

Insights, News & Events

## THE CASE OF GINA AND THE “DEVIOUS DEFECATOR”

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In a case dubbed “the mystery of the devious defecator” by a Georgia federal district judge, an Atlanta jury recently awarded a \$2.2 million verdict against a company that requested DNA samples from two workers in an attempt to identify who had been leaving feces around the workplace.

While the facts of *Lowe v. Atlas Logistics Group* are bizarre, this case of first impression serves as a timely reminder to healthcare employers about the broad reach of genetic discrimination law, specifically with respect to acquiring genetic information from employees.

### **An Unhealthy Prank**

Atlas Logistics provides shipping and storage services for the grocery industry. In 2012, an employee of Atlas began “habitually defecating in one of its warehouses” where food products were stored, destroying some products and causing obvious health concerns. To identify the perpetrator, Atlas decided to obtain genetic samples from two warehouse workers the company suspected to be behind the prank.

The company asked the two workers to consent to cheek swabs, and then retained a forensics lab to see if the DNA samples matched up with the unclaimed mystery feces. There was no match. Despite being exonerated by the lab results, word of the testing spread around the workplace, and the two warehouse workers became the butt of humiliating jokes – including one earning the nickname “Doo-Doo Man.”

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The workers filed suit in federal district court in Georgia, alleging that Atlas' DNA testing violated the Genetic Information Nondiscrimination Act (GINA), which prohibits employers from requesting "genetic information" from its employees. Earlier this year, U.S. District Judge Amy Totenberg ruled in favor of the warehouse workers, leaving the issue of damages to be determined by a jury. Judge Totenberg rejected Atlas' argument that GINA only prohibited requests for information relating to an individual's propensity for disease, concluding that the plain language of GINA "unambiguously" covered a much broader range of testing.

In late June – marking what is said to be the first jury verdict in a GINA case – the jury awarded the two workers a whopping \$2.2 million: \$475,000 in compensatory damages and \$1.75 million in punitive damages. Making matters worse for Atlas, the true identity of the "devious defecator" remains a mystery.

### **GINA: The Basics**

Enacted in 2008, GINA generally prohibits employers from engaging in three types of conduct. First, GINA prohibits employers with 15 or more employees from discriminating against employees on the basis of their genetic information. "Genetic information" is rather broadly defined and includes information generated from genetic tests, the genetic tests of family members, and the individual's family medical history.

Second, GINA prohibits employers from requesting an employee's genetic information (such as seeking DNA samples to identify a devious workplace defecator), subject to certain exceptions. Finally, GINA prohibits employers from retaliating against an employee who has opposed a practice made unlawful by GINA.

Most believe that GINA was enacted to prevent employers from relying on genetic information to screen out potentially unhealthy employees in an effort to lower surging healthcare costs. While such practices were potentially already barred by the Americans with Disabilities Act or similar state laws, GINA ensures that the practices are clearly prohibited.

### **Takeaway**

This recent case serves as an important reminder of GINA's protections, in addition to providing insight to the harsh consequences for its violations. Regardless of an employer's

motives (e.g., to detect employee wrongdoing in the interest of health and safety), and even if the employer does not act on the information, it is unlawful to request an employee's genetic information or to require an employee to submit to genetic testing.

But remember that GINA provides a "safe harbor" to protect employers when an employer receives genetic information in response to a *lawful* request for health-related information. Specifically, when you request medical information, you must warn the provider not to provide genetic information. When you make such a warning, the "safe harbor" provision provides that any receipt of genetic information in response to such a request will be deemed inadvertent and not in violation of GINA.

To be safe, always include this specific warning any time that you request health-related information from a healthcare provider or an employee.

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