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SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION : HUDSON COUNTY  
DOCKET NO.: HUD-L-4522-09

HOWARD E. FLECKER, III,

Plaintiff,

v.

STATUE CRUISES, LLC and TERRY  
MacRAE,

Defendants.

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Decided: February 28, 2011

Ravi Sattiraju for plaintiff, (*The Sattiraju Law Firm, P.C.*)

Patrick W. McGovern for defendant, (*Genova, Burns & Giantomasi*)

PETER F. BARISO, JR., P.J.Cv.

This matter comes before the court on the return date of a motion filed by Defendants Statue Cruises, LLC and Terry MacRae (“Defendants”) seeking an order compelling Plaintiff Howard E. Flecker, III (“Plaintiff”) to submit to an independent medical examination (“IME”) pursuant to R. 4:19 and extending discovery pursuant to R.4:24-1. Defendants assert the position that Plaintiff has placed his medical condition in controversy by claiming damages for severe emotional distress with regard to a claim asserted under the New Jersey Conscientious Employee Protection Act (“CEPA”). Defendants further assert that Plaintiff’s failure to amend his answers to interrogatories to reflect specific manifestations of his emotional distress until January 17, 2011 constitutes good cause to extend discovery for the limited purpose of requiring Plaintiff to submit to

the IME sought by Defendants. Defendants are represented by Patrick W. McGovern, Esq., and Raymond G. McGuire, Esq.

Defendants' motion is opposed by Plaintiff on the basis that Plaintiff's mental state is not in controversy and, consequently, Defendants are entitled to neither an IME nor an extension of discovery to accommodate same. Plaintiff is represented by Ravi Sattiraju, Esq.

The parties have consented to a disposition of this motion based upon the pleadings and without the benefit of oral argument.

### **Issues Presented**

1. Whether Plaintiff's allegation of damages for severe emotional distress in this CEPA action has the effect of placing his medical condition in controversy such that he may be compelled to submit to an IME.
2. If Plaintiff may be compelled to submit to an IME, whether Plaintiff's failure to amend his answers to interrogatories to reflect specific manifestations of his emotional distress until January 17, 2011, in addition to the information disclosed through the completion of Plaintiff's deposition on January 28, 2011, constitute exceptional circumstances sufficient to extend discovery for the limited purpose of completing Plaintiff's IME.

### **Statement of Relevant Facts**

This matter arises from Plaintiff's prior employment with Defendants.<sup>1</sup> On September 10, 2009, Plaintiff filed a Class Action Complaint on behalf of himself and all other similarly situated persons in which he alleged a violation of the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, et seq. ("WHL"). Specifically, Plaintiff alleges that the collective bargaining agreement pursuant to which he and his fellow class members were employed constituted a violation of the WHL insofar as it provided that employees would not be paid at an overtime rate until they had worked in excess of forty-eight (48), rather than forty (40), hours per week. Approximately three (3) weeks subsequent to the filing of Plaintiff's Complaint, a member of Defendants' upper management, Michael Burke, issued a memorandum to all union-represented employees, i.e., the potential class

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<sup>1</sup> Plaintiff resigned from his employment with Defendants in October of 2009.

members, in which Mr. Burke notified those employees of Plaintiff's lawsuit and of Defendants' intention to contest it aggressively. Mr. Burke's memorandum further advised those employees that, as a "protective measure[]," engineers and deckhands would be scheduled for no more than forty (40) hours per week until such time as the Defendants' prevailed in the litigation or the Plaintiff elected not to go forward. Plaintiff thereafter filed an Amended Class Action Complaint, on October 10, 2009, in which he reasserted the WHL claim and also alleged a CEPA violation premised on the aforementioned memorandum issued by Mr. Burke. On May 28, 2010, the Honorable Mark A. Baber, J.S.C., certified a class and appointed Plaintiff as an adequate representative of that class with respect to the *WHL claim only*. Plaintiff's request that a class be certified with respect to Plaintiff's CEPA claim was expressly denied and Plaintiff has, consequently, been prosecuting the CEPA claim individually since that time.

Of particular relevance with regard to the motion now pending before the court, Plaintiff's CEPA claim alleges the following:

As a result of Defendants' conduct, Plaintiffs have endured significant damages including, but not limited to, physical and bodily injuries, severe emotional distress, humiliation, embarrassment, personal hardship, career and social disruption, psychological and emotional harm, economic losses, and other such damages.

[Plaintiff's Amended Class Action Complaint, Count Two, Par. 26.]

In relation to this allegation, Defendants served interrogatories upon Plaintiff on September 15, 2010 which demanded, in relevant part, that Plaintiff state the nature of the alleged severe emotional distress. Defendants also served Plaintiff with a request for documents which, in relevant part, requested all documents relating to Plaintiff's "psychological and emotional harm as alleged in Paragraph 26 of the Complaint." Defendants ultimately agreed to extend Plaintiff's deadline to respond to the request for documents to November 20, 2010, and to extend Plaintiff's deadline to respond to interrogatories to December 15, 2010.<sup>2</sup>

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<sup>2</sup> Plaintiff's counsel has represented that the discovery extensions were largely the result of ongoing settlement discussions.

On November 30, 2010, Plaintiff supplied responses to Defendants' request for documents. In reply to Defendants' request for documents relating to Plaintiff's emotional damages, Plaintiff stated that he was "not in possession of any such materials." Plaintiff subsequently supplied responses to interrogatories on December 17, 2010. In reply to Interrogatories No. 18-23, which called for information pertaining to Plaintiff's alleged physical and bodily injuries, severe emotional distress, humiliation and embarrassment, personal hardship, career and social disruption, and psychological and emotional harm, Plaintiff replied, in relevant part:

[T]hose individuals who authored and distributed the Burke Memorandum caused Plaintiff's damages in this matter. Plaintiff has endured severe emotional distress as a result of Defendants' retaliatory conduct, which has impacted his physical and emotional well-being. [Plaintiff] has knowledge of the damages that he has endured because of Defendants' conduct.

On December 22<sup>nd</sup> and 23<sup>rd</sup>, 2010, Defendants' counsel initiated telephone calls to Plaintiff's counsel to discuss what he perceived to be Plaintiff's insufficient responses to Interrogatories No. 18-23. The conversations ultimately culminated in an email from Plaintiff's counsel to Defendants' counsel in which Plaintiff's counsel advised that Plaintiff would not submit to a "defense IME."

On January 17, 2011, in reply to Defendants' counsel's inquiry regarding the state of Plaintiff's emotional distress, Plaintiff amended his response to Interrogatories No. 18-23 to include the following:

Plaintiff further states that he has suffered from the following as a result of Defendants' retaliatory conduct: sleeplessness, anxiety, increased stress, humiliation, and loss of self-esteem.

Plaintiff's counsel contends that the amendment was intended "to further clarify that Plaintiff's claim was for garden variety emotional distress." Four (4) days subsequent to the amendment to Plaintiff's interrogatories, Defendants served Plaintiff with a demand to submit to an IME on March 17, 2011 for the purpose of evaluating the symptoms of Plaintiff's alleged severe emotional distress. By correspondence dated January 24, 2011, Plaintiff's counsel notified Defendants' counsel that Plaintiff would not submit to the IME on the basis that the proposed date of March 17, 2011 was beyond the February 7, 2011 discovery end date and that an "IME is not appropriate in this matter."

Plaintiff's oral deposition was taken on January 28, 2011, and among other topics, Plaintiff testified with regard to the symptoms of his emotional distress. Upon inquiry with regard to the symptoms of his stress, Plaintiff testified:

It was emotional. I was embarrassed. It was physically bothering me. That's why I couldn't sleep, the stress. I also deal with an autistic child, so this was just added stress.

[Plaintiff's Deposition, T137-20 to T127-23.]

Plaintiff testified that, in addition to stress, sleeplessness, and other symptoms, he was "getting anxieties," and experiences "panic" on any occasions in which he is called upon to "deal with this case." T140-24 to T141-12. Plaintiff further testified that his self-esteem has suffered in that he "thought [he] wronged [his] fellow workers, and [he] didn't feel [he] was worthy..." T193-21 to T193-15. Upon inquiry with regard to the amount of money Plaintiff believed would fairly compensate him for the alleged harm, Plaintiff's counsel directed Plaintiff not to answer on the basis that the question called for a legal conclusion and also touched upon attorney-client communications. Plaintiff did not answer the inquiry.

## **Discussion**

### **A. Independent Medical Examination**

Defendants' pending motion to compel Plaintiff to submit to an IME is governed by R. 4:19, which provides that an adverse party may require a party whose mental condition is "in controversy" to submit to a mental examination by serving proper notice of the exam upon that party. The narrow issue presently before the court – namely, whether a plaintiff alleging damages for severe emotional distress in relation to a CEPA claim has placed their medical condition in controversy such that they may be compelled to submit to an IME – is an issue of first impression in New Jersey state courts. As such, both parties rely upon non-binding authority which addressed sets of circumstances contended to be analogous to the circumstances presented in the matter *sub judice*. The majority of cases cited to the court in the present motion involve the application of Fed. R. Civ. P. 35, which the Appellate Division has described as "substantially identical" to R. 4:19, and thus, while not binding, those cases are instructive to the analysis of the present dispute. Little by Little v. McIntyre, 289 N.J. Super. 75, 79 (1996).

As an initial matter, it should be noted that the cases cited by Plaintiff and Defendants reveal a divergence of opinion among the federal courts with regard to the applicability of a five-factor test set forth by the United States District Court for the Southern District of California in Turner v. Imperial Stores, 161 F.R.D. 89 (S.D. Cal. 1995). In that case, a wrongful termination action wherein plaintiff alleged damages on the grounds of “humiliation, mental anguish, and emotional distress,” Judge Cynthia Aaron expressed the court’s unwillingness “to set a precedent requiring a party to undergo an independent psychiatric examination merely because the party claims damages for emotional distress in her complaint.” Turner, 161 F.R.D. at 98. Based upon her review of prior federal cases in which courts had ordered mental examinations, Judge Aaron concluded that such cases generally involved one or more of the following elements:

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

Id. at 95.

The five-factor test set forth in Turner has subsequently been cited by numerous federal courts including, as Plaintiff accurately notes, the United States District Court for the District of New Jersey. See, Bowen v. Parking Authority of the City of Camden, 214 F.R.D. 188, 193 (D.N.J. 2003) (noting that the “in controversy” requirement “has led to a considerable divergence of opinion among courts,” and ultimately concluding that the plaintiff’s mere allegation of a claim for emotional distress constituted an insufficient basis to compel that plaintiff to submit to an IME).<sup>3</sup>

Turner, however, has not been uniformly followed by the federal courts. In Nuskey v. Lambright, 251 F.R.D. 3 (U.S.D.C. D.C. 2008), wherein a terminated employee alleged damages for humiliation, embarrassment, and clinical depression,

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<sup>3</sup> On the topic of Bowen, it should also be noted that Defendants are incorrect in the assertion, set forth on page-three of their reply brief, that Plaintiff’s opposition brief fails to cite any legal authorities involving emotional distress damages in the context of CEPA claims. The plaintiffs in Bowen asserted CEPA violations in addition to violations of the New Jersey Law Against Discrimination (“NJLAD”). Bowen, 214 F.R.D. at 189.

Judge John Facciola described the manner in which, through several cases, he has “taken an approach different from that in *Turner*.” Nuskey, 251 F.R.D. at 7. While conceding that the Turner approach is the “majority view,” Judge Facciola expressed his contrary view that

an employee who seeks compensatory damages for emotional pain suffered as a result of employer’s action has placed the existence and extent of their alleged mental injury in controversy, giving the employer good cause to seek examination.

Id. (quoting Smith v. Koplan, 215 F.R.D.11, 13 (U.S.D.C. D.C. 2003)).

Judge Facciola’s view on this issue is based upon the rationale that a court should not, in fairness, deprive a defendant of the opportunity to examine a plaintiff’s “claims of emotional distress from a scientific vantage point.” Nuskey, 251 F.R.D. at 7.

In briefing the motion now pending before the court, both parties have cited to a series of unpublished opinions involving claims of emotional distress analogous, in varying degrees, to Plaintiff’s present allegations. These unpublished cases, as the parties are no doubt aware, are not binding upon this court and furthermore should generally not be cited to by this or any other court in New Jersey. R. 1:36-3. That being said, review of the unpublished cases as potential persuasive authorities reveals one case in particular that is most closely on point with regard to Defendants’ present motion for an order compelling Plaintiff to submit to an IME. In Dibrito v. Harrisburg Area Community College, No. 1:08-CV-2308, 2010 WL 936236 (U.S.D.C. M.D.Pa. Mar. 12, 2010), the plaintiff opposed defendant’s request that the court compel submission to an IME on the basis that she had merely presented a “garden variety” emotional distress allegation which was insufficient to place her mental condition “in controversy” pursuant to the holdings in Bowen and Turner, *supra*. Dibrito at \*1. Noting that “the law as stated by the *Bowen* court...is not well-settled,” Judge Conner concluded that the plaintiff’s medical condition was “in controversy” for three (3) primary reasons: (1) the plaintiff’s emotional distress was central to the issue of damages; (2) the plaintiff had alleged that her pre-existing condition of Lyme’s diseases was exacerbated by the emotional distress; and (3) there were “alternative sources that may have caused or contributed to plaintiff’s emotional distress.” Dibrito at \*1, FN 4.

In the matter at bar, Plaintiff has alleged damages, and thus seeks compensation, relating to severe emotional distress, humiliation, embarrassment, and other related injuries as the result of Defendants' alleged CEPA violation. By way of his January 17, 2011 amendment to interrogatories, Plaintiff has alleged "sleeplessness," which must indisputably be understood as a physical manifestation of his emotional distress. Moreover, through deposition testimony, Plaintiff has raised a reasonable possibility that his emotional distress, alleged to be continuing to the present time, is in part attributable to the stress he described in caring for an autistic child. Since Plaintiff resigned from his employment with Defendants, and can consequently assert no claim for lost wages, Plaintiff's primary claim for damages is his alleged extreme emotional distress. In light of the foregoing, Defendants must be permitted the opportunity to have Plaintiff examined by an independent medical expert in order to adequately defend against Plaintiff's pending allegations. Unless Plaintiff wishes to withdraw his claims for damages relating to extreme emotional distress at this time, he must submit to an IME.

**B. Extension of Discovery**

The second component of Defendants' pending request for relief – namely, the brief re-opening and extension of discovery – is governed by R. 4:24-1(c), which provides that no extension of discovery be permitted after the setting of a trial date absent "exceptional circumstances," and also by R. 4:24-2, which mandates that motions to compel discovery must be made returnable prior to the expiration of the discovery period unless "good cause" is otherwise shown. Since a trial date of May 9, 2011 has been set, and because the discovery period in this matter expired on February 7, 2011, discovery in this matter cannot now be extended unless both rules are satisfied.

While Plaintiff contends that Defendants have been on notice of Plaintiff's claim for emotional distress since the filing of Plaintiff's Amended Complaint, Plaintiff cannot dispute that Defendants were not adequately apprised of the specific nature of Plaintiff's alleged emotional distress damages until the January 17, 2011 amendment to interrogatories through which Plaintiff alleged, for the first time, physical manifestations of his alleged emotional distress. Defendants thereafter acted expeditiously in demanding that Plaintiff submit to an IME just four (4) days following Plaintiff's disclosure. The foregoing circumstances are sufficient to justify a brief extension of discovery for the



sole purpose of permitting Plaintiff to attend the March 17, 2011 IME and thereafter permitting the independent medial expert to prepare and submit his findings.

**Conclusion**

Accordingly, Defendants' motion for an order compelling Plaintiff to submit to an IME and extending the discovery period in this matter is granted.