

EEOC's First GINA Suit Serves As Reminder of Pre-Employment Exam Pitfall

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On May 7, 2013, the U.S. Equal Employment Opportunity Commission ("EEOC") reached a milestone of sorts as it filed – and then settled – its first complaint ever alleging genetic discrimination under the Genetic Information Nondiscrimination Act of 2008 ("GINA").

GINA went into effect in 2009. Title II of GINA makes it illegal for employers to discriminate against employees or applicants based on their genetic information. GINA also restricts employers from requesting or obtaining genetic information, which includes any information about an employee or applicant's family medical history.

The EEOC filed suit in Oklahoma federal court against Fabricut Inc., one of the world's largest distributors of decorative fabrics, alleging that Fabricut violated GINA and the Americans With Disabilities Act ("ADA") by unlawfully asking a job applicant for her family medical history in a pre-employment, post-job offer medical examination, and allegedly rescinding her job offer based on the belief that she had carpal tunnel syndrome.

GINA Violation for Pre-employment Inquiries

Plaintiff, who had worked for Fabricut in a temporary position as a memo clerk, received an offer from the company for permanent employment as her temporary assignment was coming to an end. In its complaint, the EEOC maintained that Fabricut violated GINA by asking Plaintiff questions about her family medical history during a post-offer, pre-employment medical examination.

According to the EEOC, subsequent to Fabricut's job offer, the company sent Plaintiff to its contract medical examiner for a pre-employment drug test and physical. As part of the physical, Plaintiff was required to fill out a questionnaire and disclose the existence of numerous separately listed disorders in her family medical history, including heart disease, hypertension, cancer, tuberculosis, diabetes, arthritis and "mental disorders."

ADA Regarded As Violation

Plaintiff was also subjected to medical testing, from which Fabricut allegedly concluded that Plaintiff suffered from carpal tunnel syndrome. Although Plaintiff's personal physician concluded that she did not have carpal tunnel syndrome, Fabricut allegedly rescinded its job offer based on its medical examiner's conclusions. Thus, in addition to the GINA violation, the EEOC alleged that Fabricut violated the ADA's prohibition against discriminating against individuals perceived to have disabilities when it rescinded Plaintiff's employment offer based on the belief that Plaintiff had carpal tunnel syndrome.

EEOC Publicly Settles First GINA Suit

Typically, when the EEOC resolves a charge before it has filed suit, the parties sign a confidential conciliation agreement which precludes the agency from publicly disclosing the matter or settlement. By filing the complaint and consent decree simultaneously, the EEOC brought public attention to its landmark settlement of its first GINA case. In the Consent Decree, Fabricut agreed to pay \$50,000 but did not admit to violating GINA or the ADA.

Takeaways

While the EEOC charges filed alleging GINA violations have increased each year since the law's inception, the number is still extremely small relative to all other charges filed with the Agency. However, in light of the steady increase in GINA charges as well as this recent complaint filed in federal court, employers would do well to ensure that their policies and procedures are compliant with GINA guidelines.

- **GINA's Family History Prohibition Applies Pre- and Post-Employment.** This case highlights the need for employers to be diligent and remain aware of GINA when formulating pre-hire procedures and requirements. Employers should be sure they are not requesting information regarding family medical history at any time during hiring process or employment.
- **Applies to Third Party Medical Providers.** Although GINA has been in effect since 2009, many employers still do not understand that requesting family medical history, even through a third-party medical provider or examiner, violates this law.
- **Exception for Voluntary Health Risk Assessments.** Employees may be asked questions about their family medical history in a Health Risk Assessment which is conducted as part as a voluntary workplace wellness program. However, if the employee is receiving an incentive for completion of the HRA, the employer must

make clear that an employee need not answer any of the questions about family medical history in order to obtain the incentive.

- **Public Settlement of Charges Involving New and Emerging Legal Issues.**

Employers should be aware that the EEOC is far more likely to seek a public resolution of a charge if it involves a new or emerging legal issue.

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