# No GINA Violation for Alternate Duty Assignment after Firefighter Refused Compliance with 'Mandatory Wellness Program'

By Francis P. Alvarez, Joseph J. Lazzarotti and Katrin U. Schatz

December 9, 2015

The City of San Antonio Fire Department did not violate the Genetic Information Nondiscrimination Act (GINA) when it placed a firefighter on alternate duty after he failed to comply with a mandatory wellness program that evaluated fitness for duty, the federal appeals in New Orleans has ruled. *Ortiz v. City of San Antonio Fire Dep*'t, No. 15-50341 (5th Cir. Nov. 18, 2015).

Affirming summary judgment in favor of the Fire Department, the Court also held the Department did not retaliate against the firefighter for raising a complaint under GINA. The Fifth Circuit has jurisdiction over Louisiana, Mississippi, and Texas.

## Background

Alfred Ortiz worked as a paramedic for the Fire Department under a collective bargaining agreement covering emergency services personnel. The agreement provided for a "mandatory wellness program," which required an annual "job-related medical examination." The program was designed to promote employee health and to enable employees to perform their jobs safely and effectively. The medical examination included, among other things, a medical history, physical examination, stress test, chest x-rays, and other screenings. Employees could use their personal physician to conduct the examination. Employees who failed to participate in the examination or were not certified as fit for duty were placed on alternate duty. After 60 days, employees on alternate duty were no longer eligible for overtime.

In 2011, Ortiz informed his Fire Chief that he did not want to participate in the wellness program and did not want to release his personal health information to the Fire Department. Ortiz was placed on alternate duty. When Ortiz submitted paperwork from a physical conducted by his personal physician, the Fire Department restored Ortiz to regular duty.

However, Ortiz's physician did not conduct a stress test as part of the physical because he did not believe it was necessary. Once the Fire Department learned that Ortiz had not taken the stress test, it again placed Ortiz on alternate duty. After nine months of alternate duty, Ortiz submitted results of a stress test and was restored to regular duty.

Ortiz filed a discrimination charge with the U.S. Equal Employment Opportunity Commission alleging that his first placement on alternate duty violated GINA and that his second placement was retaliatory. The Fire Department asked the district court to dismiss Ortiz's claims. The district court granted the motion, and Ortiz appealed.

## Applicable Law

GINA prohibits employers from discriminating against employees because of an employee's "genetic information." The law also prohibits employers from requesting, requiring or purchasing genetic information of an employee, subject to a small number of limited exceptions.

Under GINA, "genetic information" means information about the "genetic tests" of an individual or his family members, and information about the manifestation of a disease or disorder in family members of such individual. Medical tests such as blood counts, cholesterol screenings, or liver function tests are not "genetic tests."

Further, employers do not violate GINA by acquiring medical information that is not genetic information about a manifested disease, disorder, or pathological condition of an employee, including a manifested disease, disorder, or pathological condition that has or may have a genetic basis.

Under one limited exception, an employer may request genetic information under a voluntary wellness

## Meet the Authors

Francis P. Alvarez

Principal
New York Metro
White Plains 914-872-6866
Email

Joseph J. Lazzarotti

Principal
Berkeley Heights 908-795-5205
Email

Katrin U. Schatz

Principal
Dallas 972-728-3266
Email

## Practices

Disability, Leave and Health Management
Employee Benefits
Privacy, Data and Cybersecurity

program if certain conditions are satisfied, including the employee providing prior, knowing, voluntary, and written authorization.

## No GINA Violation

Ortiz argued the employer violated GINA by requiring him to participate in the mandatory wellness program. The appeals court rejected this argument because Ortiz presented no evidence that the employer had requested, required, or purchased his genetic information or discriminated against him based on his genetic information. The Court suggested that Ortiz had misread GINA as forbidding *any* wellness program that was mandatory, regardless of whether it requested genetic information.

Ortiz then argued the employer had retaliated against him by placing him on alternate duty after he objected to participating in the wellness program. The Court also rejected this argument. Although Ortiz's EEOC charge could constitute protected activity under GINA, the Court said, the charge was filed after the alleged retaliatory conduct had already occurred. Furthermore, the employer gave a legitimate reason for Ortiz's alternate duty placements (i.e., his failure to take a stress test) and Ortiz failed to demonstrate the reason was pretextual.

## Lessons

The case emphasizes the distinction between medical information and genetic information under GINA. A mandatory wellness program requiring annual medical examinations, but which does not seek any form of *genetic* information, including family medical history, is allowed under GINA.

Mandatory wellness or fitness-for-duty programs, if properly designed, are permissible under GINA. Employers should tread with caution, however. Recent years have seen stepped-up EEOC enforcement of GINA's prohibition on requesting family medical history or other genetic information in employer-mandated medical examinations. Because these programs are likely to receive close scrutiny, their implementation requires careful review for compliance with both GINA and the Americans with Disabilities Act, which requires medical examinations to be job-related and consistent with business necessity.

Jackson Lewis attorneys are available to answer inquiries regarding this case and other workplace developments.