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IS THIS YOUR DNA? JURY AWARDS MILLIONS TO EMPLOYEES SUSPECTED OF DIRTY DEEDS

On June 22, 2015, a jury awarded two employees of a grocery warehouse \$2.2 million in what may be the first case to go to a jury under the Genetic Information Nondiscrimination Act ("GINA"). It serves as a heads-up for employers.

A CHEEK SWAB TO MATCH DNA OF THE CULPRIT

In this **case**, the employer was investigating how disgusting piles of human waste kept appearing in the warehouse near food products. In narrowing the scope of its investigation, the employer created a list of employees whose schedules indicated that they had access during the times in question. The employer then requested that those employees undergo a cheek swab test to determine if the waste came from their bodies. The two employees who brought this case were asked to submit cheek swab samples to a third party lab.

DNA LAB ANALYSIS EXONERATES THE EMPLOYEES

The lab analyzed the samples in comparison to the human waste matter collected in the warehouse. The lab conducted short tandem repeat analysis on the samples, a process which compares samples by analyzing "genetic spacers" and includes a DNA analysis. The process can be used to compare DNA from one sample to another for identification purposes but cannot be used to determine an individual's propensity for any disease or disorder. The results of the lab tests showed that neither of the two employees was responsible for the vulgar misconduct. In other words, they were exonerated.

GINA IS NOT JUST ABOUT DISEASES OR DISORDERS

They filed suit in federal court claiming that asking them for genetic information violated their rights under GINA. Before trial, the judge ruled that the employer's actions were in violation of GINA, pointing out that the law is not limited to genetic inquiries into an employee's propensity for a disease or disorder. Indeed, the law makes it illegal (with limited exceptions) for an employer to "...request, require, or purchase genetic information with respect to an employee."

After a trial on the amount of damages, the jury awarded the two employees \$2.2 million consisting of \$475,000 for emotional pain and suffering and \$1.75 million in punitive damages. While it is expected that the verdict will be reduced to \$600,000 because of statutory caps, clearly the jury was not pleased with the employer's actions.

BOTTOM LINE FOR EMPLOYERS

This case quickly debunked any thought that GINA only applies to genetic testing conducted for the purpose of discovering an employee's or applicant's propensity for disease or disorder. GINA defines terms such as "genetic information" and "genetic test" somewhat vaguely. Consequently, employers are encouraged to talk to legal counsel before asking any employee to undergo tests of this nature and to have a detailed conversation with any labs retained to conduct any testing to ascertain whether what they do is covered under GINA.

Reference: **Jack Lowe and Dennis Reynolds v. Atlas Logistics Group Retail Services, LLC.**, (N.D. Ga, 2015).

If you have any questions, please contact Bruce Bagdady at bbagdady@hallrender.com or your regular Hall Render attorney.