# Employment Law Update: National DNA Day – April, 25 2018

**Employers Beware: Collecting Genetic Information on Employees Could Lead to Litigation**

By: Malissa Wilson

In 2003, Congress designated April 25th as National DNA Day. The day marks the 50th anniversary of the discovery of DNA□□□□double helix in 1953 and celebrates the latest advances in genetics. However, these genetic advances have adversely impacted the workplace prompting Congress to pass the Genetic Information Nondiscrimination Act (GINA) prohibiting genetic information discrimination.

Since its inception in 2009, complaints filed with the Equal Employment Opportunity Commission (EEOC) claiming genetic information discrimination under GINA are steadily increasing. In Mississippi, GINA claims account for .4% of the current total complaints of discrimination filed with EEOC. While this figure is small, an employer□□□□ignorance of GINA could result in big consequences.

GINA prohibits discrimination by health insurance providers and employers on the basis of genetic information, including information about an employee□□□□genetic tests and family medical history. GINA was enacted in the wake of developments in the field of genetics that now allow individuals to undergo genetic testing to determine if they are at risk for certain diseases and disorders, such as cancer, celiac disease, macular degeneration, bipolar disorder, obesity, and Parkinson's disease, among others.

GINA forbids employers from using genetic information in making decisions related to an employee□□□□terms, conditions or privileges of employment □□□hiring, firing and opportunities for advancement. GINA also restricts employers from requesting, requiring or purchasing genetic information, with very limited exceptions, about employees. In its report, the EEOC makes clear: □□□□□□prohibition on the use of genetic information in employment decision-making is absolute.□□□□ In a smelly series of events, one company learned just how absolute GINA's prohibitions are.

The owner of a grocery store chain conducted an unusual investigation to identify the individual who was defecating in its facility that housed grocery products. In an effort to catch the bowel-movement bandit, the company hired a company to administer DNA testing and required certain employees to provide saliva swab samples to test. When the DNA comparisons of the saliva samples and fecal matter came up negative for two employees, the employees filed suit claiming the employer conducted genetic testing in violation of GINA.

The case, *Lowe v. Atlas Logistics Group Retail Services (Atlanta) LLC*, was the first GINA case to go to trial. Not surprisingly, prior to trial, the court granted the employees□□□motion to find the employer liable given that DNA testing of employees is a blatant violation of GINA. At the damages-only trial, the jury slammed the employer with a $2.25 million verdict - $225,000 to each plaintiff in compensatory damages and $1.75 million in punitive damages. The damages award covered mental anguish and loss of enjoyment of life the plaintiffs suffered over *fears* that their genetic information could *potentially* be misused.

A search of Mississippi legal opinions reveals only one case where a GINA claim is alleged against an employer. In the case, *Easterling v. VT Halter Marine Inc., et al.*, the employer required the plaintiff to take a drug test. The test allegedly showed traces of marijuana resulting in the employee□□□□termination. The plaintiff, who disputed the test results, filed suit and sought damages against the employer under GINA. The court ultimately dismissed the lawsuit against the employer for plaintiff□□□□failure to prosecute the case without reaching the merits of the GINA claim. Indeed, the GINA claim based on the drug test would have failed because the results of drug and alcohol tests are not genetic information from a prohibited "genetic test" as defined by GINA.

Simply put, employers should not be in the business of requesting or receiving their employees□□□genetic information. If, by chance, an employer obtains an employee□□□□genetic information, it cannot make any employment decisions based on the information. The *Lowe* case illustrates that employers would be better served installing cameras, rather than conducting DNA tests, to catch offending employees.

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