

**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
BIG STONE GAP DIVISION**

<b>MARY KATHERINE HAYDEN,</b>	)	
	)	
Plaintiff,	)	Case No. 2:01CV00125
	)	
v.	)	<b>OPINION AND ORDER</b>
	)	
<b>UNITED STATES OF AMERICA,</b>	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

*Michael A. Bragg, Bragg & Associates, PLC, Abingdon, Virginia, and S. Strother Smith, III, Abingdon, Virginia, for Plaintiff; Julie C. Dudley, Assistant United States Attorney, Roanoke, Virginia, for Defendant.*

In this Federal Tort Claims Act case, the United States has moved for a mental examination of the plaintiff pursuant to Federal Rule of Civil Procedure 35. Because I hold that the request is premature, I will deny the motion.

**I**

The plaintiff, Mary Hayden, contends in this suit that the postmaster of Big Stone Gap sexually molested and harassed her while she was a postal customer and otherwise. She initially filed her action in state court, and the United States removed the action to this court pursuant to the Federal Tort Claims Act, 28 U.S.C.A. §§ 2671-

2680 (West 1994) (“FTCA”). The United States Attorney certified that the defendant postmaster was acting within the scope of his employment at the time of the conduct alleged. Pursuant to 28 U.S.C.A. § 2679(b)(1) and (d)(2), the court entered an order substituting the United States as the defendant in place of the postmaster.

The plaintiff objected to the certification that the postmaster was acting within his scope of employment and the court has scheduled an evidentiary hearing on the question of scope of employment. *See Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3d 1148, 1153 (4th Cir. 1997) (holding that when challenged, the certification “serves as prima facie evidence and shifts the burden to the plaintiff to prove, by a preponderance of the evidence, that the defendant federal employee was acting outside the scope of his employment.”).

In preparation for this hearing, the United States has moved for a mental examination of the plaintiff, on the ground that she has alleged that she is suffering from severe psychological problems as a result of the postmaster’s conduct. The plaintiff has objected to any such examination, at least at this stage of the proceedings.

Rule 35 of the Federal Rules of Civil Procedure provides that:

When the mental . . . condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a . . . mental examination by a suitably licensed or certified examiner . . . . 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, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

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

Thus, in order to require a mental examination of the plaintiff, the defendant must (1) show that her mental condition is “in controversy” and (2) establish that “good cause” for the examination exists.

Good cause is not a “mere formality” and will not be shown merely because evidence might be relevant to the case. *See Schlagenhauf v. Holder*, 379 U.S. 104, 242 (1964). Good cause in rule 35 requires a “greater showing of need” for an examination than discovery permitted by other means. *See Guilford Nat’l Bank v. S. Ry. Co.*, 297 F.2d 921, 924 (4th Cir. 1962).

At this stage of the proceedings, I do not believe that a mental examination of the plaintiff would be appropriate. While the court did permit the parties to engage in limited discovery in anticipation of the evidentiary hearing, any question regarding the plaintiff’s damages is premature. Unlike a trial on the merits, this pretrial hearing will be limited to the issue of whether the postmaster was acting within the scope of his employment. Thus, whether the plaintiff did in fact suffer psychological difficulties as a result of the conduct complained of is not presently in controversy.

It is true, as the United States contends, that one of the issues at the evidentiary hearing may be whether or not the conduct complained of actually occurred. That is because the government is likely to take the position that the postmaster's conduct was within the scope of his employment because it did not take place. While the courts of appeals have taken differing positions on this type of certification under the FTCA, the Fourth Circuit has held that it is appropriate. *See Borneman v. United States*, 213 F.3d 819, 828 (4th Cir. 2000) (stating that “this critical discrepancy [whether the conduct actually occurred] is therefore material to the court’s determination [of the scope of employment issue]”), *cert. denied*, 531 U.S. 1070 (2001). Following the presentation of evidence, the court must resolve the factual disputes and “weigh the evidence on each side to determine whether the certification should stand.” *Id.* at 827 (quoting *Gutierrez*, 111 F.3d at 1155).

Even though the court will therefore likely determine at the upcoming hearing whether the conduct by the postmaster occurred or not, it is not appropriate at this time to require the plaintiff to undergo a mental examination. There is no evidence before the court that her powers of observation or recall have been affected by any existing psychological difficulties. Absent any present cause, it would not be proper to require her to undergo a potentially invasive and stressful examination.

II

For the foregoing reasons, it is **ORDERED** that the United States' Motion Pursuant to Rule 35(a) [Doc. No. 17] is denied.

ENTER: February 20, 2002

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United States District Judge