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GINA and Preemployment Criminal Background Checks

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One day in the spring of 2009, the Rules Committee of The University of Akron Board of Trustees made a small but significant addition to a new “Employee Background Review Policy” that the university administration had proposed. The policy, modeled on an Ohio law requiring criminal background checks for all K–12 public school employees in Ohio, would require blanket criminal background checks for all prospective UA employees, excluding student employees.¹ The board added an additional requirement unique to standard criminal record policies: “at discretion of the University of Akron, any applicant may be asked to submit fingerprints or DNA sample for purpose of a federal criminal background check.”²

This new policy was approved by the board and enacted on August 30, 2009. As per university policy, the

rule was passed without faculty review and went largely unnoticed until adjunct instructor Matt Williams, vice president of New Faculty Majority, a national coalition advocating on behalf of part-time and adjunct faculty, resigned in protest on October 24, 2009, triggering local, national, and international news coverage. An editorial in the *Akron Beacon Journal* protested that “the swab-for-a-job plan at UA represents a unique and unwarranted intrusion into personal privacy and raises potent discrimination issues,”³ and on October 28th the American Civil Liberties Union issued a press release declaring its outrage over the idea that employers might consider themselves “entitled to our most private, personal genetic information.”⁴ On November 5, 2009, The University of Akron faculty senate—citing privacy and legal concerns, questioning the breadth of the DNA sample requirement, and emphasizing the threat it poses to the reputation of the university—passed a resolution requesting that the board of trustees reconsider the new provisions. Also on November 5, 2009, the university’s Office of General Counsel stated it would recommend that rule 3359-11-22 (B)(3) be amended to read:

Certain positions at The University of Akron, if required by law or contract, will be subject to both state of Ohio and federal criminal background checks regardless of how long the preferred candidate has resided in Ohio. The candidate may be required by the law enforcement agency to provide additional information for purposes of conducting the criminal background check.⁵

Since neither Ohio nor federal law enforcement agencies routinely screen the subjects of criminal background checks against state or federal DNA fingerprint databases, this suggestion would effectively retract the policy and make it just another story from a university famous for odd academic employment practices (like requiring department chairs to be in their offices from 8 a.m. to 5 p.m. each workday⁶).

But was the UA policy wrong on legal or ethical grounds? And if so, would backing off on the DNA sampling provision right its wrongness? The Rules Committee thought it was simply updating accepted fingerprint-

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ing practices prescribed in the Ohio law. Its view was that DNA identification would eventually eclipse fingerprinting as the standard technology for criminal background checks, because Ohio is moving toward mandatory DNA identification and sampling in the “booking” of all arrestees.⁷ At least for university personnel whose jobs give them access to valuable equipment, student living quarters, and faculty offices, some might find the practice of preemployment screening against databases of known felons and sex offenders simply prudent. And if we are going to be fair about it, they could argue, we should treat all university employees alike in this regard, rather than more heavily burdening the security and housekeeping personnel, who are disproportionately likely to be from minority groups or groups with low socioeconomic status. In retrospect, the incident at UA highlights some interesting questions about the privacy protections that employees deserve in an era of heightened anxieties about institutional security and the applicability of the protections they already enjoy to DNA-based forms of identification.

GINA and Genetic Identification

The drama in Akron was fueled by the irony that it unfolded just as the nation’s first federal legislation against genetic discrimination, the Genetic Information Nondiscrimination Act, was set to become effective.⁸ In response to growing concern over the prospect of employment or health insurance discrimination based on genetic information, GINA prohibits covered employers with fifteen or more employees from requesting, requiring, or purchasing their employees’ genetic information and from using it to make employment-related decisions.⁹ GINA became effective on November 21, 2009.

The legal restrictions under GINA definitively preclude employers from requesting DNA from potential employees. Section 202(a) of the act makes it unlawful for employers to use genetic information to refuse to hire, discharge, or otherwise discriminate against any former, current, or future employee with respect to the compensation, terms, conditions, or privileges of employment. It also prohibits employers from limiting, segregating, or classifying employees in a way that could deny them employment opportunities based on their genetic status. Section 202(b) is especially relevant to UA because it expressly provides that it is an “unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee or a family member.”¹⁰ As the Equal Employment Opportunity Commission has made clear, employers “no longer will be permitted to obtain *any* genetic information,” except for the limited reasons built into the statute.¹¹

UA has argued that it was merely seeking to conduct criminal background checks to protect its university students from criminal offenders in the same way that Ohio law requires background checks to protect vulnerable adults and children.¹² But the state laws on which UA has modeled its policy do not require the collection of DNA samples. Additional-

ly, as the U.S. Equal Employment Opportunity Commission has unequivocally stated, intent to discriminate is inconsequential:

An employer who asks for information and then acquires genetic information as a result of that request, runs in violation of GINA. There’s no requirement that an employer be acquiring information with the intent to discriminate. There’s no rule that the employer be acquiring information with the intent to even acquire genetic information. But the fact that they’re acquiring genetic information to begin with violates the rule itself.¹³

Thus, absent the applicability of a clear statutory exception, employers are prohibited from collecting DNA samples, even for criminal background checks. While GINA has one law enforcement exception, it applies narrowly to forensic laboratories and to those seeking to identify human remains for quality control to detect sample contamination.¹⁴

Some might object that this analysis fails to distinguish between the kinds of medically informative DNA-based risk assessments that employers might use to try to avoid potentially costly employees and the molecular typing of noninformative markers in the noncoding DNA that constitutes DNA identification. However, according to GINA, “The term ‘genetic information’ means, with respect to any individual, information about—(i) such individual’s genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of such individual.”¹⁵ “Genetic tests,” in turn, are defined for the purposes of the law as “an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes.”¹⁶ In light of these definitions, forensic testing by or for *employers* seems unambiguously prohibited by GINA. First, genetic testing, genetic counseling, and genetic education all qualify as genetic services under section 201(6) of GINA, and matching genetic markers for the purpose of conducting a criminal background check has already been recognized by courts as a form of genetic testing. In an Ohio paternity case, for example, the court found that the testing and comparison of DNA amounted to a genetic test within the scope of a parentage statute.¹⁷ Just as paternity testing aims to match two different DNA specimens to determine whether they came from the same family, a forensic specialist will compare the DNA obtained from an employee with the specimens stored in a criminal database to find identical and familial matches. Second, the EEOC has maintained that employment decisions based on mere knowledge that an individual has received genetic services violates GINA, “even if the covered entity is unaware of the specific nature of the genetic services received or the specific information exchanged in the course of providing them.”¹⁸

Currently, neither UA nor any other similarly situated employer may collect or request genetic information for any purpose that is not clearly allowed by GINA. Congress evidently intended for employees to enjoy vast protections under GINA: protection from discrimination as well as access to and

disclosure of personal genetic information.¹⁹ Nonetheless, the UA Rules Committee is correct that DNA identification is quickly becoming the standard within law enforcement and security contexts. How GINA should apply to law enforcement agencies acting on behalf of employers is less clear. The EEOC is currently soliciting opinion on GINA's law enforcement exceptions for its own rule-making, and it is conceivable that this could lead to more flexibility with respect to jobs for which criminal background checks are already standard practice. In assessing the merits of the UA counsel's move to shift the practice of preemployment DNA profile screening into the hands of law enforcement agencies, it will be important to identify any ethical or public policy considerations that such an interpretation will raise.

Workplace Genetic Profiling and Institutional Security: Ethical and Public Policy Issues

The discussion of workplace genetic screening and monitoring has a long history in bioethics and science policy circles, but so far its preoccupations have been worries about exclusionary preemployment screening for potentially costly employees or on-the-job monitoring for workplace genetic health hazards.²⁰ The UA case brings a new dimension to the topic: what about workplace genetic screening by law enforcement agencies to identify risks to the security of other employees, students, and other parties?

UA is an urban university with an enrollment of approximately 27,000 students, and it sees its share of crime and violence. In the spring of 2008, partly in response to the Virginia Tech shootings of 2007, two committees were formed: the University Safety Committee and the Safety Task Force. Both committees consisted of faculty, staff, and students, with representatives from the UA police, the Dean of Students' office, the Department of Human Resources, the Department of Athletics, the undergraduate and graduate student bodies, and the faculty. The Safety Task Force met weekly to review incidents that had occurred on or near campus in the previous week and to discuss ideas for how to anticipate or respond to such incidents. The mission of the University Safety Committee was to discuss policy proposals and to write reports for the administration.²¹

When the UA administration developed the proposed new policy in the fall of 2008, a draft of the proposal was discussed by the University Safety Committee. Although the proposal made no reference to genetic information or DNA sam-

pling,²² it nonetheless spurred heated discussion, particularly about the blanket nature of the criminal background check requirement, which would apply to all prospective UA employees (with the exception of student employees). Committee members disagreed, for example, over whether the requirement of criminal background checks, even if applied to all candidates, would be de facto discriminatory against certain ethnic or socioeconomic groups.²³ In addition, there were concerns about requiring *all* prospective employees to submit to a background check, regardless of job description.²⁴ Some faculty members of the University Safety Committee had strong ethical concerns about criminal background checks.²⁵

Nevertheless, the proposed policy was carried forward to the Board of Trustees and its Rules Committee.

The ACLU claims that the Rules Committee's addition to the UA policy is unprecedented among civilian U.S. employers.²⁶ The U.S. military collects DNA samples from all personnel, but it genotypes them only after individuals are identified as missing in action, in order to assist in the identification of remains.²⁷ In the United Kingdom, DNA samples are taken on a voluntary basis from police officers and genotyped, but their DNA sequence is to be held in a separate database and matched only against crime scene profiles when possible contamination is a concern.²⁸

For forensic laboratory personnel in the United States, GINA even allows this practice to be mandatory. However, in none of these cases are DNA profiles screened against criminal databases as part of security background checks.

Our system of justice allows us to balance an individual's reasonable expectation of privacy against society's interest in resolving tragic and egregious crimes, or as explained earlier, identifying soldiers lost to war.²⁹ That is why searches and seizures typically prohibited by the Fourth Amendment become reasonable and justifiable once there is probable cause to believe a person has committed a crime against society.³⁰ Some states apply this logic by collecting and genotyping DNA samples from all those arrested, despite the presumption of their innocence. But numerous advocates, including the ACLU, have argued that collecting DNA from people who are merely suspects in a case constitutes an unlawful search and seizure under the Fourth Amendment.³¹ As we move from convicted criminals to arrestees to job applicants, mandated DNA sampling raises still greater civil liberties concerns.

Numerous advocates have argued that collecting DNA from suspects in a case constitutes unlawful search and seizure. Mandated DNA sampling for job applicants raises still greater civil liberties concerns.

First, because genetic information can disclose sensitive information about an employee's health and an employee's family members, employer-based collection and management of employee DNA samples raises a host of practical security issues of its own. Of course, collecting, genotyping, and screening DNA samples from prospective employees would have to be conducted within the framework of protections afforded the practice in other law enforcement settings. The employer would need a properly certified and monitored laboratory, specially trained personnel, and appropriate policies for managing the material it collects. If employers produce DNA profiles from the samples for immediate preemployment screening against criminal databases, they could destroy the physical DNA samples and the sensitive information contained in their coding regions but would expose more people to risks of false positive matches without just cause. If they follow the military's policy of genotyping samples only when the forensic need arises, they would need a secure repository for sample storage, and they would face the challenge of holding in trust all the sensitive personal information that whole DNA samples might contain about their employees.

The burden of running a DNA identification program is one good reason for turning criminal background checks over to law enforcement agencies and allowing *them* to collect the DNA from prospective employees and to screen them against criminal databases. But requiring DNA collection by law enforcement agencies as part of an employee background check raises other issues as well. Individuals whose DNA remains on file with a government agency, even after acquittal, remain linked to a DNA database of criminal offenders and are subject to involuntary state dragnets. Some databases search DNA profiles on a weekly basis to look for a "hit." All employees who live in states that retain job applicants' DNA would therefore be subject to constant surveillance in cases where the sampled DNA is compared regularly against DNA collected from crime scenes. These applicants would risk being linked to and stigmatized for crimes before any trial or valid evaluation of the available evidence has begun.³² Partly for this reason, there is much debate about the constitutionality of retaining innocent individuals' DNA in a forensic database.³³ Arguably, for job applicants who are not yet suspected of a crime, each comparison of one's sample or DNA sequence could constitute an unconstitutional and unethical search.³⁴ Further, in cases where employers may request background

checks at their discretion, anyone an employer selects for a background check could become the initial suspect in a crime where multiple persons' unidentified DNA could be present. This could include crimes committed in the workplace.

Another concern foreshadowed by the UA case is the potentially disparate impact of DNA identification on minority groups. Some enforcement officials think that "DNA is blind to race."³⁵ But racial profiling and class discrimination play a role in the conviction and arrest process of certain groups, and they diminish equality of opportunity among job applicants, regardless of whether such DNA sampling could also exonerate heavily stereotyped people. Thus, dragnet policies would

disproportionately affect some racial and economic groups. Groups vulnerable to discrimination should not be the only parties subject to continual searches that could link them to crime scenes, especially where multiple offenders' unidentified DNA could be present. Since Congress will consider whether to add a disparate impact clause to GINA six years after enactment, any disparate impact found as a result of using DNA to conduct preemployment criminal background checks should be well documented by advocates.³⁶

Finally, it is important to notice that simply avoiding the practice of DNA identification does not resolve all the issues raised by the UA background check policy. If the discussion

remains captured by the introduction of genetic technologies, we risk losing sight of the larger legal and ethical issues surrounding the scope of mandated and blanket criminal background checks in general. The unprecedented nature of UA's proposed policy has underscored the need for employers and policy-makers to balance potential conflicts among employee privacy concerns, employer security interests, and law enforcement. Policies surrounding criminal background checks should achieve an employer's stated security concerns without unduly compromising employees' civil liberties and interests (let alone violating their legal rights).

As forensic technology continues to advance, perhaps we should also consider new policies that allow employees and applicants to negotiate the degree of privacy they are willing to sacrifice in exchange for helping employers maintain security.³⁷ As part of this negotiation process, the EEOC should ensure that employers understand how GINA applies to their law enforcement efforts. Congress should address any disparate or unethical outcomes that threaten to undermine the goals of GINA and other civil rights legislation. And if Con-

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gress needs nudging, then those who care about civil rights should be prepared to help.

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