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Four Years Later: Update on the Genetic Information Nondiscrimination Act of 2008

By Alejandro Valle

It has now been over four years since the passage of the Genetic Information Nondiscrimination Act ("GINA"), almost three years since its effective date of November 21, 2009, and almost two years since the Equal Employment Opportunity Commission issued its final regulations. The law is aimed at preventing the misuse of "genetic information" by employers, but with the passage of time, what do we now know about GINA and its implementation? The short answer is: not much.

Of the nearly 100,000 charges filed with the EEOC in 2010 and 2011, charges under GINA accounted for only 201 and 245 of charges in each respective year - 0.2% of all charges filed. And although federal cases have been filed asserting claims under GINA and a few written opinions have been issued, most of the written decisions have included only limited analysis given the narrow procedural posture of the cases in question. Nevertheless, some broad outlines are starting to form that may assist employers in understanding the relatively new law.

For example, in the case of *Poore v. Peterbilt of Bristol, LLC*, a federal case filed in U.S. District Court for the Western District of Virginia, 2012 WL 1118214 (W.D. Va. April 4, 2012), a terminated employee, Poore, had filed a claim against his former employer alleging (among other claims) age-based discrimination and a claim under GINA. Poore alleged that while completing a health insurance questionnaire for his employer, he disclosed his wife's multiple sclerosis. Thereafter, his employer asked that he confirm her diagnosis date and her prognosis. Three days later, Poore's employment was terminated.

After Poore filed his lawsuit, the employer moved to dismiss Poore's complaint, including his claims under GINA. While the court allowed Poore's age discrimination claim to move forward, at least beyond the initial motion to dismiss, the court dismissed Poore's GINA claim. The court explained that the basic intent of GINA is to prohibit employers from making a "predictive assessment concerning an individuals' propensity to get an inheritable genetic disease or disorder based on the occurrence of an inheritable disease or disorder in [a] family member." *Id.* at *2 (quoting H.R.Rep. NO. 110-28, pt. 3, at 70 (2007)). However, Poore's complaint failed to state a violation of GINA because the information he provided to his employer was not predictive "genetic information." Instead, according to the court, he simply disclosed that his wife had been diagnosed with multiple sclerosis. This fact, alone, has no "predictive value with respect to Poore's genetic propensity to acquire the disease," according to the court, and furthermore there was no allegation that the employer "used Poore's wife's diagnosis to forecast the tendency of any other individual to contract multiple sclerosis." *Id.* at *3. The court noted that the employee might have a claim for discrimination under the Americans with Disabilities Act, but that the facts as alleged did not support a claim under GINA.

Several other written decisions confirm that it is not enough in a GINA case for the employee to simply identify the law itself as the basis for his or her claim. In addition, courts have stated the employee must allege and show facts sufficient to establish that a specific violation under GINA has taken place. For example, in *Culbreth v. Washington Metropolitan Area Transit Authority*, No. RWT-10-cv-3321 (D. Md. March 20, 2012), a federal case from the U.S. District Court for the District of Maryland, an employee alleged a GINA violation by her employer based upon alleged discrimination on the basis of her disability. As an initial matter, and as a matter of first impression, the court noted that her GINA claim against her employer - the state - was barred by the Eleventh Amendment to the U.S. Constitution, which generally grants immunity to states from lawsuits by citizens. In addition, and leaving aside the issues of immunity, the court noted that there was also simply no factual support for a GINA claim in the employee's complaint. *Id.* at *4. The court confirmed that the statutory definition for "genetic information" does not include mere information about the sex or age of an individual. *Id.* (citing 42 U.S.C. § 2000ff(4)(C)). Moreover, the employee had admitted in her deposition that she never underwent genetic testing and that her employer never had access to her genetic information. *Id.* For these reasons alone, regardless of the immunity issue, the court dismissed the employee's GINA claim for lack of any factual support. *Id.*

The case law for claims under GINA is still developing, but as employees and plaintiffs' attorneys become more familiar with the law and its accompanying regulations, employers can expect that the number of claims asserted under GINA will only increase. In the meantime, some of the initial suggestions made in this space previously bear repeating:

- GINA applies to employers with 15 or more employees.
- GINA prohibits the use of genetic information in making decisions related to hiring, firing, or any other terms, conditions or privileges of employment.
- Covered employers should keep confidential any genetic information acquired about an employee, should maintain any genetic information learned about an employee in a separate file, and should not keep any medical information of any kind in an employee's standard personnel file.

Being mindful of these basic tenants may help evade potential pitfalls in the short run as employees, employers, and the courts become more familiar with GINA claims.


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