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HEALTH

‘Devious Defecator’ Case Tests Genetics Law

By GINA KOLATA MAY 29, 2015

Seven years ago, Congress prohibited employers and insurers from discriminating against people with genes that increase their risks for costly diseases, but the case that experts believe is the first to go to trial under the law involves something completely different: an effort by an employer to detect employee wrongdoing with genetic sleuthing.

Amy Totenberg, the federal district judge in Atlanta who is hearing the case, called it the mystery of the devious defecator.

Frustrated supervisors at a warehouse outside Atlanta were trying to figure out who was leaving piles of feces around the facility. They pulled aside two laborers whom they suspected. The men, fearing for their jobs, agreed to have the inside of their mouths swabbed for a genetic analysis that would compare their DNA with that of the feces. Jack Lowe, a forklift operator, said word quickly spread and they became the objects of humiliating jokes.

“They were laughing at us,” he said.

The two men were cleared — their DNA was not a match. They kept their jobs but sued the company. On May 5, Judge Totenberg ruled in favor of the laborers and set a jury trial for June 17 to decide on damages. She determined that even though the DNA test did not reveal any medical information, it nonetheless fell under the Genetic Information Nondiscrimination Act, or GINA.

Atlas Logistics Group Retail Services,which operates the warehouse, has not decided whether to appeal, its lawyer, Dion Kohler, said. The company had contended that the test provided no medical information about the employees and that both kept their jobs and suffered no discrimination.

The decision in this case means the scope of the law goes far beyond what

Congress seems to have envisioned, legal experts said. Even if an employer, as in this case, did not seek an employee’s DNA to look for medical conditions, it was getting a trove of data that it arguably should not have, said Jessica L. Roberts , director of the Health Law and Policy Institute at the University of Houston Law Center. The judge, she said, ruled that “a genetic test is a genetic test is a genetic test.”

“It’s really a bizarre case,” said Lawrence O. Gostin, a law professor at Georgetown University. “But beyond the comical, it touches on some quite serious issues.”

“Anyone in the future thinking about using a genetic test in ways that can embarrass or harm an individual will have to confront the fact that it violates federal law,” he added. Benign intentions are not enough.

The concern is that allowing an employer to obtain an employee’s DNA would open a Pandora’s box. “While the employer here was taking the DNA for identification purposes, once it gained access it could have theoretically tested for all kinds of other things, including issues related to health, and used that information to discriminate,” Ms. Roberts said.

The law was enacted in part to alleviate people’s fears that their genetic information could be used against them. There were concerns that people who feared discrimination if they got a genetic test would refuse to participate in clinical trials needed for the advance of medical science, or avoid getting tests that might be useful for their health.

There have been very few cases under the law, and legal experts said they did not know of any others that had gone to trial. The cases so far have mostly involved workers suing employers who had asked for their medical histories. A Connecticut woman claimed she was fired after she disclosed that she had a gene that predisposed her to breast cancer. Her claim was settled out of court with a nondisclosure agreement.

Sharon Terry, chief executive of the Genetic Alliance, an advocacy group for people with genetic disorders that lobbied for the law, said she and other advocates were pleased by the outcome of the case in the Atlanta court, but surprised by both its substance and the dearth of other cases.

“Is the law so effective that employers are well-informed and not going there, or is this less of an issue than we thought it would be?” Ms. Terry said, adding that she thought there was some truth in both.

The case of the warehouse workers began more than two years ago when

Atlas asked its loss prevention manager, Don Hill, to find out who was defecating in one of its warehouses where grocery store goods were stored. After looking at employee work schedules, Mr. Hill identified workers who he thought were present when the deeds were done. He asked a forensics lab to compare the DNA of men the company suspected with the DNA of the feces to see if there was a match.

Everyone knew about the problem, Mr. Lowe said. The workers were abuzz, wondering what sort of person could be doing it. Then, one day after his break, Mr. Lowe was ushered into a room by his supervisor. His union steward, a human resources manager and Mr. Hill were waiting for him.

“They sat me down and asked me did I know why I was asked to come upstairs,” Mr. Lowe said. “They asked if I knew about the feces. I said I had heard about it and thought it was gross. They asked me to take a DNA test because they had reason to believe it was me.”

He agreed to take the test, saying he feared for his job, and a forensics expert from the testing lab swabbed the inside of his cheek.

The lab results exonerated Mr. Lowe and another worker, Dennis Reynolds, who delivered food from the warehouse to grocery stores. But by then, Mr. Lowe had found a law firm, Barrett & Farahany, where three lawyers agreed to take the case. Mr. Reynolds joined Mr. Lowe in the lawsuit.

The lawyers thought the men had a case because the genetics law had made it illegal “for an employer to request, require, or purchase genetic information with respect to an employee.” The question before the judge was whether the DNA samples Atlas requested constituted genetic information, even though they did not reveal disease genes or risk factors for disease.

Atlas’s lawyer, Mr. Kohler, said the DNA results from the test the company sought were not genetic information, and involved normal minute variations in DNA sequences that did not reveal anything about disease genes. The intent of the law, he added, was to prevent discrimination based on a genetic propensity to disease, and there was none in this case. Both men kept their jobs. (Mr. Reynolds has since left Atlas, and now works as a used-car salesman. Atlas never figured out who was responsible.)

But Judge Totenberg said the law defined genetic information as data arising from a genetic test. The DNA test used in this case, she ruled, qualified as a genetic test that revealed genetic information.

In June, the case will go to trial to determine damages. Ms. Roberts said the

judge and jury would have little precedent to go by. The genetics law is different from other antidiscrimination laws that say employers cannot hire, fire or fail to promote a worker based on such things as race, sex or a disability. GINA says an employer cannot even ask for or buy genetic information.

“We have a lot of existing case law on how judges should award remedies for employment discrimination,” Ms. Roberts said. “But what happens when an employer obtains genetic information and does not act on it? Judges currently have little guidance.”

Correction: June 1, 2015

An earlier version of a picture caption with this article, and an appended correction, misidentified the men in the lawsuit. Jack Lowe is on the right and Dennis Reynolds is to the left.

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