

GINA: Much Ado About Nothing?

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Earlier this year it was reported that the EEOC had filed two lawsuits against employers, one in New York and the other in Oklahoma, for violating the Genetic Information Nondiscrimination Act (GINA) by requesting family medical information from employees. GINA, which became law over five years ago, prohibits discrimination on the basis of genetic information, and specifically makes it unlawful for an employer to discriminate, refuse to hire or discharge any employee because of the employee's genetic information.

After GINA went into effect, there was much consternation among employers and HR professionals about the potential for litigation that might be created by the statute. In the intervening five years since its passage, however, how much litigation has their actually been? The fact that the EEOC only now is beginning to focus on the statute would suggest that there has not been as much as was initially expected. But we should let the empirical data speak for itself.

There are three years of records maintained by the EEOC regarding GINA-based charges: 2010, 2011 and 2012. In 2010, there were 201 GINA charges filed. This number went up to 245 in 2011, and then to 280 in 2012. Looking at these numbers reveals two things. First, the numbers are growing – but hardly at a rapid pace. Second – and perhaps most importantly – the overall number of charges is barely a blip on the radar in the great scheme of things. To put this into perspective, consider that over the same period of time the EEOC received about 99,000 charges *annually* regarding race discrimination, 30,000 charges *annually* regarding sex discrimination, and over 20,000 charges *annually* regarding age discrimination. Stated differently, the number of GINA claims represents 0.28 percent of the number of race discrimination claims that the EEOC receives each year, 0.93 percent for sex discrimination, and 1.4 percent for age discrimination. In short, the number of GINA claims in the past three years does not reflect a wave of new litigation.

A recent survey of recorded decisions available on Westlaw underscores this point. Currently, there are only about 45 cases that even address GINA in any detail. Of those, the vast majority of cases resulted in the claims being dismissed from the complaint – typically because the plaintiff failed to plead that the defendant requested or obtained genetic information, or that the defendant discriminated against the plaintiff on the basis of such information. *See, e.g., Smith v. Donahoe*, 917 F.Supp.2d 562 (E.D. Va. 2013) (defendant's refusal to promote plaintiff's book on DNA insufficient to support GINA claim; plaintiff did not assert any facts that defendant misused his genetic information).

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The one case from the Westlaw survey that notably survived the dismissal stage was *Williamson v. Fermi National Accelerator Laboratory*, 2013 WL 5951853 (N.D. Ill. Nov. 7, 2013). In that case, the defendant required all employees to submit to a physical examination and fill out a questionnaire that included questions about their family's medical history. Significantly, the EEOC had concluded pre-suit that the defendant had discriminated against the plaintiff and a corresponding class of individuals because of their genetic information. The court subsequently denied the defendant's motion to dismiss the class claims – including those based on GINA.

What lessons can employers draw from all of this? For one thing, attempts by plaintiffs to use GINA as a means to tack on new claims for existing medical conditions otherwise covered by the ADA (allergies, diabetes, etc.) to date have been unsuccessful. This has left plaintiffs with having to allege (and prove) discrimination based on the much harder to grasp concept of *genetic information*. This likely explains the paucity of charges filed with the EEOC and the handful of reported decisions in the courts. Consequently, unless an employer expressly asks for family medical history information as in *Williamson*, conducts genetic tests or discriminates based on genetic data, GINA – at least to date – may have more bark than bite.