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## The Skinny on Genes: An Update on GINA-Related Litigation

By Jerilyn Jacobs

When the Genetic Information Nondiscrimination Act (GINA) was passed in 2008, we informed readers that it would take some time to see the nature and scope of claims that the EEOC and individual plaintiffs would bring. Now seven years later, we have somewhat of a better sense, but many questions remain, as demonstrated by a jury verdict last month that awarded \$2.22 million dollars to plaintiffs in a GINA action.

That case, *Lowe v. Atlas*, involved two employees who were asked to provide saliva samples as part of an internal investigation. Atlas operates a food storage warehouse for grocery stores. In the spring of 2012, Atlas employees began finding human feces on the floor at various locations in the warehouse.

Loss Prevention Risk Manager Donald Hill handled the internal investigation. Video coverage did not reveal the culprit or culprits. Hill then reviewed employee shift records and cross-referenced them with the dates of the incidents, which led to his narrowing his suspect list down to three employees. Atlas then contacted a DNA testing facility, which stated it could conduct a test that would determine whether there was a match between the samples of the offender(s) with DNA samples of the suspects, but would not reveal any information as to the suspects' respective propensity for disease or disorder.

Hill, along with the human resources manager and union steward, met with two of the three suspected employees, Jack Lowe and Dennis Reynolds. At the meeting, Hill told Lowe and Reynolds that they were potential suspects and that Atlas "would like to exclude them as suspects" by doing a "simple test." Lowe and

Reynolds contended they were threatened with discipline if they did not submit their DNA for the analysis, while Hill contended that he told them that they would be permitted to return to work whether or not they agreed to submit their DNA samples. Both Reynolds and Lowe agreed to submit their DNA. Neither was a match. The third suspected employee was later tested, and he, too, was not a match.

When coworkers learned that Lowe and Reynolds were the prime suspects and had undergone DNA testing, the two became the subject of ridicule at work and were given mocking nicknames.

Lowe and Reynolds brought a federal lawsuit in the United States District Court for the Northern District of Georgia, claiming that Atlas violated GINA by requesting their genetic information. At issue was whether the information requested and obtained by Atlas constituted "genetic information" under GINA. The district court concluded, on motion for summary judgment, that it was. The court based its reasoning on the plain language of 42 U.S.C. § 2000ff-1(b), which states that GINA makes it "an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee." While there are six exceptions to this prohibition, none was applicable in the *Lowe* matter.

The district court held that it was immaterial whether Lowe and Reynolds were coerced into providing the samples or voluntarily offered them. The court's decision turned entirely on whether Atlas *requested* genetic information. There was no question that Atlas had made such a request. The court also rejected Atlas's argument that there was no GINA violation because the analysis conducted by the lab could not determine an individual's propensity for disease or disorder.

The matter went to trial on the issue of damages only. The jury awarded \$250,000 and \$225,000 to Lowe and Reynolds, respectively, for emotional pain and suffering. The remaining \$1.75 million award was for punitive damages. Post-trial motions are currently underway. Among other arguments, Atlas contends that the statutory damages cap limits the total compensatory and punitive damages under GINA to \$300,000 per employee plaintiff. As of this past Monday, both Lowe and Reynolds have conceded that point.

Interestingly, Lowe and Reynolds pursued this lawsuit after the EEOC had dismissed the charges and issued its standard Dismissal and Notice of Rights letter that stated that it was unable to conclude a violation of the statutes.

This verdict should serve as a cautionary tale to any employers who find themselves in a situation where requesting genetic material such as saliva samples seems appropriate or necessary. Given that one of the six exceptions to the prohibition against a request for genetic information is a "prior, knowing, voluntary" written authorization, it would seem, on the one hand, that an employer

could better shield itself from liability from ensuring that written authorizations are always obtained and that employees are fully informed of their GINA-related rights. However, given that a violation occurs not when the test is undertaken or material gathered, but when the *request* is made, it also appears that a company could violate GINA by simply making such a request, and an employee who refuses to execute a written authorization after a request for one is made can then file a claim under GINA.

Despite being nearly a decade old, there remains a relative dearth of litigation history under GINA. Two years ago we advised that the EEOC had filed its first two lawsuits alleging violations of GINA. The first, [as we previously noted](#), settled relatively quickly for \$50,000. The second also settled short of any substantive findings by a court or jury, with the defendant, which had sold its facility and ceased operations by the time of the resolution of the matter, agreeing to pay a total of \$259,600 to the five claimants. The defendant also entered into a consent decree agreeing to certain training, monitoring, reporting, and other requirements should it resume business within five years.

Until and unless the courts help flesh out the ambiguities and case-specific situations that arise under GINA, employers need to ensure that they remain cognizant of their employees' GINA-related rights, lest they find themselves the subject of the landmark GINA litigation that has yet to come.

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