

## Do Not Seek DNA Information From Employees...

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Do not seek DNA information from employees ... even for non-discriminatory purposes. That seems to be the lesson learned from a recent federal court decision in Georgia. A food distribution company in Atlanta, Atlas Logistics, requested several employees to submit to cheek swab genetic tests when human feces deposits were repeatedly discovered in one of its warehouses. Although the offender(s) were not identified by the genetic tests, a forklift operator and a deliveryman who submitted to the testing later sued under the federal Genetic Information Nondiscrimination Act (GINA). Although neither of the plaintiffs was implicated in the feces depositing activity and neither suffered any adverse employment action, the forklift operator and the deliveryman claimed they were humiliated merely by being subjected to the testing. Judge Amy Totenberg of the U.S. District Court for the Northern District of Georgia granted summary judgment in favor of the employees. The court applied Section 202(b) of GINA, which provides that an employer may not "request, require or purchase genetic information with respect to an employee." This part of GINA – the nonacquisition provision – has actually has six very narrow exceptions but none of these exceptions applied. GINA's separate nondiscrimination provision, Section 202(a), prohibits discrimination in employment based on genetic information. Parenthetically, deposits of feces in the workplace (as a form of protest?) are not necessarily a rare phenomenon. For example, last year the offices of Region 8 of the Environmental Protection Agency (EPA) in Denver, Colorado, experienced repeated incidents of deliberate defecation on floors in hallways and bathrooms. The EPA's unsuccessful attempts to plead with its employees to stop this behavior received widespread media attention. As with Atlas Logistics, the offending person(s) were never identified. Some experts consulted by EPA opined that the feces deposits could be a prelude to more dramatic forms of workplace violence. The Atlas Logistics ruling emphasizes that the prohibitions of GINA extend beyond preventing use of genetic information to discriminate. Although GINA's preamble (Section 2) emphasizes repeatedly that the purpose of GINA is to prevent discrimination based on genetic information, the nearly absolute prohibition on acquisition of genetic information by an employer with respect to an employee under GINA's nonacquisition provision has a much further reach. Ironically, if local law enforcement agencies had asked for the genetic testing of the Atlas Logistics employees, there would have been no GINA violation.

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