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Trials&TRIBULATIONS

A new Act to combat genetic discrimination

By **ELIZABETH WOLFORD**
Daily Record Columnist

Enthusiasm over the scientific advancements in the area of genetic testing has been tempered by the prospect that information concerning a person's DNA will be used to deny health insurance coverage. Despite the potential advantages of early identification of disease through genetic testing, many patients remained leery of being tested.

On April 24, the U.S. Senate passed the Genetic Information Nondiscrimination Act (GINA), denominated as H.R. 493. The Act prohibits health insurers from canceling, denying, refusing to renew, or changing the terms or premiums of coverage based solely on a genetic predisposition toward a specific disease. The Act passed the Senate by a 95-0 vote, and it is expected to pass the House this week (at the writing of this column, it had not yet passed the House). President Bush has indicated his support for the legislation.

The Act goes further than simply ensuring access to health insurance coverage notwithstanding one's genetic predisposition. The legislation also prevents employers from using an individual's genetic information when making hiring, firing, promotion, and other employment-related decisions.

Congresswoman Louise M. Slaughter authored and first introduced genetic antidiscrimination legislation thirteen years ago, and said of the Senate's passage of GINA: "Since no one is born with perfect genes, each one of us is a potential victim of genetic discrimination." According to a release issued by Representative Slaughter's office, individuals have historically been denied jobs based upon their carrier status for sickle cell anemia, and employers performed genetic tests on employees without their knowledge or consent.

In fact, GINA specifically cites to the Ninth Circuit's decision in *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (Ninth Cir. 1998), where an employer was accused of testing employees during employee entrance medical examinations without their knowledge or consent for syphilis, sickle cell trait and pregnancy. The Ninth Circuit reversed the district court's dismissal of the plaintiffs' Title VII claims, reasoning that the tests, at least in part, were targeted to women and African-Americans. However, the district court's dismissal of the plaintiffs' Americans with Disabilities Act claims was affirmed.

Now, GINA expressly makes this type of conduct unlawful under Title VII, regardless of the gender or race of the individuals who are targeted.

Title II, Section 202, of GINA provides that it shall be unlawful for an employer with 15 or more employees, to discriminate against an employee "because of genetic information." It is also unlawful to segregate or classify employees because of genetic information if the conduct adversely affects the status of employment.

GINA also makes it unlawful for an employer to "request, require or purchase genetic information with respect to an employee or a family member of the employee" except where the employer "inadvertently" requests family medical history of the employee or family member, or where the request is part of health or genetic services offered by the employer so long as other criteria are also met under those circumstances (including written authorization from the employee). Employers are also permitted to seek information in order to comply with the Family and Medical Leave Act. GINA outlines other delineated exceptions, including where the information is used for genetic monitoring of the biological effects of toxic substances in the workplace or where the employer conducts DNA analysis for law enforcement purposes.

"Genetic information" is defined under GINA to include not only information concerning an individual's genetic tests, but also the genetic tests of a family member or information concerning "the manifestation of a disease or disorder in family members." However, GINA also specifically excludes from the definition of genetic information any "medical information that is not genetic information about a manifested disease, disorder, or pathological condition of an employee or member, including a manifested disease, disorder, or pathological condition that has or may have a genetic basis."

This apparently means that there must be a genetic basis to the information, as opposed to just a genetic cause of the disease. In other words, an employer is not prohibited by GINA from using, acquiring or disclosing medical information concerning a disease that may be genetically caused. GINA's attempted distinction on this point may be the subject of future court decisions.

Interestingly, GINA also specifically provides that genetic information under the Act includes "genetic information of any fetus" carried by a pregnant woman, as well as any "genetic information of any embryo" legally held by virtue of participation in assisted reproductive technology.

Among other things, GINA expands the scope of Title VII of the Civil Rights Act of 1964, and defines discrimination on the basis of genetic predisposition (including one's family medical history) to



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fall within the scope of Title VII. GINA also expressly prohibits retaliation against any person who opposes any act or practice made unlawful by the Act, and provides individuals alleging retaliatory conduct with remedies and procedures including a mechanism for claiming damages.

However, GINA specifically excludes from a discrimination claim any allegations of "disparate impact." Instead, the Act provides that six years after the date of enactment, a Commission shall be established "to review the developing science of genetics and to make recommendations to Congress regarding whether to provide a disparate impact cause of action."

The remedies and enforcement of employment discrimination in violation of GINA are provided in Title II, Section 207. As with a typical Title VII claim, attorneys' fees and costs are recoverable by a prevailing party in the discretion of the court. However, the Act appears to limit the damages recoverable to only those provided for under 42 U.S.C. §1981a, and not those permitted under 42 U.S.C. §2000e-5(g)(1). Practically speaking, this means that there may be a prohibition against backpay awards under the Act, as well as an upper limit on all compensatory and punitive damages permitted under the Act.

Traditionally, Title VII plaintiffs successfully proving employment discrimination have been entitled to remedies such as injunctions, reinstatement, backpay, lost benefits, and attorneys' fees under 42 U.S.C. §2000e-5(g)(1). In passing the Civil Rights Act of 1991, Congress expanded the remedies available to plaintiffs proving intentional discrimination by permitting, for the first time, the recovery of compensatory damages (such as damages for future pecuniary losses, pain and suffering, and mental anguish) and punitive damages, *see Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001).

However, the compensatory and punitive damages recoverable under the Civil Rights Act of 1991 are subject to a statutory cap based upon the number of individuals employed by the employer. For instance, damages recoverable against an employer with more than 500 employees is capped at \$300,000, 42 U.S.C. §1981a(b)(3).

GINA indicates that damages are recoverable as provided for by the Civil Rights Act of 1991, including the statutory caps set forth at 42 U.S.C. §1981a(b)(3). What is less than clear is whether those limits also apply to the typical monetary relief permitted under Title VII at 42 U.S.C. §2000-5(g)(1).

In *Pollard*, the U.S. Supreme Court recognized the inapplicability of the statutory caps under 42 U.S.C. §1981a(b)(3) to the damages traditionally recoverable under Title VII (in that case, a front pay award), but GINA's express language appears to alter the application of the traditional Title VII damages provision to claims of genetic discrimination. In other words, it would appear based upon the language of the Act that the statutory caps of 42 U.S.C. §1981a apply to any damage award under GINA, and it is questionable whether backpay awards are even permitted. Again, this will likely be the worthy subject of future court decisions.

Few would question the laudatory benefits of promoting discovery of the genetic basis of illness to allow for early detection in order to take steps to reduce the likelihood that an individual will contract a particular disorder. However, some fear that GINA will have the impact warned of by Senator Colburn, an Oklahoma Republican who put a hold on the legislation last year because the bill "would benefit trial lawyers more than it would protect patients."

New York State has protected against discrimination on the basis of genetic predisposition under the New York State Human Rights Law since 1996. The addition of those protections under the Human Rights Law certainly did not result in a flood of lawsuits. Likewise, according to the National Human Genome Research Institute, 32 states have laws protecting their citizens from genetic discrimination in the workplace, but litigation in this area is infrequent.

With the advent of these additional protections under GINA, only time will tell whether the language provides fodder for additional claims of unfair treatment asserted in employment discrimination lawsuits.

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