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***“Employee Briefs”***  
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## **Genes**

The Genetic Information Non Discrimination Act (GINA) prohibits employers and insurance companies from denying employment, promotions or benefits to applicants or employees whose genetic tests show that they have a predisposition to get cancer, heart ailments or other serious medical problems. The Federal Government already had a similar law which applied to federal employees, The Government Employees Rights Act of 1991. GINA requires the EEOC to issue final regulations within one year of GINA's enactment. The law defines “genetic information” as (1) an individual's own genetic tests; (2) the genetic tests of a family member; and (3) the manifestation of a disease or disorder in family members. GINA is limited to intentional acts of discrimination. Remedies and enforcement of GINA are the same as under Title VII of the Civil rights Act. The law is effective eighteen months after enactment on May 21, 2008.

## **FMLA**

The Seventh Circuit held in Townsend-Taylor v Ameritech that the employer did not violate the FMLA by terminating a married couple for absenteeism after both spouses failed to provide timely medical certifications following their absences. The couple sued the employer when the employer denied their request for retroactive application of family leave. The employer's published and posted rules specify that employees must submit medical certifications justifying FMLA leave within fifteen days of the absence. In this case the employer extended the fifteen days by another five days, but the employees failed to meet that extended deadline as well. The court found that the deadline was reasonable.

## **FLSA**

A Federal Court enjoined Sun Trust Banks, Inc. from requiring employees to waive FLSA claims in order to collect severance payments triggered by their layoff. 178 employees were scheduled to be laid off in June 2008. 21 of the 178 were members of a class that had sued the bank for alleged violations of the FLSA, consisting of alleged improper or inadequate payments for overtime hours worked. The court found that an injunction was warranted because the 21 employees would suffer irreparable damages by being forced to choose between their earned overtime pay and the receipt of severance pay.

## **Investigation**

The D.C. Circuit held in Bray v Office of Sergeant at Arms that because the complaining employee did not provide enough evidence that the employer's articulated reason for adverse employment action against the employee was pretextual, a reasonable jury would find against the employee and therefore the case may not proceed to trial. In this case, the employer promptly and fully investigated the employee's complaint that a supervisor made an obscene gesture and

concluded that the supervisor violated the employer's sexual harassment policy and demoted the supervisor. The supervisor sued. The key to the employer's being granted a motion for summary judgment and having that motion upheld by the Circuit Court was the prompt and full investigation conducted by the employer.

### **Religious Accommodation**

The District Court for the Western District of Pennsylvania held that a voluntary shift swap may not be sufficient to constitute a reasonable accommodation for employees who assert that they are unable to work on certain days because of their religious belief. EEOC v AIDI, Inc.

In this case, the employer required grocery store cashiers to work every seventh or eighth Sunday as part of a shift rotation. An employee brought a Title VII lawsuit alleging religious discrimination and retaliation. The employee argued that not only did his religion prevent him from working on Sunday, but it also prohibited him from having any other employee work on a Sunday in his place. The complaining employee was terminated because she did not "call off" in accordance with the employer's policy. The employer proved that the employee did not attend church on Sunday. The employer offered to give the employee enough hours off on the Sundays he would be scheduled to work so that the employee could attend church services. The court held that the employee and the employer had to "interact" in order to arrive at a reasonable accommodation. In this case there was no interaction.

### **Adverse Employment Action**

The Sixth Circuit held in Wills v Pennyville Rural Electric Coop that an adverse employment action under Title VII was limited to termination, demotion, failure to promote, salary decrease or material loss of benefits. Therefore, the court held, the refusal by an employer to allow an employee to leave work ten minutes prior to the end of his scheduled shift each week to attend a community meeting on time, was not an adverse employment action and no violation of Title VII occurred.

### **Lobstergate**

A jury awarded \$4 million to three police officers who reported to their superiors that several of their fellow officers went diving for lobsters on many occasions while on duty. The jury found that the three officers suffered retaliation by being called "snitches," denied promotions, having their equipment stolen and having feces wiped on their lockers. Patterson v City of Long Beach

### **Sorting and Ranking**

The EEOC issued an advisory letter specifying that sorting and ranking applicants based on the results of medical examinations is a violation of the ADA to the extent that the employer chooses to assign applicants to specific jobs based on current or past disabilities. If the employer perceives the applicant to be disabled based solely on the results of medical examinations, the ADA has been violated. The EEOC also takes the position that the results of a medical examination may not be used to decide whether or not to hire the applicant, unless the results of the medical examination demonstrate the inability of the applicant to perform the basic functions of the job, even when a reasonable accommodation is utilized or if the applicant's medical condition is a "direct threat" to safety of the applicant or other employees.

## **Working Conditions**

The Third Circuit held in United Steelworkers of America v Rohm and Haas Co. that the company need not arbitrate a grievance filed by the union who filed a grievance on behalf of four employees who were denied disability benefits. The court held that the labor contract applied “only to wages, hours and working conditions.” The court reasoned that working conditions applied only to a worker’s physical surroundings and did not cover benefit disputes.

## **Retaliation**

Since the U.S. Supreme Court decision in Burlington Northern & Santa Fe Railroad v White defined the required standard to prove retaliation, virtually every charge of discrimination will initially or subsequently in the process be amended to include a charge of retaliation. Title VII’s anti-retaliation provision makes it illegal for employers to take adverse employment actions because an employee opposed a violation of Title VII, makes a charge, testified or otherwise participated in a Title VII investigation. The following decision broadens the prohibition against retaliation to apply to non-relatives of the employee.

The Sixth Circuit in Thompson v American Stainless held that the prohibition in Title VII against retaliation also extends to a relative or another employee who was closely connected to an employee who filed a discrimination charge against an employer. In this case, the fiancé of the employee who filed the charges was terminated one month after the charges were filed. The court reasoned that an adverse employment action against a closely related fellow employee could be viewed as an attempt to intimidate other employees from filing future charges. The court cited the EEOC Compliance Manual which “expressly states that a person claiming retaliation need not be the one who conducted the protected activity.”

## **Inconsistency**

The Tenth Circuit held in Hare v Denver Merch Mart that one supervisor testifying that the reason for termination was different than the reasons given by three other supervisors was sufficient for the employee to establish possible pretext, thereby defeating a motion for summary judgment.

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