accommodations. ECF No. 31 at 3; ECF No. 33-2 at 3-5.

On November 5, 2020, Citizens asked for an informal discovery dispute conference with the Court because the EEOC was refusing a Rule 35(a) medical examination to develop evidence on the "disability" prong, but also on the "qualified person" prong of the EEOC's ADA claim. After a discovery dispute conference, on December 1, 2020, I issued the following text order:

> Having conducted an informal discovery dispute conference regarding Defendant's request for Fed. R. Civ. P. 35 examination and finding that the dispute is not amenable to resolution through the informal process, the parties have been notified that they are clear to proceed with a discovery motion briefing supported by declarations and otherwise as they deem appropriate.

Text Order of Dec. 1, 2020. This motion followed. It is supported by a detailed declaration from Dr. Bursztajn. Bursztajn Decl. (ECF No. 33-4).

III. Can a Rule 35 Mental Examination Be Ordered of a Charging Party in an EEOC ADA Case?

The EEOC's primary argument is grounded in the language of Rule 35(a)(1).[6] Focusing on the Rule's use of the word "party," it contends that, as a charging party, Mr. Lescault is not a "party" as that term should be interpreted in context in Rule 35(a).[7] Deploying a strict interpretation of "party," the EEOC contends that the Court must hold that neither a physical nor a mental examination of a charging party may ever be ordered in a case brought by the EEOC,

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[6] Rule 35(a) provides in pertinent part:

> Order for an Examination.
>
> (1) *In General.* The court where the action is pending may order a party whose mental or physical condition – including blood group – is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

Fed. R. Civ. P. 35(a)(1).

[7] From a practical perspective, the respective roles of Mr. Lescault and the EEOC in this case may be briefly summarized. As the charging party, he filed a complaint with the EEOC. It filed this lawsuit. Mr. Lescault did not file his own case and has not intervened in this case. However, in addition to seeking significant monetary and non-monetary remedies for Mr. Lescault, the EEOC has acted on his behalf in an array of ways. For example, it represented him during his deposition; it responded to interrogatories with his personal information; it produced his documents on his behalf; and it asserted the attorney-client privilege to shield some of his documents from disclosure. ECF No. 36 at 3. Nevertheless, as the EEOC points out, it retains legal control over this case, in that the charging party does not decide if the case is brought, how the case is litigated or whether the case is settled. Tr. 28.

no matter how critical such examination may be to the achievement of a just determination of the action. Simply put, the EEOC contends that, no matter that it may be "unfair,"[8] and no matter how strong the "good cause" showing, Rule 35 must be strictly read and Mr. Lescault's examination may not ordered.

The EEOC's argument begins with the well-settled proposition that federal courts lack the inherent authority to order medical examinations. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891); Caban v. 600 E. 21st St. Co., 200 F.R.D. 176, 181 (E.D.N.Y. 2001). It next contends that the Court should brush aside the Supreme Court's dicta in footnote 12 of Schlagenhauf v. Holder, 379 U.S. 104, 116 (1964), which left open whether "party," as the term is used in Rule 35(a), may be interpreted to include a "real party in interest" who is not a named party to the action. Id. at 115 n.12 (citing Beach v. Beach, 114 F.2d 479, 481 (D.C. Cir. 1940) (for purposes of Rule 35(a), "[o]ne who is not a party in form may be, for various purposes, a party in substance")). Pointing to the subsequent (1970) amendment to Rule 35(a), which added the sentence providing that a "party" may be ordered to produce for examination "a person" who is not a party, but who is in the custody or under the legal control of the party, the EEOC argues that the amendment repudiates the dicta in Schlagenhauf and the language in Beach, in that it adds only the duty of a custodian, such as parents or a guardian suing for a minor, to produce the person under their legal control. Invoking the interpretive rule *expressio unius est exclusio alterius*, the EEOC contends that a broad reading of "party" must be eschewed because a strict reading is mandated in light of the addition of limiting language. Because only the EEOC itself

[8] See Tr. 32 (at hearing, EEOC attorney asserted, "You can call it unfair, but that is the structure that Congress put in place, that these would be different because they're government enforcement actions.").

is a "party" in this case, the EEOC asserts that Mr. Lescault's mental examination may not be ordered, no matter how unjust that result may be.

This argument is profoundly flawed. For starters, it ignores the interpretative mandate in Rule 1 of the Federal Rules of Civil Procedure. Far from calling for strict construction without regard to fairness as the EEOC contends, Rule 1 provides that, like all the Rules, Rule 35(a) must be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1 (emphasis added). The profound unfairness of denying a Rule 35 examination for which a court has found good cause just because the EEOC brought the case is sufficient to compel the rejection of the EEOC's interpretation of Rule 35(a). The EEOC also ignores the precedent in this Court, which holds that "Rule 35(a) is to be construed liberally in favor of granting discovery." Eckman v. Univ. of R.I., 160 F.R.D. 431, 433 (D.R.I. 1995) (where "a plaintiff has affirmatively placed in controversy her mental condition, it is appropriate for a court to order an examination").

Second, the EEOC is simply wrong in arguing that the 1970 amendment amounts to a rejection of either Schlagenhauf or Beach. To the contrary, the Comment to the 1970 amendment references both cases with approval. E.g., Fed. R. Civ. P. 35 Notes of Advisory Committee on 1970 Amendments ("the amendment has no effect on the recent decision of the Supreme Court in Schlagenhauf"). Thus, Schlagenhauf's acknowledgment that "party" in Rule 35(a) may well encompass a "real party in interest" remains as the best available guidance. Consistent with this guidance, the Supreme Court has held that Congress did not intend that a charging party be viewed as a mere member of the public. Associated Dry Goods, Corp., 449 U.S. at 598. More recently, in EEOC v. Windmill Int'l, Inc., Civil No. 11-cv-454-SM, 2012 WL 3583436, at *2-3 (D.N.H. Aug. 20, 2012), our sister court in New Hampshire addressed whether

a charging party is a party for purposes of discovery and found that she was, at least to the extent that the EEOC should be assumed to have standing to move to quash a subpoena directed to her. Importantly, in Windmill, the court denied the EEOC's motion for protective order by focusing on the unfairness of placing the defendant at the EEOC's mercy with respect to obtaining documents from the person whose claims the EEOC is litigating and who will benefit should the EEOC happen to prevail in the action. Id. at *2-4; see also EEOC v. Jefferson Dental Clinics, PA, 478 F.3d 690, 698 (5th Cir. 2007) (in seeking damages and any other make-whole relief, "EEOC's interests are not sufficiently independent to avoid being in privity with the charging parties"; barring relief under *res judicata*).

Most significant of all, in the fifty years since the amendment that the EEOC relies on as the foundation for its interpretation of Rule 35(a), the EEOC conceded at oral argument that not a single court has ever adopted the argument that the EEOC now asserts. For its part, Citizens points to one recent directly-on-point case (involving an ADA claim of failure to accommodate a disability) in which the court assumed that the charging party may be ordered to submit to a Rule 35(a) examination; based on appropriate findings, it issued such an order. EEOC v. L-3 Commc'ns Integrated Sys., 3:17-CV-0538-N, 2018 WL 3548870, at *1-2 (N.D. Tex. July 24, 2018) (assuming ADA charging party is "party" for purposes of both Rules 35(a) and 34; ordering mental examination because mental issues in controversy when EEOC alleges charging party was disabled; good cause established by dispute regarding whether charging party was otherwise qualified). Citizens also cites two other recent Title VII cases in which the EEOC's charging party was ordered to submit to a Rule 35(a) examination. EEOC v. Costco Wholesale Corp., No. 14 C 6553, 2015 WL 9200560, at *12-15 (N.D. Ill. Dec. 15, 2015) ("fairness" requires that charging party claiming mental injury caused by workplace harassment must submit

to discovery on mental health, including Rule 35(a) examination); EEOC v. Grief Bros. Corp., 218 F.R.D. 59, 62-65 (W.D.N.Y. 2003) (with mental condition of charging party alleging injury caused by hostile work environment in controversy, court orders Rule 35(a) examination because expert can discern even four years later severity and cause of depression). The Court's own research turned up additional decisions in EEOC cases in which a Rule 35(a) examination of the charging party is discussed.[9] In three of these cases, the court granted a Rule 35(a) mental examination based on the findings that a physical or mental condition was in controversy and there was good cause for the examination.[10] Not one of these cases suggests that there is even a question regarding the court's power to order the charging party to submit to an examination if the requirements of Rule 35(a) are met.

To counter the force of these cases, the EEOC relies on one sentence from the Supreme Court's decision in EEOC v. Waffle House, Inc., 534 U.S. 279, 283 (2002), in which it declared that the charging party "is not a party to the case" for purposes of determining whether the EEOC is bound by an arbitration clause that the charging party signed.[11] Id. at 283. In reaching

[9] EEOC v. Wal-Mart Stores E. LP, No. 17-C-70, 2018 WL 6411378, at *1 (E.D. Wis. Dec 6, 2018) (Rule 35 examination of former employee ordered; no discussion of *per se* ban on examination of charging party); EEOC v. New Breed Logistics, No. 10-2696-STA-tmp, 2013 WL 1729716, at *1 (W.D. Tenn. Apr. 22, 2013) (defendant "unable to obtain Rule 35 medical examination" of employees due to "assertion of only garden variety emotional distress"; no discussion of *per se* ban on examination of charging party); EEOC v. 704 HTL Operating, LLC, Civil No. 11-845 BB/LFG, 2012 U.S. Dist. LEXIS 192403 (D.N.M. July 25, 2012) (Rule 35 examination of employee ordered; no discussion of *per se* ban on examination of charging party); EEOC v. LHC Grp., No. 1:11CV355-LG-JMR, 2012 WL 12919547, at *1 (S.D. Miss. May 29, 2012) (former employee; same); EEOC v. Maha Prabhu, Inc., No. 3:07-cv-111-RJC, 2008 WL 2559417, at *2-4 (W.D.N.C. June 23, 2008) (Rule 35 examination of job applicant denied; no discussion of *per se* ban on examination of charging party); EEOC v. Consolidated Resorts, Inc., No. 2:06-cv-01104-LDG-GWF, 2008 WL 942289, at *6-10 (D. Nev. Apr. 7, 2008) (Rule 35 examination of employee denied; no discussion of *per se* ban on examination of charging party).

[10] Wal-Mart Stores E. LP, 2018 WL 6411378, at *1; 704 HTL Operating, LLC, 2012 U.S. Dist. LEXIS 192403; LHC Grp., 2012 WL 12919547, at *1.

[11] At the hearing, in what appears to the Court to be a "Hail Mary pass," the EEOC asked the Court to consider Mississippi ex rel. Hood v. AU Optronics Corp., 571 U.S. 161 (2014), as additional support for the proposition that the charging party is not a "party" as the term is used in Rule 35(a). Tr. 26. This argument does not work. AU Optronics Corp. considers whether to expand the federal jurisdiction created by the Class Action Fairness Act ("CAFA") in the context of a mass tort case brought by a state on behalf of named and unnamed consumers. It

the conclusion that the EEOC was not bound by the arbitration agreement, the Supreme Court examined the EEOC's statutory duties to bring ADA cases and the competing policy considerations favoring arbitration under the Federal Arbitration Act. Id. at 291-95. To effectuate the statutory scheme and avoid a *de facto* forum selection clause that would trump the plain language of Title VII and the ADA, it held that the charging party is considered a non-party in this context, so that the EEOC is not contractually bound by his undertaking to arbitrate. Id. at 295-96. That is, the focus of Waffle House is on the EEOC's status as a non-party to the arbitration contract. Id. at 294. Its reasoning cannot be stretched to support a holding that, no matter what discovery is needed for the "just . . . determination of [an] action," Fed. R. Civ. P. 1, a charging party is a non-party and may not be ordered to submit to a Rule 35(a) examination.

Based on the foregoing, the Court holds that Rule 35(a) gives the Court the power to order a mental examination of a charging party in an ADA case brought by the EEOC. What remains for consideration is whether such an examination is appropriate to order in the factual circumstances of this case.

IV. Has Citizens Established that Mr. Lescault's Mental Condition is in Controversy and That There is Good Cause for a Mental Examination?

Rule 35(a) requires that the mental condition of the person to be examined be "in controversy" and that the party seeking the mental examination show "good cause."[12] Eckman,

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holds that Congress used the word "plaintiffs" in CAFA to describe the 100 or more persons whose claims must be proposed for a joint trial and meant it to refer to actual, named parties, not unnamed real parties in interest. 571 U.S. at 176. AU Optronics Corp. provides no guidance regarding the interpretation of "party" in the context of a civil discovery rule.

[12] Rule 35(a) provides in pertinent part:

> The court where the action is pending may order a party whose mental or physical condition – including blood group – is in controversy to submit to a physical or mental examination . . . . The order . . . may be made only on motion for good cause and on notice to all parties and the person to be examined."

Fed. R. Civ. P. 35(a)(1-2) (emphasis added).

160 F.R.D. at 433 (citing Schlagenhauf, 379 U.S. at 118). The burden to satisfy these predicates must be shouldered by the party seeking the examination – here Citizens. Medoza v. City of Peiria, No. CV-13-258, PHX-NVW, 2013 WL 5705365, at *2 (D. Ariz. Oct. 21, 2013). Rule 35(a) requires a motion with notice, followed by an order, making this discovery rule different from other forms of discovery, which may be initiated without a motion or an order of the court. See Fed. R. Civ. P. 35(a).

Focusing first on the "in controversy" requirement, the Court notes that the EEOC alleges that Mr. Lescault suffered from a disabling condition (anxiety) but retained the ability to perform the essential functions of his position with the reasonable accommodation of being "off the phones." See generally Boadi v. Ctr. for Human Dev., Inc., Civil Action No. 3:14-cv-30162-KAR, 2017 WL 2369372, at *2 (D. Mass. May 31, 2017) ("an allegation of a specific mental or psychiatric injury or disorder" may warrant Rule 35 psychological examination) (citing Turner v. Imperial Stores, 161 F.R.D. 89, 95 (S.D. Cal. 1995)). Citizens hotly has disputed every element of these allegations. To support its motion, it has presented factually grounded arguments, buttressed by a detailed declaration from a well-qualified psychiatrist (Dr. Bursztajn), that Mr. Lescault's symptoms may or may not be caused by a severe or disabling anxiety disorder, that Mr. Lescault may or may not have been able to perform his job with or without the accommodation of "being off the phones," that the accommodation of a temporary leave to continue treatment may have been reasonable and that Mr. Lescault's resignation may not have been caused by Citizens' refusal to accommodate his disability.

With this foundation, the Court finds that Citizens' "in-controversy" showing is robust. It is not based on a "mere showing of relevance or mere conclusory allegations in the pleadings." Eckman, 160 F.R.D. at 433. It is more than sufficient to demonstrate the Mr. Lescault's mental

condition is in controversy. See L-3 Commc'ns Integrated Sys., 2018 WL 3548870, at *1-2 (EEOC placed charging party's mental condition in controversy when it claimed that, despite undisputed disability, claimant was able to do job with accommodation, which employer disputed). This case is very different from the decisions to which the EEOC points, for example Banga v. Kanios, No. 16-cv-04270-RS (DMR), 2020 WL 1905557 (N.D. Cal. Apr. 16, 2020), in which the court declined to order a Rule 35(a) examination because the charging party had abandoned his claim of serious emotional injury, leaving only the bare allegation that he "should undergo an IME because he has placed his mental condition at issue by alleging discrimination based on his disability." Id. at *2; see also Boadi, 2017 WL 2369372, at *3 (whether plaintiff could perform the essential functions of her job not in issue; therefore, her condition was not in controversy and Rule 35(a) examination motion denied).

The EEOC's primary argument that Mr. Lescault's mental condition is not in controversy may be given short shrift.[13] It is based on the testimony of Ms. Francis, Citizens' Leave Program Office worker, who answered an objectionable (and objected-to) question by stating that, based on the information filled in on the form by the social worker, she "believe[d] that Mr. Lescault had a disability." Francis Dep. at 191. Despite Ms. Francis' lack of credentials to opine to a medical diagnosis, coupled with her clear testimony that the foundation for her belief was the social worker's opinion, not her own, the EEOC labels this answer as a binding admission of a

[13] The EEOC also argues that, with the passage of the ADA Amendments Act of 2008 ("ADAAA"), Pub. L. No. 110-325, 122 Stat. 3553, Congress threw up an absolute bar, preventing an employer from ever challenging whether an employee actually suffers from a supposedly diagnosed impairment. Tr. 46-47, 57-58. It further contends that anxiety, as the most diagnosed mental health disorder, is conclusively proven by the say-so of the charging party. Id. at 42-43, 60. Both propositions are simply wrong. While the ADAAA may have expanded the definition of disability, it did not eliminate it as an element to be proven through competent evidence based on the circumstances in the particular case. See Mancini v. City of Providence by & through Lombardi, 909 F.3d 32, 40-46 (1st Cir. 2018) (after ADAAA, rare medical infirmities like missing limbs do not require medical evidence but conclusory averments of substantial limitation in one or more major life activities at time of allegedly discriminatory action do not suffice; granting of summary judgment affirmed).

medical diagnosis and contends that Citizens cannot "renounce[e] the admission of the employee it authorized to handle Mr. Lescault's accommodation request." ECF No. 35-1 at 12. The EEOC's argument is not just factually flawed, but also disregards the bedrock proposition, undergirded by significant public policy considerations, that when "'an employer takes steps to accommodate an employee's restrictions, it is not thereby conceding that the employee is disabled under the ADA or that it regards the employee as disabled.'" Castro-Medina v. P&G Commerc. Co., 565 F. Supp. 2d 343, 367 (D.P.R. 2008) (emphasis added) (quoting Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789, 798 (9th Cir. 2001), clarified, 292 F.3d 1045 (9th Cir. 2002)); Marlon v. W. New Eng. Coll., No. Civ. A. 01-12199-DPW, 2003 WL 22914304, at *9 (D. Mass. Dec. 9, 2003), aff'd, 124 F. App'x 15 (1st Cir. 2005) (per curiam) (same). "To find otherwise would unacceptably punish employers for doing more than the ADA requires, and might discourage such an undertaking on the part of employers." Sepúlveda-Vargas v. Caribbean Rests., LLC, 888 F.3d 549, 554 (1st Cir. 2018) (cleaned up). Neither Ms. Francis' testimony regarding her belief nor Citizens' engaging in the ADA interactive process with Mr. Lescault constitutes an admission that his mental condition is not in controversy.

The second inquiry for the Court is whether Citizens has demonstrated good cause. This requires a fact-sensitive analysis. Conforti v. St. Joseph's Healthcare Sys., Inc., Civ No. 2:17-cv-00050-CCC-CLW, 2020 WL 365100, at *3 (D.N.J. Jan. 22, 2020). As Eckman holds, the Rule 35(a) "good cause" requirement requires a greater showing than mere relevance and conclusory allegations. Eckman, 160 F.R.D. at 433. Here, as in Eckman, the EEOC alleges that Mr. Lescault suffers from a mental condition and has provided medical records from a nurse practitioner and a physician (both lacking specialized mental health training), as well as from a social worker, to establish the diagnosis. See generally id. at 433-34. As in Eckman, the Court

"cannot fault the . . . defendants for wanting to have [a psychiatrist], their expert, examine plaintiff [where t]he severity of plaintiff's emotional problems has been placed on this record and will play a central role in this case." Id. at 434. As Eckman holds, this alone supplies the necessary "good cause for a Rule 35(a) mental examination." Id. That is, when a defendant obviously has substantial questions concerning the extent of a claimant's emotional impairment and the medical evidence has been provided and found wanting, "good cause" is shown for a Rule 35(a) examination. Id.

Citizens' showing of good cause is further buttressed by its detailed proffer of the disputed evidence summarized by the Court, *supra*, as "Factual Background," as well as the reality that this requested mental examination will not result in a duplication of prior examinations, or in cumulative or invasive procedures. Eckman, 160 F.R.D. at 434. As in Eckman, Mr. Lescault has never been evaluated by a psychiatrist or psychologist, nor has he ever been administered the tests (for example, to detect malingering) that Dr. Bursztajn will perform. Id. (citing Peters v. Nelson, 153 F.R.D. 635, 638-39 (N.D. Iowa 1994)). Nor is good cause undermined by the passage of several years since the events in issue. See L-3 Commc'ns Integrated Sys., 2018 WL 3548870, at *2 ("physician may provide a retrospective opinion of an individual's condition even if the physician did not examine the individual until after the relevant date"; passage of three years no impediment to finding of good cause).

The Court finds that Citizens has demonstrated that Mr. Lescault's mental condition is in controversy and that there is good cause for a Rule 35(a) mental examination.[14]

[14] During the hearing, Citizens mentioned that Dr. Bursztajn might develop testimony regarding Mr. Lescault's claim of damages due to emotional distress caused by the ADA violation. In response, the EEOC clarified that it is seeking only garden variety emotional distress damages and Citizens confirmed that it does not contend that the need to develop evidence on garden variety emotional distress damages is good cause justifying the examination. Therefore, the Court's Rule 35(a) Order does not encompass leave to perform clinical inquiry for the sole purpose of exploring emotional distress damages. See EEOC v. The Vail Corp., Civil Action No. 07-cv-02035-REB-KLM, 2008 WL 4489256, at *6 (D. Colo. Oct. 2, 2008). However, the Court's Order is not intended to preclude Citizens

V. Has Citizens Adequately Specified the Time, Place, Manner, Conditions and Scope of the Examination and the Person Who Will Perform it?

The final requirement of Rule 35(a) is that the Court's Order must specify the time, place, manner, conditions and scope of the examination and the person who will perform it. Fed. R. Civ. P. 35(a)(2)(B). Citizens' motion identifies Dr. Bursztajn as the psychiatrist[15] to perform the examination; it has provided his declaration and his impressive curricula vitae laying out his credentials. ECF No. 33. This proffer is supplemented by the representation that Dr. Bursztajn is qualified by his training and experience to administer the clinical tests that he proposes for the examination.[16] ECF No. 36 at 11 n.8. Specifically, Dr. Bursztajn proposes to conduct the examination remotely by Zoom or another remote platform, which will permit Mr. Lescault to participate from wherever he would be comfortable, provided that he must be alone during the examination and no audio or video recording may be created of the examination. Bursztajn Decl. ¶¶ 17-18. Dr. Bursztajn estimates that the examination will take three to four hours, with comfort breaks as needed, and can be scheduled on a date that is mutually convenient for Mr. Lescault and Dr. Bursztajn. Id. ¶ 18. Dr. Bursztajn's plan for the examination is described appropriately in his declaration, which includes the opinion that the tests to be administered cannot be specified in advance as they will be dictated by the evaluation of available data

from seeking to present an opinion from Dr. Bursztajn, for example on rebuttal, to address evidence of emotional distress damages; whether such an opinion may be received in evidence is up to the trial judge.

[15] The Court will not linger over the EEOC's argument that Dr. Bursztajn is not qualified because the statements in his declaration demonstrate prejudice that is contrary to the requirements of Rule 35(a). ECF No. 35-1 at 19. The Court finds that Dr. Bursztajn's statements are appropriate to demonstrate that the medical evidence produced thus far is inadequate to answer serious questions regarding Mr. Lescault's mental condition – this does not reveal inappropriate prejudice, but rather confirms that a Rule 35(a) mental examination is needed because the medical record is not sufficient.

[16] The EEOC's unsupported argument to the contrary is rejected.

gathered in the course of the interview, as well as the opinion that advance specification of testing risks examinee preparation and coaching. Id. ¶ 17.

In arguing that this specificity is insufficient, the EEOC attacks with legal arguments Dr. Bursztajn's professional opinions supporting his reasons for declining to list the tests to be administered in advance. ECF No. 35-1 at 17-19. The EEOC presents no professional opinion to support its request for an advance list and its argument suggests that it will seek a mini trial on the appropriateness of every test that Dr. Bursztajn might consider.[17] At bottom, if (despite his credentials) Dr. Bursztajn chooses tests that are clinically inappropriate, the EEOC can challenge his opinions in a Daubert motion or by cross-examination. As described by Dr. Bursztajn's declaration, the proposed examination is far from an "opaque enterprise" as the EEOC argues. ECF No. 34 at 19.

The Court finds that Citizens has adequately specified the time, place, manner, conditions and scope of this examination and the person who will perform it and orders that it may proceed accordingly.

VI. Conclusion

Citizens' motion for a Rule 35(a) mental examination of Mr. Lescault is granted. The Court hereby orders that Mr. Lescault must appear for an examination, conducted by Dr. Bursztajn, on a date that is mutually convenient for Mr. Lescault and Dr. Bursztajn.[18] The examination will take place via the videoconferencing platform agreed upon by the parties and

[17] The Court observes that the granting of the EEOC's request for disclosure of every possible test would lead to significantly more delay, particularly where the EEOC does not rely on any specific expert-based reason for its request. Mindful of the EEOC's unrelated argument that the delay so far is a separate reason to deny the Rule 35(a) motion, the Court is strongly disinclined to issue a ruling that will cause still more delay of this now long-delayed Rule 35(a) examination.

[18] To the extent that the timing of the examination impacts the Court's scheduling order, either with respect to expert disclosures and the expert discovery close or with respect to the dispositive motion and pretrial memoranda deadlines, the parties are urged to file a joint motion, or if they do not agree, separate motion(s) to extend.

shall not last more than four hours (exclusive of comfort breaks). The attendees at the examination are limited to Mr. Lescault and Dr. Bursztajn and it shall not be audio or video recorded. The parties are encouraged to cooperate to ensure that the examination is completed in a timely fashion.

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
July 16, 2021