

## GENETIC TESTING IN THE WORKPLACE: THE EMPLOYER'S COIN TOSS

*A toss of the coin by the modern-day employer reveals two options regarding genetic testing in the workplace. The employer may choose to take advantage of increasingly precise, available, and affordable genetic testing in order to ascertain the genetic characteristics – and deficiencies – of its employees. This outcome exposes the employer to a vast array of potential litigation and liability relating to the Americans with Disabilities Act, the Fourth Amendment, Title VII of the Civil Rights Act, and state legislation designed to protect genetic privacy. Alternatively, the employer may neglect to indulge in this trend of genetic testing and may face liability for employer negligence, violations of federal legislation such as OSHA regulations, and increased costs associated with insuring the health of genetically endangered employees. In the rapidly developing universe of genetic intelligence, the employer is faced with a staggering dilemma.*

### **The Most Recent Development: An Overview**

#### *Equal Employment Opportunity Commission v. Burlington Northern Santa Fe Railway*

On May 6, 2002, the Equal Employment Opportunity Commission (“EEOC”) settled its case against Burlington Northern Santa Fe Railway (“Burlington”). Thirty-six Burlington employees walked away with \$2.2 million.<sup>1</sup> What did Burlington do wrong?

“Burlington admitted no wrongdoing and there has been no determination that what it did was illegal. What it did according to Burlington was fairly benign,” said Hunter Hughes, mediator of the settlement proceedings.

Then why did the case settle before trial? In the EEOC’s first case challenging genetic testing of employees, the defendant railway company admitted to conducting undisclosed genetic testing on its employees after the workers complained of carpal tunnel syndrome (“CTS”) stemming from work-related activities.<sup>2</sup> It hoped to use a pilot DNA test to confirm the existence of the condition in conjunction with a comprehensive medical exam.<sup>3</sup> Undoubtedly, Burlington felt compelled to react to its employees’ complaints or risk accusations of employer negligence and failure to comply with federal safety regulations, to name a few potentially-devastating outcomes. How far was it required to proceed in its investigation of the employees’ grievances?

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<sup>1</sup> EEOC v. Burlington Northern Santa Fe Railway Co., No. 02-C-0456 (E.D. Wis. 2002).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

If a new genetic test was available to test for the presence of CTS, should the railway have employed such an innovative device? What would have been the outcome if it had not?

### *The Significance of the Burlington Case*

The *Burlington* case was decided at a crucial moment in time. In the summer of 2002, Senator Tom Daschle and several other Democratic Senators plan to co-sponsor a bill about genetic testing and discrimination. The bill, entitled the Genetic Nondiscrimination in Health Insurance and Employment Act,<sup>4</sup> would prevent insurance companies from using genetic information to deny medical coverage or boost premiums and would bar employers from using such information in hiring, promotion, or salary decisions. Additionally, the bill would allow victims of genetic discrimination to sue for unlimited, uncapped damage amounts from their employers or insurers.<sup>5</sup> Opposition from Republican leaders, as well as employer organizations and coalitions such as the Health Insurance Association of America, threatens the passage of such legislation.

A careful balance of competing interests is necessary before such a bill is adopted into law. The politically popular stance is one that readily protects privacy interests and is openly suspicious of the potential evils of genetic testing. Former President Clinton issued an executive order in February 2000 banning the use of predictive genetic information against federal employees;<sup>6</sup> current President Bush has similarly signaled his support for genetic privacy legislation, and, as the former governor of Texas, signed a genetic privacy bill.<sup>7</sup> Americans want to be assured that their genetic compositions are being protected by lawmakers, but what of the employers who face increasing pressure to make use of readily-available genetic tests? Indeed, employers are caught between a rock and a hard place, with no clear-cut federal legislation or case precedent to guide their actions. The choice to use or refrain from using genetic testing in the workplace is riddled with risky consequences.

### **A Breakdown of Current Laws Surrounding Genetic Testing**

There are several avenues of recourse available to an employee who believes his or her rights have been violated by the use of genetic testing in the workplace:

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<sup>4</sup> 2001 S. 318; 107 S. 318.

<sup>5</sup> *Id.*

<sup>6</sup> Executive Order 13145 “To Prohibit Discrimination in Federal Employment Based on Genetic Information,” February 8, 2000.

<sup>7</sup> See S.B. 11, 77th Leg., Reg. Sess. (Tex. 2001).

- The Americans with Disabilities Act (“ADA”)<sup>8</sup>
- The Fourth Amendment’s constitutional prohibition on illegal searches and seizures<sup>9</sup>
- Title VII of the Civil Rights Act of 1964<sup>10</sup>
- Individual state legislation prohibiting discrimination in the workplace based on the results of genetic tests<sup>11</sup>

The Americans with Disabilities Act of 1990, which expanded the Civil Rights Act of 1964, protects individuals with disabilities from discrimination.<sup>12</sup> The ADA is considered the most significant piece of federal legislation pertaining to employer-based genetic discrimination; however, it does not explicitly or completely address genetic testing. A person is protected by the ADA only if he is disabled.<sup>13</sup> The ADA defines “disability” as “(A) a physical or mental impairment that substantially limits one or more of the major life activities... (B) a record of such an impairment; or (C) being regarded as having such an impairment.”<sup>14</sup> Since 1995, the EEOC has been involved in an elaborate effort to classify genetically predisposed individuals as possessing an “impairment” under section C and thereby qualifying for protection under the auspices of the ADA. Its efforts have met with moderate success; though it has added a clarification of its position to its compliance manual, the ADA has not been formally amended to include such a provision.<sup>15</sup> Thus, the ADA does not prevent employers from requiring pre-placement medical exams, which may include physical exams and genetic tests, and employers are still not prevented from requiring workers to consent to general medical record release or family history including genetic information at various points in the application or employment phases.<sup>16</sup>

In the first case it has initiated involving genetic testing, the EEOC attempted to include the Burlington workers under its definition of those suffering from an “impairment” under section C. Is this feasible? The ADA explicitly protects only those employees with a proven, qualifying

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<sup>8</sup> Americans with Disabilities Act, 42 U.S.C. § 12112 (1995).

<sup>9</sup> U.S. CONST. amend. IV.

<sup>10</sup> 42 U.S.C. § 2000(e) et seq.

<sup>11</sup> *See e.g.* N.Y. Exec. Law 296(19)(a).

<sup>12</sup> 42 U.S.C. § 12112 (1995).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* § 12102(2)(A)-(C).

<sup>15</sup> Smith, Nathalie. “The Right to Genetic Privacy? Are We Unlocking the Secrets of the Human Genome Only to Risk Insurance and Employment Discrimination? 2000 Utah L. Rev. 705, 738-40 (2000).

“disability.” “Persons with mere predispositions to genetic disorders do not fall within the ADA’s definition of disability because they display no present symptoms that substantially limit a major life activity.”<sup>17</sup> The inclusion of the Burlington workers found to possess a CTS genetic disorder would seem to constitute a substantial expansion of the currently-accepted definition of disability; however, “the ADA was created to protect only those persons that are presently disabled, and interpreting it to include all persons with a potential to become disabled in the future, including those persons genetically predisposed to becoming disabled, would violate the original intent of the ADA.”<sup>18</sup> Additionally, a genetic predisposition for a disease is only an indicator that a person may become afflicted; genetic testing is by no means a dispositive predictor of an individual’s future health.<sup>19</sup> “When scientists genetically test an individual for a disease such as breast, ovarian, or prostate cancer, a positive test result only indicates a susceptibility to, and not an absolute certainty of, developing the disease.”<sup>20</sup> How should this ultimate uncertainty affect the labeling of a genetic predisposition as a “disability” or “impairment”? As the EEOC concedes, no action was taken to discriminate against the Burlington workers based on the results of the genetic test performed; none of the workers tested were found to possess the chromosome characteristic at issue.<sup>21</sup> Thus there appears to be no question of a genetic “disability” or “impairment” and hence no valid ADA claim.

Additionally, the ADA gives added protection for things required to maintain a viable business environment. Specifically, the ADA permits employers to conduct medical examinations of current employees if they are “job-related and consistent with business necessity.”<sup>22</sup> In *Burlington*, there is no opposition to the railway’s claim that it used genetic testing only as a diagnostic tool for a particular genetic trait, one which was the subject of inquiries and complaints by its employees. Thus the railway can argue that it reacted out of business necessity, employing its right to use all information necessary to make an important work-related safety evaluation. “Particularly where this use is motivated by non-discriminatory

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<sup>16</sup> *Id.*

<sup>17</sup> Steinforth, Kimberly A. “Bringing Your DNA to Work: Employers’ Use of Genetic Testing Under the Americans with Disabilities Act,” 43 Ariz. L. Rev. 965, 968-69 (2001).

<sup>18</sup> *Id.* at 969.

<sup>19</sup> Deyerle, Kristie A. “Genetic Testing in the Workplace: Employer Dream, Employee Nightmare,” 18 Comp. Lab. L. 547, Summer, 1997.

<sup>20</sup> Smith, *supra* note 9, at 726.

<sup>21</sup> Interview with Hunter Hughes, mediator of the settlement proceedings.

<sup>22</sup> 42 U.S.C. 12112(d)(4)(A) (1994); 29 C.F.R. 1630.14(c) (1997).

purposes, it should be protected, despite the limitations of the ADA, as a necessary element of conducting business.”<sup>23</sup>

The constitutionally protected right to privacy has developed and expanded from its initially narrow and constrictive “penumbra” as defined in *Griswold v. Connecticut* to encompass medical information and its confidentiality.<sup>24</sup> In *Whalen v. Roe*, the United States Supreme Court recognized a right to privacy in medical information.<sup>25</sup> In *Doe v. Attorney General of the United States*, the Ninth Circuit confirmed the privacy interest inherent in medical confidentiality by stating that “there are few matters that are quite so personal as the status of one’s health, and few matters the dissemination of which one would prefer to maintain greater control over.”<sup>26</sup> In *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, the Ninth Circuit further concluded that one who consents to a general medical examination does not waive a basic privacy right not to be tested for intimate, personal matters involving his or her health.<sup>27</sup> Specifically, while the taking of a bodily fluid sample implicates one’s privacy interests, “the ensuing chemical analysis of the samples to obtain physiological data is a further intrusion of the tested employee’s privacy interests.”<sup>28</sup>

However, the court in *Norman-Bloodsaw* dealt only with undisclosed testing for conditions unrelated to the workplace environment or job performance, stating that “there was little, if any, ‘overlap’ between what plaintiffs consented to and the testing at issue here.”<sup>29</sup> In contrast, in *Burlington* the employer tested for a specific condition that both affects and is affected by the workers’ daily employment tasks. Based on the *Norman-Bloodsaw* language, one could tentatively conclude that the employees’ expectations of privacy were lowered because the condition subject to testing had a connection to their work.<sup>30</sup> Further, the employees basically solicited the testing performed in *Burlington*. After experiencing problems with their arms, they complained to their union and to their employer, and ultimately sought attention. There is an argument that the employees’ actions constituted consent to an invasive procedure, one targeted at exploring and diagnosing conditions related to CTS (the source of their initial complaint). Whether consent to generalized medical testing also extends to genetic testing remains to be considered by a court of law.

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<sup>23</sup> Steinforth, *supra* note 11, at 969.

<sup>24</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>25</sup> *Whalen v. Roe*, 429 U.S. 589 (1977).

<sup>26</sup> *Doe v. Attorney General of the United States*, 15 F.3d 264, 267 (9th Cir. 1994).

<sup>27</sup> *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1270 (N.D. Cal. 1998).

<sup>28</sup> *Id.* (citing *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 616 (1989)).

<sup>29</sup> *Id.* at 1269-70.

<sup>30</sup> *Id.*

Under Title VII of the Civil Rights Act of 1964, the unauthorized retention of sensitive medical information on the basis of race or sex constitutes an “adverse effect” or injury.<sup>31</sup> In *Norman-Bloodsaw*, genetic tests were performed on female employees for the purpose of testing for pregnancy and on black employees for the purpose of testing for sickle cell trait, a condition present almost exclusively in the African-American population.<sup>32</sup> Genetic testing becomes a straightforward violation of Title VII when employees or applicants are singled out based on race or sex.<sup>33</sup> Burlington did not violate Title VII because the railway chose only those employees at risk for CTS based on work environment and without regard to race or sex. In fact, Title VII could be construed as a preventative measure that could be used to support the existence of genetic testing in the workplace. If companies select subjects for testing according to neutral, non-biased qualifying characteristics, as Burlington did, the provision may well serve its intended purpose of preventing racial and gender discrimination in the workplace.

Federal law does not explicitly restrict the use of genetic testing in employment. Because of a growing need for more stringent regulation, virtually every state has adopted legislation aimed at more careful management of this novel capability. There are three types of legislation that various states have elected to pass into law.<sup>34</sup> First, in the 1970s, in response to discrimination against carriers of sickle cell trait, almost every state passed laws prohibiting discrimination in employment based on genetic characteristics.<sup>35</sup> A second type of legislation passed by a significant number of states prohibits employers from requiring applicants or employees to undergo genetic testing.<sup>36</sup> The third type of legislation bans discrimination based on genetic test results or the refusal to take a genetic test, while at the same time banning discrimination based on mere genetic information, such as that which might be provided by an employee on a simple medical questionnaire.<sup>37</sup> As an example of the second type of law, in 1996 New York passed a law restricting genetic testing by disallowing the use of such testing as a condition of employment, membership or licensure.<sup>38</sup> Further, employers, employment agencies, labor organizations, and licensing agencies are prohibited from purchasing or otherwise acquiring

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<sup>31</sup> 42 U.S.C.S. § 2000(e) et seq.

<sup>32</sup> *Norman-Bloodsaw*, 135 F.3d at 1265.

<sup>33</sup> *Id.* at 1272.

<sup>34</sup> Rothstein, Mark A. “Protecting Genetic Privacy by Permitting Employer Access Only to Job-Related Employee Medical Information: Analysis of a Unique Minnesota Law,” 24 Am. J.L. and Med. 399, 1998.

<sup>35</sup> *Id.* at 402.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 402-03.

<sup>38</sup> N.Y. Exec. Law 296(19)(a)(1).

such test results.<sup>39</sup> The law has a very broad impact, as it decreases the minimum number of employees required in order to classify one as an employer to four, thereby narrowing the requirements set forth by the ADA and Title VII (each require at least fifteen employees for coverage).<sup>40</sup>

Public policy underlying such statutes is relatively clear and straightforward, with little variation among the various states. Legislators are worried about the uncertainty inherent in genetic tests, which remain relatively new and imprecise in many respects. Additionally, concern over the creation of a “genetic underclass” defined by genetic defects has prompted lawmakers to use caution when considering genetic testing in work environments. Lastly, legislators are apprehensive regarding the use of genetic tests to test for conditions unrelated to job performance. Where an employee may be at risk or places co-workers at risk, the necessity for genetic diagnostic testing may be increased and its use justified.<sup>41</sup>

Because of the traditional exception that is made for situations in which genetic testing is required in the name of workplace safety, Burlington may have been able to make a case that its employees required such testing to remain safe on the job. Even Minnesota’s law, one of the most liberal and far-reaching in terms of protecting employees’ right of privacy from genetic testing invasion, allows for immunity for those tests required to measure an individual’s ability to perform job-related functions.<sup>42</sup> The Minnesota Human Rights Act (“MHRA”) is the only state or federal law to require that all medical exams be strictly limited to those related to workplace performance ability.<sup>43</sup> Ironically, however, its progressive legislation is in direct support of the kind of test that was performed by Burlington’s medical staff. There is no evidence that the railway tested its employees for anything other than CTS, and it is admitted by both sides that there was no attempt to use this limited information for screening purposes. Some say that “the MHRA represents the most promising legislative approach for protecting the confidentiality of individual medical records and preventing employers from obtaining access to or basing employment decisions on such records.”<sup>44</sup> In sum, since Burlington did not violate the most progressive and protective state legislation, and existing state legislation is admittedly much more constrictive than the federal law, was the railway truly at fault?

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<sup>39</sup> See N.Y. Exec. Law 296(19)(a)(2).

<sup>40</sup> Wukitsch, David J. “New York’s Legal Restrictions on the Employer’s Collection and Use of an Employee’s Genetic Information,” 9 Alb. L.J. Sci. & Tech. 39, 1998.

<sup>41</sup> *Id.*

<sup>42</sup> Rothstein, *supra* note 28, at 408.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 416.

On the other side of the coin, there are several reasons why an employer should worry about not utilizing genetic testing to its utmost potential:

- Possible tort liability under theories of employer negligence, specifically with respect to third parties
- Fear that workers' compensation programs do not address genetic predispositions and thus leave the employer liable to its employees
- Mandatory federal regulatory legislation (like OSHA) requiring workplace safety
- Cost containment

Employers have a duty of good faith and due care toward their employees, most notably in the prevention of unnecessary work-related injuries. An employer in the modern age of technology and genetic savvy may be found liable for manifestations of genetic conditions of which it should have been aware. Under the tort theories of negligent hiring, retention, and entrustment, employers are held directly liable for injuries caused by the acts of their employees, whether within or outside the scope of their employment.<sup>45</sup>

According to the theory of negligent hiring, an employer may be found liable to third parties for the torts of its employee beyond the scope of employment "where it knew or had reason to know of the [employee's] particular unfitness, incompetence or dangerous attributes...and could reasonably have foreseen that such qualities created a risk of harm to other persons."<sup>46</sup> This tort claim may go directly to the quality and thoroughness of an employer's pre-employment investigation into the health and competence of job applicants.<sup>47</sup> Because an employer bears the responsibility of assessing the degree of risk that its employees pose to third parties, it has a significant, vested interest in ascertaining whether or not an employee possesses characteristics that will instill dangerous propensities in the workplace. The increasingly available and affordable nature of genetic testing is a method through which employers can more accurately and thoroughly predict the extent of liability they will incur by hiring a certain employee. For example, as genetic tests become more and more prevalent in society, an employer who refuses to utilize them will be held liable to third parties for the damages sustained

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<sup>45</sup> Seltzer, Joanne. "The Cassandra Complex: An Employer's Dilemma in the Genetic Workplace," 27 Hofstra L. Rev. 411, Winter, 1998.

<sup>46</sup> Di Cosala v. Kay, 450 A.2d 508, 516 (N.J. 1982).

<sup>47</sup> 27 Am. Jur. 2d Employment Relationship § 473 (1996).



by an employee whose genetic condition causes lapses of consciousness or incapacity.<sup>48</sup> The costs that Burlington incurred as a result of its settlement pale in comparison to the costs it may have suffered as a result of a lawsuit brought by victims of a train wreck if that accident was caused by improper laying of track due to an employee's genetically-predictable CTS condition. Employers may well have too much to lose through tort claims based on negligent hiring to justify refusing to make use of valuable genetic testing.

Negligent retention tort claims are based on the theory that an employer has a continuing duty to retain only those employees who are fit and competent.<sup>49</sup> An employer may be held liable for negligent retention if it "(1) had "reason to know of the particular unfitness, incompetence or dangerous attributes of the employee" and (2) "could reasonably have foreseen that such qualities created a risk of harm to other persons."<sup>50</sup> If an employer conducts routine genetic monitoring of employees in the workplace, it will be particularly susceptible to this tort claim once it is made aware of the employee's condition or propensity.<sup>51</sup> In *Burlington*, negligent retention is relevant in that the railway had been put on notice of its employees' questionable CTS affliction at the time the employees filed complaints. A failure to fully investigate such claims would have rendered the company vulnerable to claims of negligent retention. Tort damages may well have exceeded the amount of settlement for the railway company.

A third type of employer negligence, that of negligent entrustment, occurs "where the employer supplies an employee with a chattel knowing the employee to be likely...to use it in a manner involving unreasonable risk of physical harm to himself and others."<sup>52</sup> Individual states vary as to the level of care that must be demonstrated by the employer. A Georgia appeals court ruled that "the employer must look into all available information in order to satisfy its burden of ordinary care."<sup>53</sup> In *Burlington*, the available information included the genetic test for CTS, which had been developed and promulgated by a licensed physician. Without clear federal, state, or administrative regulations banning the use of genetic testing, the employer could be induced to make use of the genetic testing available in order to protect itself from a negligent entrustment claim. Additionally, without a full disclosure of the complainant's CTS condition, Burlington may have been liable to the employees themselves for injuries caused by job-related work.<sup>54</sup> If an employer has access to genetic tests revealing a condition that might impact an employee's work-

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<sup>48</sup> Seltzer, *supra* note 39, at 462.

<sup>49</sup> 27 Am. Jur.2d Employment Relationship 476 (1996).

<sup>50</sup> *Favorito v. Pannell*, 27 F.3d 716, 719 (1st Cir. 1994) (quoting *Di Cosala*, 450 A.2d at 516).

<sup>51</sup> Seltzer, *supra* note 39, at 463.

<sup>52</sup> 27 Am. Jur.2d Employment Relationships 477 (1996).

<sup>53</sup> *Cherry v. Kelly Services, Inc.*, 319 S.E.2d 463, 464 (Ga. Ct. App. 1984).

related abilities and overall well-being, it might be found negligent for failing to exercise its ordinary duty of care by not performing and acting upon the test results.<sup>55</sup>

In these types of employer negligence cases, third parties are the intended beneficiaries, as employees are normally precluded from filing tort claims due to the principles embodied in state workers' compensation programs. Currently, workers compensation guidelines contain no provisions that deal explicitly with genetic testing.<sup>56</sup> Whether or not genetic tests will be incorporated into these guidelines has yet to be determined. Permitting the disqualification from workers' compensation of individuals at genetically increased risk of occupational disease would violate important public policies; for example, it would eliminate employers' incentives to clean up the workplace and replace harmful production materials and processes with safer and healthier ones, and it would treat genetically at-risk employees less favorably than other employees with occupational disease in direct violation of the aims of many states to reduce or eliminate genetic discrimination.<sup>57</sup> However, genetically predisposed individuals are neither included nor disqualified under current state workers' compensation programs; whether they are free to sue their employer for its failure to implement genetic testing under any of the theories of employer negligence remains to be seen.

By virtue of its fiduciary position, an employer is charged with responsibility for the safety of its employees. The Occupational Safety and Health Act of 1970 (OSHA) was passed into law with the intent to reduce risk of injury in the workplace.<sup>58</sup> OSHA invokes a long history of employer-conducted medical examinations, specifically requiring biological monitoring of employees through "periodic analysis of body fluids, tissues and excreta in order to measure the impact of the body's exposure to chemical agents and to evaluate the health risks these chemicals pose."<sup>59</sup> Genetic testing may be used to warn people with particular genetic dispositions to avoid certain jobs that may trigger an adverse condition; because of such precautionary abilities, it is likely that, for the purpose of protection of employees, OSHA will require the most precise testing available in order to further ensure the safety of workers.<sup>60</sup> In particular, OSHA is concerned with regulating employee well-being with respect to cancer-causing agents. In fact,

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<sup>54</sup> Casebolt v. Cowan, 829 P.2d 352 (Colo. 1992).

<sup>55</sup> Seltzer, *supra* note 39, at 464.

<sup>56</sup> Rothstein, Mark A. "Genetics and the Work Force of the Next Hundred Years," 2000 Colum. Bus. L. Rev. 371, 2000.

<sup>57</sup> *Id.* at 401-02.

<sup>58</sup> 29 U.S.C. § 651 et seq. (1970).

<sup>59</sup> 29 U.S.C. § 655(c)(7) (1994)

<sup>60</sup> Andrews, Lori B. and Ami S. Jaeger, "Confidentiality of Genetic Information in the Workplace," 17 Am. J.L. & Med. 75, 76 (1991).

one section of OSHA provides that “before an employee is assigned to enter a regulated area, a preassignment physical examination by a physician shall be provided. The examination shall include the personal history of the employee, family and occupational background, including genetic and environmental factors.”<sup>61</sup> Further, because the ADA does not protect workers from post-employment requirements or requests to provide genetic information, the employer can follow these OSHA requirements without violating the ADA.<sup>62</sup> In effect, the regulations promulgated by OSHA “seem to allow for the implementation of a company-wide genetic monitoring or screening program to improve employee health or safety.”<sup>63</sup> Therefore, existing federal safety regulations and developing case law place upon the employer the burden of responsibility for the well-being of his employees as well as the public. When genetic testing offers a more certain method of assuring such safeguarding and is accompanied by federal statutory encouragement such as OSHA, the employer may be compelled to make full use of it.

Employers have an interest in hiring and retaining healthy, productive employees. Unhealthy workers can cost employers money through absenteeism, insurance costs, and the retraining required to replace those who ultimately leave the workplace. Most notably among these incentives to implement genetic testing in the workplace is the cost of health insurance, which continues to rise by twenty percent each year.<sup>64</sup> As costs associated with retention of a sick employee (or one that is genetically predisposed to become sick) rise and the cost of genetic tests falls, employers will be further compelled to use such devices to eliminate high insurance premiums associated with those who possess genetic predispositions to prolonged, costly afflictions. Additionally, due to the increasing costs of health insurance coverage as well as to the Employee Retirement Income Security Act of 1974 (“ERISA”), employers are increasingly electing to self-insure.<sup>65</sup> Those who do self-insure are excluded from high premiums as well as from all types of state insurance regulations, including state legislation that prohibits genetic discrimination.<sup>66</sup>

A recent amendment to ERISA, the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), was intended to prevent even self-insured employers from establishing

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<sup>61</sup> 29 C.F.R. 1910.1003(g)(1)(i) (1997); *see also* Richard Severo, “Federal Mandate for Gene Tests Disturbs U.S. Job Safety Official,” N.Y. Times, Feb. 6, 1980, at A1.

<sup>62</sup> Wukitsch, *supra* note 34, at 48; Seltzer, *supra* note 25, at 452.

<sup>63</sup> Weaver, Kirke D. “Genetic Screening and the Right Not to Know, 13 Issues L. & Med. 243, 268-68 (1997).

<sup>64</sup> O’Hara, Susan. “The Use of Genetic Testing in the Health Insurance Industry: The Creation of a “Biological Underclass,”” 22 Sw. U. L. Rev. 1211, 1223 (1993).

<sup>65</sup> 29 U.S.C.A. §§ 1001-1461 (1999).

different rules for employee health insurance eligibility based on genetic information.<sup>67</sup> However, this amendment contains numerous exceptions “that tend to deemphasize the extent of these expressed rights” and can best be summarized only as “a promising start to future legislation.”<sup>68</sup> Therefore, the increasing numbers of employers who self-insure retain the privilege of choosing who they will and will not cover for their employees.<sup>69</sup> Such incentive will create a much more volatile situation, one in which discrimination in health care insurance will predominate.

Cost containment for the employer must be a consideration in the development of clear-cut legislation to address the issue of genetic testing in the workplace. As has been demonstrated, it was likely the main consideration in Burlington’s decision to make use of genetic tests for CTS and its decision to settle the lawsuit, as any other decision may have resulted in a far greater expense to the railway.

## **Conclusion**

Burlington Northern Santa Fe Railway Co. purposefully and readily agreed to an unfavorable settlement prior to trial. Why? There exists a clear lack of federal prohibition with regard to the use of genetic testing in the workplace. Furthermore, there was an admitted non-presence of any evidence on the part of the EEOC to suggest that Burlington had used the genetic information to discriminate against its employees based on the test results or to screen for conditions unrelated to the workplace; consequently, the railway did not violate the ADA. Burlington settled to avoid the expense and publicity associated with a full-blown trial. “The fact that the case was high profile that got significant attention from the EEOC and was a very emotional matter for many of the individuals involved certainly affected the settlement process.”<sup>70</sup> Burlington, while offering no admission of liability, realized that reacting to the concerns of its employees using genetic testing had resulted in criticism and stigmatism. Heads, Burlington lost. But what was the alternative? Claims of negligence and OSHA violations, branding as a company who does not react to its employees’ conditions and concerns to the fullest extent possible. Tails, Burlington would have lost.

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<sup>66</sup> Smith, *supra* note 9, at 737 (citing Nancy E. Kass, “Insurance for the Insurers: The Use of Genetic Tests,” Hastings Center Rep. Nov.-Dec. 1992 at 6, 8.).

<sup>67</sup> Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104191, 110 Stat. 1936 (codified as amended in scattered sections of 29 U.S.C.A. and 42 U.S.C.A.).

<sup>68</sup> Smith, *supra* note 8, at 742.

<sup>69</sup> *Id.*

<sup>70</sup> Interview with Hunter Hughes, mediator of the settlement proceedings.