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Utilizing Federal Rule of Civil Procedure 35 to Conduct a Vocational Assessment of the Plaintiff in Employment Discrimination Cases

By Spencer H. Silverglate and Craig Salner

Spencer H. Silverglate is a founding principal of Clarke Silverglate & Campbell, P.A. and serves as the firm's Managing Shareholder. Mr. Silverglate engages in litigation, trial and appellate practice in the state and federal courts throughout Florida. His substantive areas of emphasis include employment law, commercial litigation and catastrophic personal injury cases. He is AV rated by Martindale-Hubbell and has been selected by a variety of publications as one of the top attorneys in South Florida. Mr. Silverglate is Past President of the Florida Defense Lawyers Association.

Craig Salner is an associate at Clarke Silverglate & Campbell, P.A. Mr. Salner engages in litigation, trial and appellate practice in the state and federal courts throughout Florida. His substantive areas of emphasis include employment law, personal injury defense and appellate matters. He is a current committee chairperson with the Florida Defense Lawyers Association and has been published by the FDLA's "Trial Advocate Quarterly."

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One North Franklin, Chicago, IL 60606
www.iadclaw.org
Phone: (312) 368-1494 Fax: (312) 368-1854
E-mail: aomaley@iadclaw.org

A. Introduction

Anyone who defends employment discrimination cases likely is familiar with this scenario: Your client terminates the plaintiff from his lucrative upper-management position. Plaintiff splits his time between looking for an attorney and thumbing through the classifieds. He ultimately accepts a low-level position earning one-third the income with another company. By the time he exhausts his administrative remedies and sues your client in federal court, his potential back pay and front pay claims are significant. Are you forced to accept that he mitigated his damages? Of course not. However, one of your best discovery tools -- a vocational assessment by an expert -- may not be available. This article analyzes a defendant's ability to obtain a vocational rehabilitation assessment of the plaintiff in federal employment discrimination cases.

B. The Vocational Examination

You are considering asking the court for a vocational assessment of the plaintiff. Your vocational expert would assess the plaintiff's employment interests and administer standardized tests to ascertain his abilities and aptitudes. The goal, assuming the facts warrant it, is to have your expert opine that the plaintiff could have pursued a broad range of equivalent job opportunities rather than the low-level, dead end position he may have taken. You are trying to limit or eliminate both back pay and front pay.

This article presupposes that the plaintiff has not received a vocational assessment from his own expert. The weight of authority suggests that if a plaintiff undergoes such an examination from his own expert, the defendant will be granted the reciprocal right to have its own expert administer a similar examination. However, vocational rehabilitation assessments by plaintiffs are more common in personal injury actions, where the plaintiff's expert is used as an "offensive" tool to prove up damages. Where there is no personal injury, which is the case in most discrimination lawsuits, a plaintiff typically has no reason to retain a vocational rehabilitation expert.

C. Rule 35

Federal Rule of Civil Procedure 35 governs "independent" examinations:

> **(a) Order for Examination.** When the mental or physical condition . . . of a party . . . is in controversy, the court . . . may order the party to submit to a physical or mental examination by a *suitably licensed or certified examiner* or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, and manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(Emphasis added). The italicized language was added by amendment in 1991. According to the Advisory Committee Notes, the amendment extends the rule to include a broader scope of examinations, such as dental examinations or functional capacity

tests. Dentists and occupational therapists are not physicians or clinical psychologists, but they may be well-qualified to give valuable testimony about the physical or mental condition at issue.

D. Making the Logical Leap

The threshold for any Rule 35 examination remains that a party has put his physical or mental condition at issue. While the complaint typically will allege a mental injury, and perhaps even a physical injury, a vocational expert may not be qualified to assess either. This is why caselaw before the 1991 amendment disfavored vocational assessments. See Stanislawski v. Upper River Services, Inc.[1] (vocational rehabilitation examinations neither contemplated nor authorized by rule providing for mental or physical examination); Soudelier v. Tug Nan Services, Inc.[2] (mental and physical examinations must be conducted by a physician, not a vocational rehabilitation expert). Things have changed, however.

E. The Caselaw

Since the 1991 amendment, caselaw generally favors vocational assessments. Three leading cases on this issue are Jefferys v. LRP Publications[3] from the Eastern District of Pennsylvania, Casey v. Burlington Northern Railroad Co.[4] from the District of Oregon and Fischer v. Coastal Towing Inc.[5] from the Eastern District of Texas. Jefferys was an employment discrimination claim based on pregnancy, disability and gender.[6] Defendants requested a vocational assessment to determine her present employment opportunities or limitations.[7] The plaintiff's mental condition was in controversy, as it was stipulated that the plaintiff had a fear of flying.[8] The district court allowed a defense vocational assessment, reasoning that a certified rehabilitation counselor and certified vocational evaluator has the required credentials of a "suitably licensed or certified professional" under Rule 35.[9] The court did not analyze the correlation between the plaintiff's mental condition and the assessment, instead focusing on the expanded language of the rule and the examiner's qualifications.[10]

Casey and Fischer are personal injury claims but still contain pertinent analyses of Rule 35. In Casey, plaintiff alleged that he suffered a permanent injury to his shoulder, depression and emotional distress and an impairment of his earning capacity.[11] The defendant sought to have its board certified vocational rehabilitation counselor examine the plaintiff.[12] The district court found these allegations sufficient to place the plaintiff's physical and mental health in controversy, observing that "the physical and mental condition of a plaintiff determines his future employment prospects."[13] The district court ordered the plaintiff to undergo an interview and non-invasive vocational testing, including achievement and aptitude tests.[14]

Similarly, in Fischer, the district court held that the plaintiff placed both his physical and mental condition at issue by alleging damages for loss of earnings and/or earning capacity, physical and mental pain and anguish and physical impairment.[15] On defendant's motion, the district court ordered the plaintiff to undergo an evaluation by defendant's licensed rehabilitation counselor.[16] The court added that the expert could not undertake a physical examination or ask

questions relating to liability issues.[17]

Casey and Fischer's distinction as personal injury cases really is no distinction at all. Regardless of the type of injury, the goal of the vocational assessment is the same – determining the types of work that the plaintiff can perform. Sometimes a physical limitation exists; other times it does not. That the action arose from personal injury rather than alleged employment discrimination is of no moment.

That said, Mohamed v. Marriott Intern., Inc.[18] was an employment discrimination claim involving a vocational assessment. Its use is limited, however, because the defendant sought to have the hearing-impaired plaintiff undergo a Sign Communication Proficiency Interview ("SCPI"), not a general vocational assessment.[19] The SCPI tests a person's sign language skills.[20] Mohamed's best use is that the court expanded the Rule 35 scope of "a mental condition in controversy" by holding that the plaintiff's ability to perform sign language fit within this definition.[21]

Other federal cases allowing vocational assessments include the following:

- Merce v. Greenwood[22] (personal injury claim in which vocational assessment permitted).
- Trokey v. D.H. Pace Co.[23] (personal injury claim in which interview by board certified rehabilitation counselor permitted).
- Smolinsky v. State Farm Ins. Co.[24] (personal injury claim in which vocational assessment permitted).
- Sice v. Oldcastle Glass, Inc.[25] (personal injury claim in which functional capacity examination by medically qualified professional permitted).
- Escobar v. Blessey Marine Services, Inc.[26] (same).

Finally, not all courts have permitted vocational rehabilitation assessments since the 1991 Amendment. See Storms v. Lowe's Home Centers, Inc.[27]; In re Falcon Workover Co., Inc.[28] In Storms, the court held that, notwithstanding the 1991 Amendment, "where a party seeks a mere vocational assessment not connected with any physical or mental examination, as is the case here, Rule 35 is not implicated."[29] Storms is a good illustration of the difficult logical connection between a mental or physical injury on the one hand and a vocational assessment on the other. The courts that have allowed vocational assessments have focused more on the language of the amendment rather than the nexus between the nature of the injury and the specialty of the expert.

F. Conclusion

A vocational rehabilitation counselor can be an important weapon to limit a plaintiff's economic damages. A Rule 35 vocational assessment arms the

expert with a foundation to opine about the plaintiff's suitability for alternate employment. The cases discussed herein should help in obtaining the examination.

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[1] 134 F.R.D. 260 (D. Minn. 1991).

[2] 116 F.R.D. 429 (E.D. La. 1987).

[3] 184 F.R.D. 262 (E.D. Pa. 1999).

[4] 1997 WL 30823 (D. Or. 1997).

[5] 168 F.R.D. 199 (E.D. Tex. 1996).

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[11] Casey at *1.

[12] Id.

[13] Id.

[14] Id. at *2.

[15] Fischer, 168 F.R.D. at 201.

[16] Id.

[17] Id.

[18] 1996 WL 103838 (S.D.N.Y. 1996).

[19] Id.

[20] Id.

[21] Id. at *3-4.

[22] 2006 WL 1129398 (D. Utah 2006).

[23] 2006 WL 726245 (S.D. Ill. 2006).

[24] 1999 WL 1285824 (E.D. Pa. 1999).

[25] 2005 WL 82148 (D. Colo. 2005).

[26] 2004 WL 2115270 (E.D. La. 2004).

[27] 211 F.R.D. 296 (W.D. Va. 2002)

[28] 186 F.R.D. 352 (E.D. La. 1999).

[29] 211 F.R.D. at 297.