

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND**

**OLIVER LYONS**

v.

**C.A. NO. 08-498 ML**

**A.T. WALL, ET AL.**

**MEMORANDUM AND ORDER**

Jacob Hagopian, Senior United States Magistrate Judge

Plaintiff, Oliver Lyons, *pro se*, an inmate at the Adult Correctional Institutions (the “ACI”) in Cranston, Rhode Island, filed this action complaining that defendants violated his civil rights (Docket # 1). Presently before the Court is a motion to compel a court ordered psychiatric examination pursuant to Rule 35 of the Federal Rules of Civil Procedure (the “Federal Rules”) filed by plaintiff (Docket # 6). This matter has been referred to me for determination pursuant to 28 U.S.C. § 636(b). For the reasons that follow, plaintiff’s motion is DENIED.

Federal Rule 35 empowers a court to “order a party whose mental or physical condition ... is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner ... [or] 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). A party seeking such examination must demonstrate that the “condition for which the examination is sought is ‘genuinely in controversy’ and that ‘good cause exists for ordering the examination.’” *Whaley v. Erickson*, No. 05-C-898, 2006 WL 3692633, at \*2 (E.D.Wis. Dec. 11, 2006)(quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 118-19 (1964)). Here, plaintiff has not shown that his psychiatric condition is in controversy. To support his motion, plaintiff points to a document filed by certain ACI defendants in a case previously brought by plaintiff and dismissed by the Court, stating that plaintiff had not shown any evidence that he had psychiatric problems. However, defendants

have not yet answered plaintiff's complaint here, and it is premature to determine if there is a genuine controversy regarding plaintiff's psychiatric condition in this action.

Further, Federal Rule 35 "does not vest the court with authority to appoint an expert to examine a party wishing an examination of himself." *Brown v. U.S.*, 74 Fed. App'x 611, 614 (7th Cir. 2003); *see also Melton v. Simmons*, No. 1:08CV458-3, 2009 WL 454619, at \*1 (W.D.N.C. Feb. 23, 2009). Instead, this rule authorizes the court to order plaintiff to submit to an examination (or order a party, such as a parent or guardian, who has brought an action on behalf of a person under his legal control, to produce that person for an examination) on motion by an *opposing party*. *Lindell v. Daley*, No. 02-C-459, 2003 WL 23111624 at \*1-2 (W.D.Wis. June 30, 2003); *see also Cabrera v. Williams*, No. 4:05CV3121, 2007 WL 2682163 at \*2 (D.Neb. Sept 7, 2007).<sup>1</sup>

Additionally, plaintiff may not use Federal Rule 35 to obtain an expert medical witness at the court's expense. *Whaley v. Erickson*, No. 05-C-898, 2006 WL 3692633 at \*2-3 (E.D.Wis. Dec. 11, 2006). "[T]he court is not obligated to subsidize the plaintiff's litigation by paying for him to present expert witness testimony, even though he is proceeding *in forma pauperis*." *Id.* at 3 (citing *McNeil v. Lowery*, 831 F.2d 1368, 1373 (7th Cir. 1987))("A litigant's constitutional right

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<sup>1</sup>Although Federal Rule 35 was amended in 1970 to give courts authority to order a party to "produce for examination a person who is in its custody or under its legal control," it appears that this language was intended to allow courts to compel a parent, guardian or other person suing to recover injuries to a minor or other person under his or her control to produce such minor or other person on the motion of an opposing party. *See* 8A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE §2233 (2d ed. 1994); *see also Lindell*, 2003 WL 23111624 at \*1-2 (Federal Rule 35 allows court to compel production by parent or guardian of minor upon motion of opposing party; it is not intended for a situation where plaintiff wishes an examination of himself). It does not appear that the rule was designed for courts to compel defendant prison officials to bring a plaintiff prisoner to a medical examination at government expense upon a motion of the prisoner. *See Cunningham v. Orr*, No. Civ. S88-384, 1989 WL 516269 at \*1 (N.D.Ind. May 8, 1989)("Nothing in the Federal Rules of Civil Procedure pertaining to discovery, or Rule 35 which is specifically concerned with the physical and mental examination of persons, appears to contemplate or authorize a party to compel his or her own physical examination - the obvious assumption being that persons do not need court orders if they want to have themselves examined. Indeed, the Rules appear to make no allowance for prisoners who may be unable to have themselves examined in strict conformity with their wishes.").

of access to the courts does not include a waiver of witness fees so that an indigent plaintiff can present his case fully to the court.”)).

For the foregoing reasons, plaintiff’s Motion to Compel is hereby DENIED.

IT IS SO ORDERED.

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Jacob Hagopian  
Senior United States Magistrate Judge  
March 24, 2009