

**“STRIKING OUT”: THE GENETIC INFORMATION
NONDISCRIMINATION ACT OF 2008 AND TITLE II’S IMPACT ON
PROFESSIONAL SPORTS EMPLOYERS**

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The Genetic Information Nondiscrimination Act (“GINA”) is a recently enacted law that prohibits employers and insurance companies from discriminating against people based upon their genetic information. Soon after the passage of GINA, many people praised the law, but the flaws of GINA have not been as widely talked about. This Recent Development addresses a major flaw in GINA, the lack of a “direct threat” exception such as there is in the Americans with Disabilities Act. GINA is discussed in the context of professional sports, where the imperfections in GINA are most evident.

I. INTRODUCTION

Lou Gehrig is an American baseball hero.² He will always be remembered for the World Series Championships he helped the Yankees win,³ his fierce competition with legendary players Babe Ruth and Joe DiMaggio,⁴ and his famous speech in Yankee

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² Lou Gehrig: The Official Website, Biography, 1–5, <http://www.lougehrig.com/about/bio.htm> (last visited Dec. 3, 2009) (on file with the North Carolina Journal of Law & Technology). Lou Gehrig was born in New York City in 1903. He played for the New York Yankees from 1925 to 1938. He played 2,130 straight games for the Yankees and has “the 15th all time highest” lifetime batting average. *Id.*

³ *Id.* Gehrig helped the Yankees win six World Series titles. *Id.*

⁴ *Id.* at 2, 3 (“Ruth and Gehrig began to dominate the baseball headlines in 1927 in a way two players had never done before. That year Ruth hit 60 homers, breaking his old record of 59, and Gehrig clouted 47, more than anyone other than Ruth had ever hit. As late as August 10th, Gehrig had more homers than the Babe, but Ruth's closing kick was spectacular. Together they out-homered every team in baseball except one. . . . DiMaggio and Gehrig would dominate the league the way Gehrig and Ruth had, and the Yankees began a

Stadium on July 4, 1939, when he declared that he was “the luckiest man on the face of the earth.”⁵ Perhaps Lou Gehrig will be more commonly remembered for the reason he chose to retire from the Yankees⁶—his diagnosis with a genetic degenerative disease called amyotrophic lateral sclerosis (“ALS”), or more widely known as Lou Gehrig’s disease.⁷ Genetic testing was not available when Gehrig was diagnosed with ALS in 1939.⁸ However, if genetic tests were available and utilized by the Yankees, would Gehrig’s increased potential for developing ALS, a disease that seriously impairs one’s motor skills,⁹ have negatively impacted his future with the team? While it is impossible to know the answer to this question, there is a strong possibility that Gehrig would have been subject to genetic tests due to an increase in the use of genetic testing by professional sports organizations.¹⁰

four-season dynasty that included winning four World Series and losing only three games out of 19. In 1936, Gehrig led the league in home runs and runs scored. The next year DiMaggio did the same.”).

⁵ *Id.* at 5 (“New York sportswriter Paul Gallico suggested the team have a recognition day to honor Gehrig on July 4, 1939. There were more than 62,000 fans in attendance as Gehrig stood on the field at Yankee Stadium with the 1927 and 1939 Yankees. He fought back tears of overwhelming emotion and began to speak his immortal words of thanks, calling himself ‘the luckiest man on the face of the earth.’ It was one of the most poignant and emotional moments in the history of American sports, and there was not a dry eye in Yankee Stadium.”).

⁶ *Id.* at 4 (Gehrig retired in the middle of the season in 1939 after being diagnosed at the Mayo Clinic with ALS).

⁷ *Id.* (“ALS (Amyotrophic Lateral Sclerosis), also known as Lou Gehrig’s Disease, is an incurable fatal neuromuscular disease characterized by progressive muscle weakness, resulting in paralysis. The disease attacks nerve cells in the brain and spinal cord. Motor neurons, which control the movement of voluntary muscles, deteriorate and eventually die. When the motor neurons die, the brain can no longer initiate and control muscle movement. Because muscles no longer receive the messages they need in order to function, they gradually weaken and deteriorate.”).

⁸ Robert Wright, *James Watson & Francis Crick*, TIME, Mar. 29, 1999, at 172 (DNA (deoxyribonucleic acid) was not discovered until the 1950’s by two scientists, James Watson & Francis Crick).

⁹ See *supra* note 7 and accompanying text.

¹⁰ See generally Michael S. Schmidt & Alan Schwarz, *Baseball’s Use of DNA Raises Questions*, N.Y. TIMES, July 22, 2009 at A1. (discussing Major League Baseball’s use of genetic tests on potential players).

The increasing availability of genetic testing,¹¹ coupled with lowering costs of genetic tests,¹² has led to an increase in the use of testing on players by professional sports organizations for various reasons.¹³ Genetic testing has brought about an intense debate about the ethical and legal implications of employers using genetic tests within professional sports (and employers in general).¹⁴ However, genetic testing on professional sports players may become increasingly more difficult with the passage of the Genetic Information Nondiscrimination Act of 2008 (GINA) and specifically Title II.¹⁵ GINA¹⁶ is “[a]n Act [t]o prohibit discrimination on the basis of genetic information with respect to health insurance and employment.”¹⁷ Title II directly addresses employment discrimination and states that:

It shall be an unlawful employment practice for an employer to fail or refuse to hire, or discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee[.]¹⁸

¹¹ See Daniel Schlein, *New Frontiers for Genetic Privacy Law: The Genetic Information Nondiscrimination Act of 2008*, 19 GEO. MASON U. CIV. RTS. L.J. 311, 311 (2008–2009).

¹² See *id.* (“Technological advances in genetic sequencing raise the real possibility that within the next 10 years the cost of compiling an individual’s complete genome will be driven down to \$1,000 or less.”).

¹³ See generally Dan Vorhaus, *MLB Meets GINA*, GENOMICS LAW REP, July 22, 2009, <http://www.genomicslawreport.com/index.php/2009/07/22/mlb-meet-gina/> (discussing some of the different reasons MLB uses genetic tests).

¹⁴ See Schlein, *supra* note 11, at 311–12. (“This growing knowledge of humans’ genetic makeup and employers’ potential access to it have accentuated longstanding concerns about discrimination in hiring, firing, or assigning workers to specific jobs and the likelihood that employers may avoid hiring those who they believe are likely to create extra costs in the form of sick leave, resignations, or early retirements.”).

¹⁵ See Vorhaus, *supra* note 13.

¹⁶ See Genetic Information Nondiscrimination Act of 2008, 42 U.S.C § 201 (2000ff) (2006) (GINA does not include sex within its definition of “genetic information” therefore, it is possible that professional sports may test for gender under GINA.).

¹⁷ *Id.* Introduction.

¹⁸ *Id.* § 202(a)(1).

This Recent Development focuses on professional sports employers performing genetic tests on players and the problems these employers will face due to the enactment of GINA. This Recent Development will also provide possible solutions for these problems. Part II of this Recent Development addresses the use of genetic testing in professional sports and the employers' reasons for using genetic tests on players. Part III explains why the professional sports industry is distinctive from other forms of employment. Part IV provides an overview of GINA, including a brief legislative history and the motivation behind its development. Part IV also gives an overview of how employers generally use genetic testing and an explanation of Title II, the portion of GINA that directly addresses employers' responsibilities. Part V concentrates on why the absence of a "direct threat" exception within GINA will have a negative impact on professional sports.¹⁹ A direct threat exception would allow professional sports employers to perform genetic tests if there is a concern for the player's safety. For example, a professional sports employer could perform a genetic test on a player if a player is believed to have a genetic heart condition that could prove fatal if the player suffers from too much physical exertion.

II. USES OF GENETIC TESTING IN SPORTS

Within the past decade, genetic testing has become more widely available.²⁰ Recently, professional sports employers have made use of genetic tests to their advantage by performing tests on players, potential players, and their families.²¹ The most important asset to a professional athlete and his or her team is his or her

¹⁹ See The Americans with Disabilities Act, 42 U.S.C. §§ 12,111(3), 12,113(b), 12,112(b)(6) (1990).

²⁰ Schlein, *supra* note 11, at 311 (discussing how, as knowledge of genetics grows so does the availability of genetic testing) "Commercially available genetic tests are proliferating rapidly and are already available for more than 1,500 diseases in 1,254 clinical laboratories, with an estimated 1,000 more moving through clinical testing phase." *Id.*

²¹ Schmidt & Schwarz, *supra* note 10, at A1 ("[T]he Yankees voided the signing of an amateur from the Dominican Republic after a DNA test conducted by Major League Baseball's department of investigations showed that the player had misrepresented his identity.").

physical condition, which is why professional sports employers have been one of the major users of genetic tests within the employment arena.²²

Two highly publicized examples that occurred within the past five years illustrate why professional sports employers feel the need to incorporate genetic testing. The first is the story of six-foot, eleven-inch tall Eddy Curry,²³ who played with the Chicago Bulls beginning in 1998.²⁴ In early 2005, Curry began to feel chronically ill²⁵ and saw a number of cardiologists to determine if he had any heart conditions.²⁶ In addition, the Bulls wanted to test him for a genetic heart condition called hypertrophic cardiomyopathy (“HCM”).²⁷ Curry refused to have the test even though a similar condition had caused two players to drop dead on the basketball court.²⁸ The Bulls decided to trade Curry to the New York Knicks rather than go to court or incur liability for the death of one of their players.²⁹

The issue of genetic testing has more recently appeared in professional baseball. Major League Baseball (“MLB”) has admitted to genetically testing some potential players,³⁰ especially in the Dominican Republic.³¹ In 2001, “more than 300 players in the major and minor leagues were found to have falsified their

²² See generally Andrew E. Rice, *Eddy Curry and the Case for Genetic Privacy in Professional Sports*, 6 VA. SPORTS & ENT. L.J. 1 (2006). (discussing the unique conditions professional sports employers face in terms of the health of a professional sports employee-player).

²³ *Id.* at 1.

²⁴ *Id.* at 2.

²⁵ *Id.* at 2–3.

²⁶ *Id.*

²⁷ *Id.* at 3–4 (“HCM is a disease of the heart muscle that causes the heart to enlarge and weaken.”); see also Dan Vorhaus, *MLB’s Genetic Testing Program at the Plate Again*, GENOMICS LAW REP, July 28, 2009, available at <http://www.genomicslawreport.com/index.php/2009/07/28/mlbs-genetic-testing-program-at-the-plate-again/> (HCM often affects those who are abnormally tall).

²⁸ See Rice, *supra* note 22, at 3.

²⁹ *Id.* at 2–3.

³⁰ See Schmidt & Schwarz, *supra* note 10, at A1, A16.

³¹ Tresa Baldas, *Baseball’s DNA Policy May Be Called Out: New Federal Law Restricts How Employers Can Use Genetic Information; MLB, Companies Look For Loophole*, FULTON COUNTY DAILY REP., Aug. 3, 2009, at 1.

birthdates.”³² Many players claimed to be much younger than they actually were in order to have a better chance of being recruited by an MLB team.³³ As a result of identity fraud, professional baseball employers began to use genetic tests on potential players to confirm their identities.³⁴ These two examples illustrate two of the biggest problems that professional sports organizations face—maintenance of the physical condition of the athletes and misrepresentation by athletes with regard to their age. Genetic testing has helped in some way to solve these problems, particularly in protecting the health of the players.

III. WHY THE PROFESSIONAL SPORTS INDUSTRY IS DISTINCTIVE FROM OTHER FORMS OF EMPLOYMENT

In terms of employment and labor law, exceptions have been made for professional sports in certain areas.³⁵ Professional sports organizations have argued that in terms of employment law, their employers and employees confront unique circumstances that are not common to the typical American employer or employee.³⁶ There is claim of a distinction for professional sports concerning the use of genetic tests. The argument that professional sports should be distinguished in terms of genetic discrimination legislation was presented three years prior to the enactment of GINA.³⁷ The argument addressed New York State’s genetic discrimination law:

³² Schmidt & Schwarz, *supra* note 10, at A16.

³³ *Id.*

³⁴ *See id.* (Fraud was costing MLB a great deal of money, because “[i]n the eyes of baseball, there’s a huge difference between 16 and 19 years old.”); *see also* Posting of Nathaniel Grow to SPORTS LAW BLOG, *MLB Confirms Use of Genetic Testing on Latin American Prospects*, July 23, 2009, <http://sports-law.blogspot.com/search?q=Genetic+Information+Nondiscrimination+Act> (In February 2009, a 19 year old prodigy who was “signed by [the Washington Nationals] for \$1.4 million—was in reality 23-year-old Carlos David Alvarez Lugo.”) (on file with the North Carolina Journal of Law & Technology).

³⁵ *See generally* Robert D. Manfred Jr., *Labor Law and the Sports Industry*, 17 HOFSTRA LAB. & EMP. L.J. 133, 132–38 (1999) (discussing certain differences between labor law and professional sports).

³⁶ *See generally id.*

³⁷ Rice, *supra* note 22, at 16.

A specialized model to deal with genetic information might be appropriate in the professional sports context for several reasons. First, the employees are engaged in uniquely physical activities, and employers rely on employees to be in peak physical condition. Second, there are substantial amounts of money at stake, for both employees and employers. Third, the parties already largely govern themselves through collective bargaining, and a centralized Commissioner's office can exert pressure on the several employers in the league.³⁸

Also, unlike most other businesses, professional sports organizations earn a large share of its profits from super-star athletes. If an athlete dies, the image of the entire organization is tarnished and can result in a loss of profits. Therefore, professional sports organizations have a strong moral and financial interest in protecting their images.

IV. THE GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008³⁹

A. *History of GINA*

Representative Louise Slaughter (Democrat-New York) originally presented a bill to prohibit genetic discrimination to Congress in 1995.⁴⁰ However, it took thirteen years before it became law.⁴¹ The spark that ignited the idea for this bill most likely came from The Human Genome Project.⁴² The goal of the Human Genome Project was to “identify all the approximately 20,000–25,000 genes in human DNA [and] determine the sequences of the 3 billion chemical base pairs that make up human

³⁸ Rice, *supra* note 22, at 47.

³⁹ Schlein, *supra* note 11, at 318. Prior to the enactment of GINA, “[t]he accessibility, use, and disclosure of genetic information [were] governed by a variety of federal, state, and in some cases, local statutes and regulations.” *Id.*

⁴⁰ Lauren Elizabeth Nuffort, *The Genetic Information Nondiscrimination Act of 2008: Raising A Shield to Genetic Discrimination in Employment and Health Insurance*, 21 HEALTH LAWYER 1, 9 (2009).

⁴¹ *Id.* at 3 (discussing the history of GINA in depth).

⁴² See genomics.energy.gov, Human Genome Project Information, http://www.ornl.gov/sci/techresources/Human_Genome/home.shtml (last visited Nov. 10, 2008) (providing information on the Human Genome Project). See also Nuffort, *supra* note 40, at 3.

DNA.”⁴³ These goals were achieved,⁴⁴ and the discoveries produced aspirations for curing genetic diseases, but also caused concern over the possible harmful ways in which genetic information might be used.⁴⁵

One of the major concerns of the use of genetic tests, which prompted Representative Slaughter to introduce GINA, was that employers and health insurers could use the results of these tests to discriminate against people with the potential for genetic diseases.⁴⁶ Part of Representative Slaughter’s motivation⁴⁷ was that an employer would wrongly discriminate against a person who has the potential for a genetic disease, which may never manifest.⁴⁸

Slaughter’s desire to prevent discrimination against people whose genetic information showed a risk for acquiring certain genetic diseases partly manifested from the 1970’s cases of discrimination mostly against African-Americans with the potential of developing sickle cell anemia.⁴⁹ Slaughter was also concerned that “[d]espite the fact that these [genetic] tests are potentially life-saving, many Americans have not taken advantage of this technology because they fear discrimination by insurance companies and their employers.”⁵⁰ Opponents of the bill, such as the U.S. Chamber of Commerce and America’s Health Insurance Plans, argued that there was insufficient evidence of genetic

⁴³ Nuffort, *supra* note 40, at 3.

⁴⁴ *Id.* at 4. See also *supra* note 42 (providing information on genes and genetic tests).

⁴⁵ Nuffort, *supra* note 40, at 4. (“[T]he presence of a specific genetic variation may indicate that a person is predisposed to disease but it does not guarantee that the person will manifest the disease”).

⁴⁶ 153 CONG. REC. E120 (daily ed. Jan. 16, 2007) (statement of Rep. Slaughter).

⁴⁷ Nuffort, *supra* note 44, and accompanying text.

⁴⁸ See *Norman-Bloodsaw v. Lawrence Berkely Lab.*, 135 F.3d 1260 (9th Cir. 1998) (claiming under Title VII that genetic tests were being performed only on African-American employees for sickle-cell disease and only on women employees for breast cancer).

⁴⁹ See *supra* note 46 (“Throughout the 1970s, many African Americans were denied jobs, educational opportunities, and insurance based on their carrier status for sickle cell anemia, despite the fact that a carrier lacked the two copies of a mutation necessary to get sick”).

⁵⁰ See *supra* note 46.

discrimination to support the enactment of a new law.⁵¹ However, Slaughter was able to persuade other members of Congress⁵² of the seriousness of genetic discrimination, and eventually the bill became law.⁵³

B. *Employers and Genetic Testing*

Before discussing the provisions for employers under Title II, it is important to understand the methods and types of genetic tests employers, including professional sports employers, use with employees. In terms of methods, employers may perform genetic screening⁵⁴ or genetic monitoring⁵⁵ on their employees. An example of genetic screening would be an employer who conducts a business requiring employees to operate heavy machinery choosing to give potential hires genetic tests to determine if there are any serious physical conditions that might interfere with the required work. Alternatively, genetic monitoring might occur when an employer who owns a chemical plant where employees work around dangerous toxins conducts genetic tests on employees every few months to observe reactions to the toxins.

⁵¹ Nuffort, *supra* note 40, at 4.

⁵² 154 CONG. REC. E771 (daily ed. April 30, 2008) (statement of Joe Baca) (“Individuals should not be penalized because of their genetic make-up; this is something no one has control of.”). *See also* 154 CONG. REC. 784 (daily ed. April 30, 2008) (statement of Hon. Sheila Jackson-Lee) (“The simple fact is without protection, people are apprehensive about seeking potentially beneficial genetic services or participating in much needed clinical research.”).

⁵³ *See* Nuffort, *supra* note 40, at 3.

⁵⁴ Schlein, *supra* note 20, at 314–15 (“Genetic testing in the workplace is usually conducted to screen or monitor employee health. Genetic screening occurs when an employer or healthcare provider uses medical examinations that are intended in whole or in part to detect genetic abnormalities or anomalies for diagnostic or therapeutic purposes, or for genetic counseling or education. . . . [S]creening is thus ‘a predictive tool to assess the likelihood that an otherwise healthy individual might develop an illness in the future.’”).

⁵⁵ *Id.* at 15 (“Genetic monitoring . . . is the periodic medical examination of employees to evaluate whether any of their genes have undergone modification through chromosomal damage or molecular mutation as the result of exposure to toxic workplace substances Genetic monitoring in the workplace ‘helps pinpoint risks for an exposed group as well as for individuals, aids in prioritizing evaluations of safety and health practices, and facilitates detection of previously unknown hazards.’”).

The genetic tests employers perform usually fall into two categories: diagnostic tests and predictive tests.⁵⁶ A diagnostic test establishes whether a person is currently suffering from a genetic condition.⁵⁷ A predictive test reveals the probability that a person might develop a genetic disease in the future.⁵⁸

C. Title II—Prohibiting Employment Discrimination on the Basis of Genetic Information

Title II of GINA specifically addresses the use of “genetic information” within employment.⁵⁹ The Act states that:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee.⁶⁰

However, there are exceptions.⁶¹ They include:

[W]here an employer inadvertently requests or requires family medical history of the employee or family member of the employee . . . health or genetic services are offered by the employer, including such services offered as part of a wellness program . . . where an employer requests or requires family medical history from the employee to comply with the certification provisions of [the Family and Medical Leave Act] . . . where the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace . . . the employee provides prior, knowing, voluntary, and written authorization.⁶²

⁵⁶ See *Nuffort, supra* note 40, at 5 (“Diagnostic tests are used to identify the presence or absence of a disease. Predictive genetic tests come in two forms: predictive-presymptomatic and predictive-predispositional. Predictive-presymptomatic genetic tests are used to predict if an individual will definitely get a disease in the future, while predictive-predispositional tests are used to predict the risk of an individual getting a disease in the future.”).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See 42 U.S.C § 2000ff (2) (2006). Title I addresses genetic discrimination and health insurance.

⁶⁰ *Id.* § 2000ff-1(a)(1).

⁶¹ *Id.* § 2000ff-1(b)(1)–(6) (listing exceptions in detail).

⁶² *Id.* See also *Nuffort, supra* note 40, at 15 (noting that an employer making a general request for medical history and receiving the genetic information through that medical history is considered an exception under GINA); Peter

Title II also contains a confidentiality provision that places a “limitation on disclosure” on any genetic information that the employer may have concerning an employee.⁶³ Unfortunately for professional sports organizations, it is not clear whether or not their usage of genetic tests falls under any of the exceptions provided for employers under GINA.

V. WHY GINA WILL HAVE A NEGATIVE IMPACT ON PROFESSIONAL SPORTS EMPLOYERS

A. *The ADA’s*⁶⁴ *Direct Threat Exception*⁶⁵ and GINA

GINA’s major flaw, especially concerning professional sports employers, is that the exceptions permitted do not tolerate testing in situations where there is a possible “direct threat”⁶⁶ to the

Conrad, *Wellness in the Work Place: Potentials and Pitfalls of Work-site Health Promotion*, 65 MILBANK Q., 255, 255 (1987) (providing extensive information on wellness programs). The article defines wellness programs as workplace programs that “consist of health education, screening, and/or intervention designed to change employees’ behavior in order to achieve better health and reduce the associated health risks. These programs range from single intervention (such as hypertension screening) to comprehensive health and fitness programs.” *Id.* See also 29 U.S.C. 2613 § 103 (1993) (“An employer may require that a request for leave . . . be supported by a certification issued by the health care provider . . .”). The Family Medical Leave Act (“FMLA”) is a law that “entitle[s] employees to take reasonable leave for medical reasons, for the birth or adoption of the child, and for the care or a child, spouse, or parent who has a serious health condition.” *Id.*

⁶³ 42 U.S.C at § 2000ff-5(b).

⁶⁴ See Mark A. Rothstein, *GINA, the ADA, and Genetic Discrimination in Employment*, 36 J.L. MED & ETHICS 837 (2008) (discussing the relationship between disability discrimination and genetic discrimination).

⁶⁵ 42 U.S.C. § 12111(3) (1990); see 42 U.S.C. § 12112(b)(6).

⁶⁶ See *Schlein*, *supra* note 20, at 366 (“Unlike the ADA, for example, GINA does not incorporate any ‘direct threat’ defense that would enable an employer to terminate or reassign an employee with a known predisposition or medical condition that might make him harmful to himself, co-worker, or members of the public.”). See also *Rice*, *supra* note 22, at 21–23 (discussing why there should be a “direct threat” exception in the genetic testing law in the state of New York).

employee/player, which is allowed in the Americans with Disability Act (“ADA”):⁶⁷

Under the ADA, employers may require “that an individual shall not pose a direct threat to the health or safety of the individual.” An employer might argue, therefore, that despite having acted on his mistaken belief that a plaintiff has an impairment that substantially limits major life activity, the employer has not violated the ADA because the plaintiff’s genetic condition still poses a direct threat to his health or safety.⁶⁸

A “direct threat” exception should be allowed under GINA. The closest provision to the “direct threat” exception under GINA is the exception allowing for genetic monitoring in toxic work environments.⁶⁹ However, there are no explicit exceptions for an employer faced with a situation similar to that of the Chicago Bulls and Eddy Curry. Under a direct threat exception, the Chicago Bulls would be allowed to test Curry since the HCM, which is exacerbated by physical activity, would be considered a direct threat to Curry’s physical well being that is significantly increased by his job duties.⁷⁰ The Chicago Bulls and an employer screening an employee for exposure to toxins are both using genetic tests to protect their employees from a possible workplace hazard. As with the ADA, if the condition, which can be detected by genetic tests, could cause an employee to die while performing in the “course of their employment,” the employer should have the opportunity to request that test, not just for the protection of the employees’ health, but also due to other practical considerations

⁶⁷ See *Rothstein, supra* note 71, at 838 (“The ADA is the principal federal law prohibiting discrimination, including employment discrimination, on the basis of disability. The ADA, however, does not prohibit *all* discrimination in employment based on disability because the ADA’s definition of ‘an individual with a disability’ is limited. The ADA uses a three-pronged definition of disability as being a physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such an impairment, or being regarded as having such an impairment.”) (emphasis in original).

⁶⁸ Rice, *supra* note 22, at 22–23.

⁶⁹ 42 U.S.C § 2000ff-1(b)(5).

⁷⁰ Rice, *supra* note 22, at 23.

such as insurance costs and tort claims.⁷¹ An excellent example that demonstrates this point is the Supreme Court's decision in *Chevron v. Echazabal*.⁷²

The Supreme Court's holding in favor of Chevron addressed why it would benefit employers, not just employees, to do testing where there was a direct threat to an employee's own health, "Moral concerns aside, [Chevron] wishes to avoid time lost to sickness: excessive turnover from medical retirement or death, litigation under state tort law, and the risk of violating Occupational Safety and Health Act of 1970."⁷³ The Court held "[a] regulation of the Equal Employment Opportunity Commission authorizes refusal to hire an individual because his performance on the job would endanger his own health, owing to a disability. The question in this case is whether the Americans with Disability Act . . . permits the regulation. We hold that it does."⁷⁴

Using a scenario similar to the facts in *Echazabal*, if a professional baseball team finds that a player may be showing symptoms of HCM and that running to bases may cause sudden death, then a professional sports team's interests are the same as Chevron's interests regarding "moral reasons" and other legitimate concerns such as the cost of losing a valuable player and workers compensation.⁷⁵ The exceptions provided in GINA exclude situations where employers might want to perform genetic tests for

⁷¹ 42 U.S.C.A. § 12182(b)(3) (defining a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services"); see also 42 U.S.C. §§ 12112(b)(6), 12113(b).

⁷² U.S. 73 (2002). In *Echazabal*, the respondent was employed by an independent contractor hired to perform work for Chevron. Echazabal desired to be employed directly by Chevron, but a medical exam showed that there was a possible problem with his liver. Chevron refused to hire Echazabal because doctors said that his liver condition "would be aggravated by continued exposure to toxins at Chevron's refinery," and as a result Echazabal brought an action against Chevron. Chevron asserted the defense that Echazabal's condition was a direct threat to his health, and Echazabal claimed that the direct threat defense could only be used in cases where there was a threat to others.

⁷³ *Id.* at 84.

⁷⁴ *Id.* at 76.

⁷⁵ *Id.* at 84.

practical and ethical reasons that are not discriminatory. One attorney critical of GINA wrote that “[t]here is clearly a good practical reason for the testing in both cases . . . but neither testing to confirm identity (or otherwise prevent fraud, as in the case of MLB) or to prevent even potentially fatal medical conditions (as in the case of Eddy Curry) is explicitly permitted under GINA.”⁷⁶

It is not apparent that a direct threat exception provides an opportunity for professional sports to abuse the privilege to perform genetic tests. The direct threat exception is not an easy escape for employers who do not want to hire a person with a disability. “[T]he standard of proof for an ADA claim under the ‘regarded as’ prong is significant and requires a showing that an employer regards the employee as substantially limited in his or her ability to work by finding the employee’s impairment to ‘foreclose generally the type of employment involved.’”⁷⁷

The reason why there are so few exceptions under GINA is not evident. Since professional sports employers began using genetic tests on employees, there have been few claims of employment discrimination brought against employers because of these genetic tests.⁷⁸ However, despite the fact that there has been very little history of actual genetic discrimination, GINA reflects a greater societal fear of what employers could potentially do with the genetic information, and not what has actually occurred.⁷⁹

⁷⁶ Dan Vorhaus, *MLB’s Genetic Testing Program at the Plate Again*, GENOMICS LAW REPORT, July 28, 2009, <http://www.genomicslawreport.com/index.php/2009/07/28/mlbs-genetic-testing-program-at-the-plate-again/> (last visited Dec. 3, 2009) (on file with North Carolina Journal of Law & Technology).

⁷⁷ Schlein, *supra* note 20, at 321 (explaining how an employer must show that an employee’s ability significantly impairs their ability to perform the job at hand).

⁷⁸ *Id.* at 315 (“Although there have so far been relatively few confirmed cases of insurance or employment discrimination based on a person’s genes, surveys and media reports consistently suggest that the public remains very wary of the possible misuse of their medical data.”).

⁷⁹ *Id.* at 315–16 (“A . . . 1999 survey of cancer genetics specialists disclosed that 68% of respondents would not inform their insurers if their own tests revealed a specific variant of colorectal, breast, or ovarian cancer, while 26% said they would use an alias when being tested.”). This survey is an example of

To subdue fears concerning genetic discrimination, GINA's structure could be modeled after the ADA in other areas. Once the offer has been made to the potential employee, the ADA allows and employer to tell the employee that the offer is conditioned on the employee's submission to a complete medical examination as long as the employer provides this same condition to every potential employee.⁸⁰ A provision in GINA that allows genetic screening if performed on all potential hires would dispel the notion of discrimination while protecting professional sports organizations and players.

B. *Protection for Employee-Players*

A strong argument for genetic testing in professional sports is that testing does not automatically lead to termination or being traded to a new professional sports team, but could expose the player to different forms of treatment that could further the career or even the life of the player. For example, when basketball player Reggie Lewis⁸¹ dropped dead on the court because he suffered from HCM, one could speculate that if genetic tests were performed in advance they could have saved Lewis' life. The effect of his death on the public and his team members was described by one sports writer who stated: "[i]f you were at the playoff game during which [Reggie] Lewis collapsed and in Boston after he died, you know the scope of the tragedy, which left his team shattered and his family dealing with unanswered questions."⁸² It is unknown why a genetic test was not performed on Lewis. If genetic testing is allowed in professional sports, other players may not have to suffer the same fate as Lewis.

how people's fear of the use of this information prevents them from giving it to the employers in the first place without any proof of how the employers would use that information.

⁸⁰ *Id.* at 322 (explaining the ADA's process of requesting medical exams from potential employees).

⁸¹ See Christine Gorman & Sam Allis, *Did Reggie Lewis Have to Die?*, TIME, Aug. 9, 1993, at 43 (detailing the circumstances surrounding the death of Reggie Lewis).

⁸² Rice, *supra* note 22, at 33 (quoting David Aldridge, *In Curry Case, Teams Have no Right to Seek DNA Tests for Players*, PHILA. INQUIRER, Oct. 9, 2005, Sports).

A legitimate counter-argument for allowing professional sports organizations to perform genetic testing is that professional sports employers may not hire athletes even if there is only a slight chance of developing some type of genetic condition in the future.⁸³ The question arises whether it would be rational, for example, for the NBA to reject the next LeBron James or for the MLB to reject the next Derek Jeter because the athlete has a slight potential for a genetic disease. In the history of genetic testing in sports, the concern has really been for athletes who were at the time showing symptoms of already manifested genetic diseases.⁸⁴ Daniel Schlein points out that “[i]t is doubtful, however, whether an individual with a chromosomal abnormality that caused no detectable or immediate alterations in biological processes would be considered ‘substantially limited,’ since genes within a particular population will vary naturally.”⁸⁵ Also, with the knowledge genetic tests provide, professional sports teams could possibly use preventive medical techniques to protect players from developing a type of genetic disorder.

Professional sports employers traditionally have not chosen to test players who are asymptomatic and instead wait until there is a legitimate concern before testing a player.⁸⁶ Discretion used by professional sports employers can reduce the chance that a professional sports employer is discriminating based upon the mere possibility that a player may have a genetic disease.⁸⁷

There are also public policy considerations that may allow genetic testing to protect players. For example, an 18 year-old young man who has recently graduated from high school with the opportunity to play professional sports is offered millions of

⁸³ *Id.* at 23. (“[F]rom a common sense perspective, it seems illogical that an individual could be directly threatened by a condition that neither presently constitutes an impairment or substantially limits a major life activity . . . [t]ests for the various genes linked to HCM cannot disclose the level of risk associated with those genes.”).

⁸⁴ See generally *id.* (providing multiple examples of genetic testing conflicts in which a player was showing symptoms of a disorder, and no examples of testing with no symptoms).

⁸⁵ Schlein, *supra* note 11, at 325.

⁸⁶ See generally Rice, *supra* note 91.

⁸⁷ See generally *id.*

dollars with the prospect of a large fan base and endorsements may not take the results of his genetic test as seriously or may want to deny the results for fear of losing his contract.

Allowing genetic tests may, in some circumstances, protect players who would risk their health to keep lucrative contracts. Players may fear that negative test results would limit their appeal to other professional sports teams, decrease endorsements, or prevent them from participating in playing a sport that they enjoy. These fears may overpower the possibility that participating in the sport with a genetic defect may result in a shorter life span.

VI. CONCLUSION

Considering the story of Lou Gehrig,⁸⁸ allowing for exceptions within GINA for genetic testing in professional sports will probably not lead to a loss of future great players or a rash of discrimination within the different sports organizations. Exceptions within GINA, such as the direct threat exception, may protect players whose genetic illness could be exacerbated by physical exertion and cause sudden death like the case of Reggie Lewis.⁸⁹ Allowing for provisions in GINA for genetic testing in professional sports can lead to a safer, economically sound, fairer professional sports world.

⁸⁸ Schmidt & Schwarz, *supra* note 10, at A16.

⁸⁹ Gorman & Allis, *supra* note 81.

