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It’s Time to Give Your Employee Wellness Programs Check-Up to Ensure Compliance with GINA

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The U.S. Court of Appeals for the *Fifth* Circuit recently provided employers with some food for thought in considering their employee wellness programs in relation to the ***Genetic Information Nondiscrimination Act (GINA)***. In ***Ortiz v. City of San Antonio Fire Dep’t.*** (SAFD), the collective bargaining unit allowed for a mandatory wellness program for all SAFD employees. As part of SAFD’s mandatory requirements, all uniformed employees were required to submit to a “job-related medical evaluation,” which included a physical exam; blood and urine tests; and testing for vision, hearing and lung capacity. Additionally, the program required a chest X-ray every five years and a stress test, as well as a “Prostate-Specific Antigen” test for employees over 40 years old. In the event an employee was not certified to be fit for his position’s essential duties, he was placed on “alternate duty” (akin to administrative detail) or “conditional full duty.”

The plaintiff (Ortiz) first protested participation in the overall wellness program and expressed concerns over releasing his personal health information to any entity without his written consent. Eventually, he was placed on alternate duty after having failed to comply with the program. After submitting a physical from his doctor, he was released back to regular duty, only to later move back to alternate duty once it was determined that his physician had not administered the requisite stress test (and plaintiff refused to undergo such test). Approximately nine months later, the plaintiff ultimately submitted stress test results and returned to regular duty. During the time frame of his alternate duty, he filed various grievances

pertaining to the wellness program, and then filed an EEOC charge alleging that his placements on alternate duty were unlawful discrimination and retaliation under GINA and Title VII. He subsequently filed suit on such claims, and SAFD obtained summary judgment from the district court, which plaintiff appealed.

Relying on the statutory definitions of "genetic information" and "genetic tests" under GINA, the Fifth Circuit clarified that information covered by the act includes "genetic tests" of the employee or his/her family members and information pertaining to "the manifestation of a disease or disorder in family members of such individual." S*ee, e.g.*, 42 U.S.C. § 2000ff(4)(A) and 29 C.F.R. § 1635.3(c). The court further pointed to the definition of a "genetic test" (42 U.S.C. § 2000FF(7)(A)-(B)) as being "an analysis of human DNA, RNA, chromosomes, proteins or metabolites, ***that detects genotypes, mutations, or chromosomal changes***" (emphasis added) while excluding general medical tests used to test blood counts, cholesterol and liver function. With these definitions in mind, the court held that "[A]n employer does not violate GINA through 'the use, acquisition, or disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition of any employee or member, including a manifested disease, disorder, or pathological condition that has or may have a genetic basis.'"

Under this framework for analysis, the court determined the types of information opposed by the plaintiff did not run afoul of GINA and the plaintiff's argument ran contrary to the statutory distinction between "medical information" versus "genetic information." Accordingly, the dismissal of plaintiff's GINA discrimination claim at the district court level was affirmed. Likewise, as to the GINA retaliation claim, the district court's holdings were again affirmed, with the Fifth Circuit agreeing that the majority of the acts complained of did not constitute protected activity under GINA because the plaintiff had not mentioned GINA or "genetic information." As to the EEOC complaint filed by the plaintiff for alleged discrimination on the basis of genetic information, the court found this to be protected activity, but affirmed the district court's finding that no causal link existed in terms of timing and, further, that SAFD had offered a legitimate non-retaliatory reason for its actions — namely that plaintiff had refused to comply with a mandatory program created to ensure firefighters could perform safely and efficiently — and that there was no evidence establishing such rationale to be pretextual.

As employers begin to face more claims of discrimination and/or retaliation under GINA, and as the case-law continues to develop on GINA issues, this case serves as an important reminder to employers to periodically give their wellness programs a "check-up" to ensure they are making only lawful inquiries and that they don't seek to obtain "genetic information" prohibited under GINA.