**Testimony of Michael Aitken**

Our last presenter is Mr. Michael Aitken.

MR. AITKEN: Good afternoon. My name is Mike Aitken. I'm the director of governmental affairs for the Society for Human Resource Management, and I appreciate the opportunity to provide commentary to the committee regarding genetic discrimination in the employment context.

I appear today on behalf of SHRM, which is the world's largest association devoted to human resource management. We represent more than 190,000 individual members, and our mission is to serve the need of the HR profession by providing the most essential and comprehensive resources available. SHRM believes that employment decisions should be based on an individual's qualifications and ability to perform a job, not on the basis of characteristics that have no bearing on job performance. Therefore, SHRM strongly opposed employment discrimination on the basis of an individual's genetic information.

The Society also believes, however, that any legislative remedy proposed must be carefully drafted so as not to be overly broad, thereby leading to unintended consequences with existing federal and state employment and benefits laws, as well as existing nondiscriminatory employer practices. In my commentary today I'll try to discuss the interplay with the proposed legislation that's been advanced previously may have on current federal and state laws, as well as existing nondiscriminatory employer practices.

Despite the fact that there hasn't been strong evidence to suggest widespread use of genetic information by employers, there is interest in enacting legislation that would codify current protections, as well as to fill the gaps left unaddressed by current law. Under the current federal framework, there are several statutes that could potentially -- and I stress that in particular with what Jane was talking about -- provide protection against genetic discrimination. However, these laws remain largely untested in the courts in this area.

For example, given that some genetic diseases have been found to be more prevalent in certain racial and ethnic groups, Title VII of the 1964 Civil Rights Act may serve to prohibit genetic discrimination against members of these groups. To date, at least one court case supports employment discrimination claims based on genetic information under Title VII. This was the U.S. Court of Appeals in the 9th Circuit held in Norman-Bloodsaw v. Lawrence Berkeley Laboratory that mandatory pre-employment genetic testing performed without consent may amount to an adverse impact under Title VII, since the claimants were tested for genetic markers based on their protected status.

Although it does not explicitly address the genetics issue, another federal statute that many argue offers protection against genetic discrimination is the Americans with Disabilities Act, or ADA. According to the EEOC interpretation for the 1995 guidance on disability, genetic discrimination is prohibited under the third part of the statutory definition of the term "disability," which protects individuals who are regarded as having impairments that substantially limit one or more major life activities. This prong of the ADA reflects recognition by Congress that the reactions of others to impairment or perceived impairment should be prohibited in the same way as discrimination based on actual impairment.

In fact, the EEOC in 2001 filed a genetic discrimination suit against Burlington Northern Santa Fe Railroad in its genetic testing of employees who were filing claims for work-related carpal

tunnel syndrome. Although the case was not decided on the application of the ADA to a genetic issue, the suit was quickly settled.

Should a new federal discrimination law be enacted, it is essential that it is developed to reflect the requirements and protections of existing employment statutes and that it is not in conflict with current laws or that it makes illegal existing nondiscriminatory employment practices. Let me briefly just touch on a couple of potentially challenging areas in current law, as well as employment practices where the use of medical and potentially genetic information is present in the workplace.

Under the ADA, medical records may be used to help determine if an employee has an impairment that substantially limits one or more major life activities or has a record of such a substantial limiting impairment. Moreover, medical information is often an integral part of determining a reasonable accommodation of a disabled employee. Since employers are required to determine whether or not an employee or an applicant has a disability within the meaning of the law, the employer of the applicant's medical information is often required. HR professionals and employers would face an insurmountable challenge in making proper decisions without this information.

The Family and Medical Leave Act creates a similar challenge. As you probably know, the FMLA allows an employee to take up to 12 weeks of unpaid leave for their own serious health condition or the serious health condition of a family member. In order for an employer to determine whether an employee qualifies for FMLA leave, that is whether the serious health condition is manifested by the employee him or herself, or the family member, the employer must collect relevant medical information on the nature of the condition. The medical information may very well indicate a genetic-based health condition.

For example, and many of you have probably heard of this before, an employee may request intermittent leave to assist her ailing mother who is receiving radiation treatment for a diagnosed breast cancer, a serious health condition under the Family and Medical Leave Act, and a disease with a known genetic component. In granting the leave request, the employer has just acquired genetic information. The interplay of legislation in various state worker's compensation laws will create more challenges for employers. Under state worker comp laws, medical information is necessary to file a claim and is used to determine whether or not the injury is work related.

In 1996, Congress addressed the issue of genetic information for group health insurance in the Health Insurance Portability and Accountability Act, or HIPAA. HIPAA currently permits a group health plan to disclose health information to an employer that sponsors a plan provided the information is only used for plan administrative purposes and the employer has put in place certain specified safeguards on medical privacy on its disclosures.

Employer-sponsored wellness programs is another instance where employers may uncover genetic information. Establishing a wellness program often involves a confidential individualized health risk assessment for the employee. However, in conducting the risk assessment, information may be collected that would include family history, blood test results, and other potential genetic information.

Similar to that law, an employer may also inadvertently acquire potential genetic information through the water cooler scenario. For example, it's not uncommon for colleagues to share personal information about the health status of their family members with each other in the

workplace. Proposals that include an overly broad definition of genetic information could turn that casual conversation about loved ones around the water cooler into a litany of costly litigation and workplace disputes.

In each of these instances, it's not the employer's intent to seek out the potential genetic information of the employees. Nevertheless, an employer that simply possesses this information, whether or not the employer ever acts on the information, could be exposed to future liability if legislative proposals to prohibit genetic discrimination focus on only controlling the information and not on the discriminatory intent of the employer.

As a result, SHRM makes the following recommendations to public policy decisionmakers considering crafting a legislative remedy. First, legislative proposals should differentiate between the mere possession of genetic information and the use of the information for discriminatory purposes. Any proposed statute should be directed at controlling discriminatory conduct rather than attempting to regulate the flow of information.

Second, we believe that genetic discrimination is wrong and if a company intentionally discriminates, remedies should be available. However, SHRM opposes legislation that would provide unlimited punitive and compensatory damages for victims of genetic discrimination. Many of the earlier versions of proposals that were out there did exactly that.

Third, legislative proposals should not impede employer efforts to protect the safety and well-being of their employees through workplace wellness programs and other services currently available under state and federal laws.

Fourth, duplicative efforts to guard against genetic discrimination are costly and confusing. Any legislative proposal regarding genetic discrimination should take into account the protections already available under federal and state laws.

With that, I would like to thank the committee again for the opportunity to appear before you today and will be pleased to answer any questions you may have.

MS. MASNY: Thank you, Mr. Aitken.