

**Testimony of Burton J. Fishman**  
**Fortney & Scott, LLC**  
**On behalf of the Genetic Information Nondiscrimination in Employment**  
**Coalition**  
**Subcommittee on Health, Employment, Labor and Pensions**  
**Committee on Education and Labor**  
**U.S. House of Representatives**  
**Hearing on “Protecting Workers from Genetic Discrimination”**  
**2175 Rayburn House Office Building, Washington, D.C.**  
**January 30, 2007, 10:30 a.m.**

Chairman Andrews, Ranking Member Kline, and distinguished members of the subcommittee. Thank you for this opportunity to testify on the issue of genetic discrimination in the workplace. I commend the subcommittee for holding its first hearing of the 110<sup>th</sup> Congress on this important topic. My statement will focus on the potential impact genetic nondiscrimination legislation will have on employers, employees, and their organizations.

My name is Burton Fishman. I am Of Counsel to the Washington, D.C. law firm of Fortney & Scott. By way of introduction, I served as Deputy Solicitor for National Operations at the U.S. Department of Labor under Secretary Lynn Martin, during the term of President George H. W. Bush. I was “present at the creation” of the Americans with Disabilities Act (ADA) and have remained involved in the administration and application of that law. I have written numerous books and articles on the subject and have been involved in a number of matters with respect to the statute. That background served as a natural preface to my concerns with the issue and the bill before you today.

I appear before you this morning as Counsel to the Genetic Information Nondiscrimination in Employment Coalition, the GINE Coalition, which is a business coalition of trade associations, professional organizations, individual companies and their representatives, including the Society for Human Resource Management (SHRM), the U.S. Chamber of Commerce, The National Association of Manufacturers (NAM), and the College & University Professional Association for Human Resources (CUPA-HR), to name a few. In addition to the hundreds of thousands of members of those associations and the millions of employees they employ, representatives from biotechnology, pharmaceutical research, health care, information technology, and other industries have joined in the Coalition’s deliberations. The exclusive focus of the GINE Coalition is the issue of genetic non-discrimination in employment. The Coalition has worked diligently and faithfully with all participants in the debate on the substance of federal legislation on the subject of genetic non-discrimination. Today’s testimony before the Committee is limited to that issue.<sup>1</sup>

Let me be clear from the outset: **the GINE Coalition strongly supports genetic nondiscrimination and confidentiality.** The Coalition believes that employment decisions

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<sup>1</sup> Title I of the Genetic Information Nondiscrimination Act addresses issues related to genetics and insurance coverage. Although certain individual Coalition members may have views on Title I, the Coalition’s comments are limited to Title II of the bill.

should be based on an individual's qualifications and ability to perform a job, not on characteristics that have no bearing on job performance.

## **BACKGROUND**

Members of the GINE Coalition, like the rest of society, are thrilled by and enthusiastically support the scientific research and truly spectacular breakthroughs relating to the sequencing of the human genome. Scientists in academia and industry have identified genes responsible for diseases from deafness to kidney disease to cancer. Through their efforts, we are uncovering hereditary factors in heart disease, diabetes, Parkinson's disease, bipolar illness, asthma, and other common illnesses of our society. As Dr. Francis Collins predicted a few years ago:

“Quite possibly before the end of the first decade of this new millennium, each of us may be able to learn our individual susceptibilities to common disorders, in some cases allowing the design of a program of effective individualized preventive medicine focused on lifestyle changes, diet and medical surveillance to keep us healthy. This will also enable us to focus our precious health care resources on maintaining wellness, instead of relying on expensive and often imperfect treatments for advanced disease.

“These same discoveries about genetics will lead us to predict who will respond most effectively to a particular drug therapy, and who may suffer a side effect and ought to avoid that particular drug. Furthermore, these remarkable advances will lead us to the next generation of designer drugs, focused in a much more precise way on the molecular basis of common illnesses, giving us a much more powerful set of targeted interventions to treat disease. (Testimony of Dr. Francis Collins before the Senate Health, Education, Labor and Pension Committee, July 20, 2000).”

One comes away from such predictions with an exhilarating sense of hope and optimism for the future of medical science. Every human being has one or more defective genes, or genetic “markers,” indicating a predisposition to certain abnormal traits or conditions. Given the rapid pace of genetic discoveries, in the near future, we hope, the hereditary basis for many of the profound diseases which afflict us today will not only be identified, but such knowledge will also be useful for purposes of prevention and cure. At that time, such genetic information will be vital to an individual and his/her physician, and perhaps also to the individual's employer. The information could be used for purposes of preventing exposure to conditions in the workplace that would accelerate the onset of a particular disease or, as Dr. Collins suggested, for the purpose of fashioning individualized, employer-provided wellness programs to help prevent the disease from occurring.

However, this exhilaration is compromised by a bill, such as H.R. 493, the Genetic Information Nondiscrimination Act of 2007, which characterizes certain genetic information as “forbidden” and penalizes the flow of information. Our concern is that the very progress in medical science that Dr. Collins envisions will be delayed and deterred by legislation such as has been proposed here.

We recognize that there is a *fear* that genetic information *may* be used by employers not for beneficent purposes, but as the basis for employment discrimination. In the research community, the concern is that such fears will discourage individuals from participating in

genetic research and testing. Such fears are fed by anecdotal but apocryphal stories and, of course, on the rare but highly publicized case involving Burlington Northern-Santa Fe Railroad, from nearly a decade ago.<sup>2</sup> The fact that the employees in this case were able to seek and gain redress under current law indicates that no additional legislation is required. As significant, the very fact that we hear from one of the Burlington Northern employees at this hearing underscores that what occurred there was an *unusual and unrepeated* event, one that should not serve as the basis for sweeping legislation.

Indeed, there are surveys conducted by neutral bodies such as the American Management Association which show that few employers seek or even understand genetic information. Further, in the more than 30 states which have laws prohibiting genetic discrimination, there have been *no* reported cases, even though several statutes were enacted decades ago. Thus, there is no empirical evidence of genetic discrimination in employment, unlike the mountains of evidence of discriminatory conduct which preceded passage of other nondiscrimination laws, such as Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

Somewhere in the distracting mix of irrational fears, a rational understanding of the benefits of genetic research has been lost. Somewhere, the legitimate concern for worker safety by government and by employers has been overlooked and replaced with notions of the sanctity of the genome. But the product of genetic research is not employment discrimination. The product of genetic research will be to help people – employees and employers – make health-giving choices based on shared knowledge. But viewed through the distorting prism of H.R. 493, the response to advances in genetic research is to prohibit the spread of knowledge. H.R. 493 responds to fear and ignores hope. It limits the spread of knowledge in the name of worker fear rather than finding ways of applying that knowledge in the name of worker safety. That is not how Congress has responded in the past and should not be how Congress responds today. Fear should not be the predicate for federal legislation.

This is particularly true in the still-nascent field of genetic testing. Currently, the predictive ability of genetic tests and other forms of genetic information has little practical workplace utility since, in the current state of medical and scientific diagnostics, genetic tests reveal only the possibility that a particular trait, condition, or illness may develop in the future. There is no medical certainty that such illnesses will, in fact, ever develop; neither is there any certainty as to how far in the future they would become manifest. Thus, such information is simply too remote and too speculative on which to base current employment decisions, even if an employer were interested in doing so – a conclusion utterly unsupported by actual conduct. Furthermore, because of the awe-inspiring speed at which scientific knowledge is expanding, legislation based on today's understanding will likely respond to a scientific context that has already fallen into obsolescence. In fact, many of the states which passed legislation early on, have already had to amend laws rendered obsolete by the advance of scientific knowledge.

Yet, it is the opinion of the sponsors and supporters of pending federal genetic nondiscrimination bills that such legislation is necessary. Although we do not share that view, as a coalition that stands squarely against employment discrimination, we do not oppose the pending legislation. However, we believe the proposed bill can be improved. We hope to work with Congress to craft an effective, efficiently administered, practical law that avoids unintended consequences and baseless lawsuits, and which will not impede progress in science.

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<sup>2</sup> *EEOC v. Burlington Northern Santa Fe Railroad* (N.D. Ia, settled April 18, 2001).

## THE GINE COALITION'S POSITION ON GENETIC NONDISCRIMINATION

The GINE Coalition has developed a set of core principles by which it measures genetic nondiscrimination legislation. The Genetic Information Non-Discrimination in Employment (GINE) Coalition endorses the following legislative principles:

- The members of the coalition believe that employment decisions should be made 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, we strongly oppose employment discrimination on the basis of a person's genetic makeup.
- Possession of genetic information must be differentiated from the use of this information for discriminatory purposes. Any proposed statute should be directed at controlling discriminatory conduct, rather than attempting to regulate the flow of information. As we like to say, genetic discrimination is about discrimination, not genetics.
- We believe that genetic discrimination is wrong, and if a company does intentionally discriminate, remedies should be available. However, the coalition would oppose legislation that would provide unlimited punitive and compensatory damages for victims of genetic discrimination, or that would expose employers to baseless litigation. Furthermore, no employer should be at risk of liability for inadvertently receiving information that is deemed "genetic."
- Duplicative efforts to guard against genetic discrimination are costly and confusing. Any legislative proposals regarding genetic discrimination should take into account the protections already offered by the HIPAA and its regulations, the ADA, and other federal, state, and local statutes and regulations.

In sum, the GINE Coalition's Statement of Principles embraces the letter and spirit of nondiscrimination and espouses the idea that discrimination, not information, should be the target of any such legislation. These principles are explained in more detail as follows.

Let me state again, the GINE Coalition supports the policy of nondiscrimination in employment based on an individual's genetic makeup or pre-disposition to certain diseases or conditions. Employment decisions should be based on an individual's qualifications and ability to perform a job, not on the basis of other characteristics or imputed attributes that have no bearing on job performance.

Further, being mindful of the rapid developments in genetic research and Dr. Collin's predictions regarding the beneficial use of genetic information in the near future, we believe that genetic non-discrimination legislation must be carefully and narrowly drafted. *Possession* of genetic information must be differentiated from the *use* of such information for discriminatory purposes. Legislation should be directed at controlling and punishing discriminatory conduct, rather than regulating and burdening the flow of information. The law should not trigger liability based on an employer's mere receipt of genetic information, such as through conversations concerning a relative's illness or derived from such normative behavior as visiting the sick and consoling the bereaved.

Thus, our hope today is to sound a note of caution and urge this Committee to carefully consider the impact of its actions. In light of the absence of any evidence of the use of genetic information for discriminatory purposes, there is no urgent need to act speedily.

As Congress has the time to act with deliberation and care to draft a law, I urge the subcommittee to ensure that any genetic discrimination legislation *excludes* any unnecessary and detrimental provisions which would:

1. Expose employers to punitive damages for technical violations;
2. Mandate that employers provide health coverage of all genetic disorders.
3. Create conflict among Federal laws and between Federal and state standards;
4. Fail to provide a single Federal standard;
5. Permit receipt of genetic information under the FMLA, but not with respect to the ADA, HIPAA, and other more likely sources of such information;
6. Adopt an overly broad definition of “family member;” and
7. Require employers to process genetic information and health care information in different ways.

#### Punitive Damages for Technical Violations

All parties share the goal of eliminating discrimination any in the workplace, from the hiring process to providing benefits. When a company intentionally discriminates, remedies should be available. However, the Coalition opposes legislation that that would expose employers to baseless litigation and would provide punitive and compensatory damages *absent* actual discrimination. The receipt of genetic information as part of an ADA accommodation dialogue should not create even the possibility of conduct violating any law. Assisting an employee receive health insurance coverage should never give rise to a cause of action. Given the availability of significant protections under other laws, administrative enforcement and equitably based remedies (including loss of wages and benefits) should be sufficient to allay fear of possible discrimination while mitigating the risk of a dramatic increase in baseless and inherently expensive litigation. Unfortunately, the House bill resorts to jury trials with punitive and compensatory damages for *any* violation, without distinction, which will necessarily invite additional litigation.

#### Mandate to Cover All Genetic Conditions

The driving force behind the Genetic Information Nondiscrimination Act has not been a rash of genetic discrimination cases or mishandling of genetic information, but, rather, the fear of possible discrimination which may deter employees from availing themselves of genetic tests. Therefore, the Coalition strongly believes it is in all parties interest that the bill *only* should prohibit employers from discriminating based on genetic tests, not family history that could be – and most times is – completely unrelated to tests, usually anecdotal, and often erroneous. This limitation would greatly minimize the opportunity for unintended consequences and unnecessary litigation under the bill, while also thoroughly addressing the issue which generated the bill. It would also greatly reduce the probability that the bill will conflict or complicate compliance with other laws.

As proposed, the House bill could permit plaintiffs to sue an employer for offering health benefits that do not cover treatment for a specific genetic condition. This provision would serve as a *de facto* federal mandate requiring employers to offer health plans covering *all* treatments

for *all* genetic related conditions. Members of the subcommittee may recall that President Clinton in Executive Order 13145, barring genetic discrimination against federal employees, specifically exempted the Federal government from being compelled to provide such coverage and from any resulting law suits.<sup>3</sup> We urge that this bill should provide for similar protections in the private sector and to all states and political sub-divisions.

#### Conflict Among Federal Laws and Between Federal and State Standards

Should a new federal genetic discrimination law be enacted, the Coalition believes it is essential that it be made to precisely mirror the requirements and protections of existing employment statutes and that it not conflict with current laws or disrupt existing nondiscriminatory employment practices.

As a practical consideration, there is always concern that new employment legislation will be drafted without due consideration being given to its impact on and its interaction with existing laws. The interrelationship and interaction among the ADA, FMLA and state workers' compensation law, all of which impose different legal requirements, demonstrates this problem. Because each law was passed at a different time and has a different policy objective, an employer's efforts to comply with one law can easily cause it to be in conflict with provisions of the other laws. Employment laws are most effective when compliance with one federal or state law does not contradict other laws or does not require employers to violate one law to satisfy another.

Any genetic nondiscrimination legislation must be balanced, objective, and developed with existing law in mind. Any legislative proposals regarding genetic discrimination should take into account and be in accordance with the protections already offered by the HIPAA and its regulations, the ADA, and other federal, state, and local statutes and regulations. Duplicative efforts to guard against genetic discrimination are costly, confusing, and unnecessary.

#### Lack of a Single Federal Standard

H.R. 493 would not create a single federal standard, but unfortunately would allow a patchwork of state standards to impose inconsistent requirements. Any Federal legislation should recognize the problems faced by employers as they try to comply with the numerous genetic discrimination laws already in existence. More than 30 states have enacted laws prohibiting discrimination based on genetic information. However, these laws vary widely. If Congress enacts legislation barring employment discrimination based on genetic information then it should include a safe harbor providing that employers in compliance with the federal standards cannot be liable under state or local laws banning such discrimination. There should be only one standard, *your* standard.

#### Permitting Receipt of Genetic Information

Under the proposed bill, genetic information may lawfully be acquired from *some* sources, such as FMLA medical certifications and workers' compensation forms, whereas the same information from more likely sources, such as employer-provided sick or family leave that

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<sup>3</sup> “[n]othing in this order shall be construed to . . . require specific benefits for an employee or dependent under the Federal Employees Health Benefits Program or similar program.”; 1-402(b)

is not FMLA qualifying, ADA accommodations or discussions regarding health insurance coverage under HIPAA or COBRA, is not allowed.

The interplay of the proposed legislation and the ADA and HIPAA creates significant difficulties. Employer efforts to make timely and accurate determinations regarding requests for accommodations or claims brought under current law should not be inhibited or made illicit.

Finally, many employers provide leave for illnesses not covered by the FMLA, or beyond what is mandated by the FMLA for medical and family reasons or provide similar leave but fall below the 50 employee threshold under the FMLA. In order to administer these leave programs, employers routinely require employees to provide documentation of the need for leave. Exposing employers to liabilities for requiring documentation will discourage them from offering these leave benefits.

It is imperative that legislative efforts be focused on prohibiting the discriminatory use of genetic information, not on the flow of such information. There should be a broad exception permitting the acquisition of all such information, if collected pursuant to law and retained in confidential files. The information should not be the issue; the misuse of the information should.

#### Expansive Definition of Family Member

If there must be a cause of action based on family history, then it should be of reasonable scope. The Coalition believes that any legislation should only cover instances in which information is scientifically proven to reveal patterns of inheritance of genetic conditions and is useful for medical diagnosis of the employee and his or her immediate family. Unfortunately, the House bill defines “family member” as *all* “individuals related by blood to the individual or the spouse or child.” This is merely an opportunity for plaintiffs’ attorneys to exploit and an invitation for frivolous litigation. There is no reason, in law or science, to provide statutory status for 4<sup>th</sup> cousins thrice removed, or the unknown relatives of the unknown biological father of an adopted child.

#### Inconsistent Recordkeeping and Technical Requirements

H.R. 493 would require employers to follow one set of rules for handling genetic information and a different set for handling health care information. As a result, employers would have to distinguish between genetic information and other health care information they collect in the course of providing benefits, accommodations for the disabled, and a safe workplace, in general. Indeed, in many cases, employers might be required to keep two or more sets of confidential health care files for employees – one for records with genetic information, one for records with other health care information, one for insurance matters.

Further, making the distinction between genetic information and health information is not a task for laymen. Making that distinction, as demanded by the bill, may not even be possible. HR professionals should not be compelled to decide when a health problem is genetic or not, contingent or manifest, or any other similar decisions. As significantly, such decisions, if erroneous, should not be the basis of statutory claims, jury trials, and punitive and compensatory damages.

The balance of our submission is a discussion of existing state and federal laws which have a bearing on genetic discrimination in the workplace, and specific concerns with pending

federal legislation. We believe they support the Coalition's belief that the current absence of claims of genetic discrimination in employment grows that the fact that (1) employers have no interest in acquiring such data and (2) current laws already prohibit and punish such conduct. That, in turn, supports the Coalition's belief that Congress faces no urgent need to act and can duly deliberate the implications of this or any legislation regarding genetic discrimination in the workplace.

## **CURRENT LAWS RELATING TO GENETIC NONDISCRIMINATION**

### **A. State Laws**

State legislatures have been the pioneers in enacting laws governing various aspects of genetic information in the workplace. To date, laws enacted in over 30 states address in one form or another the issue of genetic discrimination in employment. In addition, other state laws may address additional select aspects of genetic information.

The state experience is valuable for a number of reasons. Not least of these is that it shows the 'cost' of hasty legislation in a rapidly developing area. No fewer than six states have already had to revise their laws to keep pace with scientific advances. More than any other feature of state law, this promises to be model for federal legislation.

The 1948 McCarran-Ferguson Act explicitly grants insurance regulation to the states. The Employee Retirement Income Security Act of 1974 ("ERISA") preempts state laws pertaining to self-funded employee benefits plans. In 1996, the Health Insurance Portability and Accountability Act ("HIPPA") became the first federal law to directly address genetic information. The law prohibits health insurance discrimination based on any "health status-related factor," including genetic information, for group health plans. Laws governing genetic discrimination in 34 states have complemented HIPPA protections related to health insurance.

### **B. Executive Order 13145**

On February 8, 2000, President Clinton signed Executive Order 13145, which prohibits discrimination in federal employment on the basis of genetic information. The EEOC was assigned responsibility for the Executive Order and its enforcement under the Americans with Disabilities Act. On July 26, 2000, the EEOC issued a Policy Guidance explaining the definitions, Prohibitions, and exceptions in Executive Order 13145.

### **C. Title VII of the Civil Rights Act of 1964**

Title VII of the 1964 Civil Rights Act may provide some protection against genetic discrimination where such discrimination may have "disparate impact" based on race, sex, religion or national origin, e.g., sickle cell anemia (African-Americans), Tay Sachs (Ashkenazi Jews).

### **D. Genetic Information and the Americans with Disabilities Act**

State and federal statutes prohibiting disability discrimination in employment are the most likely source of genetic information protections. The ADA protects individuals with one or more physical or mental impairments that substantially limits the individual in performing a major life activity; an individual with a record of such impairment; or an individual who is



“regarded as” having such an impairment. It is clear that the ADA covers individuals who have a genetically-related disability once it is manifest and substantially limits a major life activity. Also, the ADA covers individuals with a prior record of a genetically-related disability that is manifest. However, the courts have not yet determined definitively whether the ADA should be construed to cover employment discrimination on the basis of genetic information concerning diagnosed, but asymptomatic, genetic conditions which are not manifest. To this point, virtually no case law exists regarding ADA coverage of genetic discrimination in the workplace.

That being said, the EEOC has long taken the position that the Americans with Disabilities Act protects individuals with asymptomatic genetic conditions from discrimination in employment. The EEOC successfully filed against Burlington Northern-Santa Fe Railroad based on genetic testing of employees for a genetic marker related to carpal tunnel syndrome. The notoriety of that incident demonstrates that it was a unique event. It also demonstrates that current laws were able to resolve the matter completely. After swift government enforcement actions, the parties reached a settlement on the EEOC suit in April 2001, in which the railroad agreed to stop testing. As was stated before the House on July 24, 2001 by one of those improperly tested by Burlington-Northern, the EEOC’s actions were exceptional, effective, and exemplary.

Given the EEOC’s guidance on this issue, as well as their enforcement history, employers should expect EEOC enforcement actions and individual charges under the “regarded as” prong of the ADA, if they choose to make employment decisions involving individuals with genetic disorders based upon myths, fears, or stereotypes, rather upon the person’s ability to perform specific required job tasks, with or without reasonable accommodation, in a safe manner.<sup>4</sup>

## **LIMITATIONS ON GENETIC TESTING IN THE WORKPLACE**

An employer’s ability to engage in genetic testing and to use the results of such testing in making a variety of employment decisions may already be limited in a number of ways by the provisions of the Americans with Disabilities Act. 42 U.S.C. Sec. 12101, *et seq.* Genetic testing is a medical examination and the ADA contains specific provisions limiting the manner in which an employer may conduct medical examinations and inquiries.

The ADA contains specific provisions dealing with the ability of an employer to request or obtain medical information or to require medical examinations. The ADA prohibits absolutely any medical inquiries or medical examinations at the pre-offer stage of the employment application process. 42 U.S.C. Sec. 12112(d)(2)(A). Genetic screening clearly constitutes a medical inquiry or examination and, hence, the ADA would prohibit an employer, for example, from requiring all job applicants to undergo genetic screening.

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<sup>4</sup>We should recognize, however, that there may be perfectly valid and non-discriminatory reasons for an employer to consider an employee’s genetic information in order to ensure that the employee is working in an environment that would not exacerbate the employee’s genetic predisposition to an illness or other health condition. The ADA recognizes that an employer may impose the qualification standard that an employee not poses a “direct threat” to the health or safety of others in the workplace. 42 U.S.C. Sec. 12113(b). The EEOC has expanded this statutory definition to include the individual with a disability. 29 C.F.R. Sec. 1630.2(r). Protection of a worker may mean that for his or her health and the safety of others, the individual should not be assigned to a job. In *Echazabal v. Chevron*, 536 U.S. 73 (2002), the Supreme Court unanimously ruled that the EEOC’s interpretation was correct and that an employer may legitimately object to idly permitting an employee’s self-inflicted exposure to injury or worse.

Once an offer of employment has been made, the employer may condition Sec. that offer upon the successful completion of a medical examination. *Id.* at Sec. 12112(d)(3). This so-called conditional offer medical examination specifically is authorized under the ADA and the statute contains no limitations upon the scope of such an examination. Hence, the ADA, at this stage of the employment process, would not prohibit or limit the ability of an employer to engage in genetic screening. To give a conditional offer examination, however, an employer must satisfy three requirements. First, the examination must be given to all entering employees regardless of disability. *Id.* at Sec. 12112(d)(3)(A). Second, the information obtained must be collected and maintained in a confidential manner. 42 U.S.C. Sec. 12112(d)(3)(B).<sup>5</sup> Third, the statute requires that the results of any medical examination may be used only in accordance with the non-discrimination requirements of the statute. *Id.* Sec. 12112(d)(3)(C). Generally, this requirement means that an employer may revoke a conditional offer of employment only if the results of the medical examination demonstrate that the individual cannot perform the essential functions of the job with or without reasonable accommodation.

Finally, the ADA limits an employer's ability to conduct medical examinations or make medical inquiries of current employees to those circumstances where the examination or inquiry can be shown to be "job related and consistent with business necessity." 42 U.S.C. Sec. 12112(b)(4)(A). This standard has been interpreted by the EEOC as relating to an employee's present ability to perform the job. *See* 29 C.F.R. App. Sec. 1630.10 (there should be "a fit between job criteria and an applicant's (or employee's) actual ability to do the job."). Because genetic testing normally addresses what may occur in the future, not an individual's actual ability to perform specific job tasks, in most cases, it is unlikely the ADA would allow genetic testing of current employees under the "job relatedness" standard.<sup>6</sup>

The current trend of judicial decisions recognizes that non-disabled individuals may enforce the statute's restrictions on medical inquiries.<sup>7</sup> Hence, even if an individual with a genetic marker or defect is not deemed to be "disabled" within the definition of the ADA, the statute still protects the person from being required to undergo genetic testing unless the testing complies with the above requirements.

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<sup>5</sup> The ADA authorizes disclosure of medical information obtained from a conditional medical examination only in the following circumstances:

- To supervisors and managers who need to be informed about necessary restrictions on the work duties of the employee and any necessary accommodation;
  - To first aid and safety personnel; and
  - To government officials investigating compliance with the ADA.
- 42 U.S.C. Sec. 12112(d)(3)(B)(i)-(iii).

<sup>6</sup>An exception may arise where federal regulations, such as those promulgated by OSHA, would require an employer to engage in medical monitoring of employees. *See, e.g.,* 29 U.S.C. ' 655(c)(7) (providing for the monitoring of employee exposure for employee safety).

<sup>7</sup>*See Cossette v. Minnesota Power & Light Co.*, 188 F.3d 964 (8th Cir. 1999); *Griffin v. Steel Tech, Inc.*, 160 F.3d 591, 594 (10th Cir. 1998); *Fredenburg v. Contra Costa County Dept. of Health Services*, 172 F.3d 1176, 1182 (9th Cir. 1999).

## CONCLUSION

In closing, the Genetic Information Nondiscrimination in Employment Coalition believes that genetic discrimination is wrong. To reiterate, we believe 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.

The GINE Coalition believes that any federal legislation prohibiting genetic discrimination in employment should focus on controlling discriminatory conduct, not the flow of information, should conform to other federal employment discrimination laws, should create a single federal standard, should avoid duplicative administrative burdens, and should not impede the beneficent results of the remarkable research now taking place. Finally, such legislation should not be so broadly constructed as to encourage frivolous litigation. By acknowledging the principles set forth in this testimony, the subcommittee can help make this legislation more effective.

Again, I thank the subcommittee for listening to our perspective on the issue of genetic discrimination and for its invitation to testify today. The Coalition looks forward to working with you – in the future, as in the past – to make this the best possible law. I will be happy to answer any questions you may have.