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# NEW ISSUES IN TESTING THE WORK FORCE: GENETIC DISEASES

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Employer testing of employees and job applicants will prove one of the most difficult and explosive workplace issues over the next ten years. Many examples of this phenomenon are already in our midst. We have begun to witness computer monitoring of employee productivity and of time spent on the telephone or in the bathroom (a computer clock can show when an employee was working). Various preemployment psychological tests have reappeared. One hears discussion, again, of lie detector tests. Drug testing issues abound. Punishment of drunk driving, on the basis solely of a breath test, has provoked a major outcry in at least one state, but various employers have apparently quietly considered the merits of using such a test at work. Employers, insurance companies, and state legislatures continue to debate the pros and cons of blood tests for seropositivity to HIV (the AIDS virus).

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The newest topic -- genetic testing -- may prove to be one of the most controversial. Genetic testing has important, specialized uses. Used forensically, it can, for example, affirm or disaffirm the identity of a person accused of rape. Genetic testing may also make possible the early identification of people who will get, or who are predisposed to get, a wide variety of diseases (there may be as many as 3,000 genetic diseases). Over the next decade, we may be able to identify persons at risk (or at increased risk) of developing certain types of heart and kidney disease and many types of cancer. The same is true of familial Alzheimer's disease, manic-depressive illness, Huntington's disease, Duchene's muscular dystrophy, cystic fibrosis, sickle cell anemia -- the list of diseases which have been studied by geneticists lengthens every year. Metabolic disorders (including diabetes), alcoholism, panic disorder, and some types of schizophrenia are among the diseases where there is evidence supporting the importance of hereditary factors.

Genetic techniques are either now available or may soon become available that can help screen applicants for employment, and employee and managerial candidates for promotion. Employers may have a strong stake in being able to ascertain who will be able, healthy and safe workers in the future, not only for job performance purposes, but also to reduce health insurance burdens. A potentially enormous number

of Americans in the workforce are critically affected by these developments -- probably far more than are currently implicated by current AIDS or drug and alcohol testing -- and the specter of genetic testing on a wide scale raises serious moral and legal issues. Thus, to take an example, because the furnishing of family health records to employers will make such screening even more reliable, one can imagine the great potential for unscrupulous use of such records, particularly in a one-company town or by a company attached to a major health maintenance organization (HMO).

To a large extent, the workplace issues surrounding this topic resemble those involved in AIDS and drug testing. Accordingly, society will have to address many of the following problems in the near future:

* The tests, even properly performed, are not infallible, due to the nature of the tests and of the conditions tested (not everyone who tests positive will develop a given disease or become seriously ill even if the disease does appear);

* Laboratories are clearly not infallible;

* People who are tested may substitute the blood of others, through a variety of subterfuges;

* Correlations between positive tests and disability or impaired performance may vary widely for various genetic diseases, for different employees, and even, over time, for the same employee;

* The rights and responsibilities of employers who learn of positive test results of their employees are not at all clear; must employers therefore tell employees of the results? May employers refuse to hire some employees who test positive and not others?

* The specter of employers being held 'vicariously' liable for the actions of impaired employees looms large; will an air carrier be held to have known, for example, that a pilot of a crashed plane had a heart condition, the predisposition to which could have been revealed in a genetic test? If an employer does <u>not</u> use such tests, could it become by default, a haven, and therefore an insurer, for those who are more likely to develop expensive genetic diseases?

At present, genetic diagnosis for most of these diseases is in the research phase, relatively expensive and time-consuming. But the ordinary blood test -- roughly ten or twenty milliliters of venous blood drawn from the arm -- is sufficient for DNA (genetic) analysis. People whose blood

would now reflect antibodies to HIV (i.e., who are AIDS-seropositive), may comprise .5 to 1% of the United States population. The panorama of diseases with some hereditary etiology affects at least half the population, a figure which outstrips even the widespread abuse of drugs and alcohol in this country. Disagreements about AIDS and drugs, and about the testing issues that surround them, are among the most heated that occur in the workplace. It is reasonable to assume that genetic testing will provoke comparable anger and controversy. While the ethical aspects of such testing will likely become much more complex and confusing over time, it behooves all workers and managers to become familiar with the potential legal treatment of some of these issues under the law, since the law may produce some clarity on these subjects in the relatively near future.

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Already we can determine that genetic testing by employees risks invasion of privacy claims. The courts have held that a right of privacy exists in the workplace.[4/] However, an

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[4/] Virtually every state has recognized that a general right of privacy exists either by virtue of common law (i.e., judge-made law) or statute. For example, in Massachusetts, state law gives the courts the right to grant an equitable remedy and award damages when an

[Footnote Continued]

employee's right of privacy is not absolute. There may well be legitimate business reasons for an employer to obtain information about an employee which intrudes on the latter's privacy. In deciding when an individual's privacy has been inappropriately invaded, the courts have typically engaged in a balancing test: has the employer demonstrated sufficient business justification to obtain the information, and has the employer gone about obtaining it in the least intrusive way, so as to outweigh the employee's interest and expectations in privacy.

Based on the foregoing, it is apparent that an employer's testing program to determine the presence of some genetic condition has the potential to violate an employee's privacy rights. If an employer takes blood from an employee in order to carry out a test, that is an obvious physical intrusion. If the employer learns that the employee carries a gene predisposing him towards familial Alzheimer's disease, that may

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individual has been subjected to "unreasonable, substantial or serious interference with his privacy." Mass. Gen. Laws Chapter 214, §1B. Whether as a matter of common or statutory law, the right of privacy has been interpreted to encompass protection from four distinct wrongs: (1) intrusion upon an individual's physical solitude; (2) the publication of private matters about a person violating ordinary decencies; (3) putting an individual in a false light in the public eye; and (4) the appropriation of some element of the individual's personality for commercial use.

disclose intensely personal information about the employee and his or her family background. If the employer finds out that the employee has a gene linked to manic depression, that may lead to an erroneous conclusion that the person is now too unstable for duty, thereby portraying him or her in a false light.

In order for an employer to justify its need to undertake tests when such results may occur, the employer must therefore be able to articulate a specific problem in the work place necessitating its action. For example, the courts have often disapproved an employer's administering drug or alcohol tests unless the employer has demonstrated some compelling reason: that the safety of individuals, or other employees, or members of the public is at stake; that there are security needs which must be satisfied; that there are job performance requirements that must be met; or that important public relations considerations are involved.[5/] Even then, the employer must undertake its tests in a way that will maintain the dignity of

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5/ A good example of a recent case in which societal concerns outweighed the individual's privacy interests is Child Protection Group v. Cline, No. 17296 (W. Va. Sup. Ct. November 12, 1986), which involved the disclosure under the state freedom of information act of medical information concerning the mental competency of a school bus driver who had exhibited peculiar behavior. There, the court found that the disclosure of medical information would indeed be an invasion of privacy, but that the compelling public need outweighed the confidentiality issues involved.

the individual and will safeguard as much as possible against any inadvertent or unnecessary disclosure of private information to third parties. Finally, the employer will have a much better chance of establishing the legitimacy of its testing program if, rather than not hiring or discharging the individual, it can show that the testing program was done with a rehabilitative purpose (where relevant), or in order to provide reasonable accommodations.

No court as yet has examined genetic testing in the context of employee privacy rights. Employers will try to defend such testing by showing that it is necessary, for instance, to avoid placing individuals who are prone to certain illnesses or disabilities like manic depression in high-stress jobs, or to reduce the costs of health and life insurance premiums by not hiring at-risk individuals. It remains to be seen whether employers will have to satisfy the kinds of criteria that the courts have articulated with respect to drug and alcohol testing in order to demonstrate that their needs outweigh a person's privacy interests.

While privacy considerations underlie the moral and legal framework which has emerged in the area of employer

screening,[6] there are a number of other specific legal issues, some of them unrelated to privacy, which bear on this subject and of which employers should be aware. These issues have achieved some degree of clarity in the AIDS and drug and alcohol testing areas, and many of them will no doubt prove applicable to other emerging topics concerning employer testing, at least by analogy. In general, it is safe to say that use of data gleaned from genetic testing, as well as administration of the tests themselves, will implicate state and federal handicap discrimination laws in addition to the privacy considerations discussed above. There are also several other more peripheral legal issues which necessarily enter the testing picture. With respect to all of these, society's experience with AIDS testing can provide useful guidance as to future trends in the genetic testing area.

The subject of testing employees for disease has received considerable legal scrutiny over the past few years. Legal commentators have predicted, and the courts and state agencies

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[6] The importance attached to individual privacy in this area was recently evidenced by the federal Public Health Service's aborted plan to require mandatory HIV (AIDS) antibody testing for marriage licenses, hospital admission, and high-risk pregnant women. Heeding paramount concerns of various groups about "confidentiality, civil liberties, and special sensitivities," the Service eventually conceded that before any such mandatory screening could occur, statutory and procedural changes in federal and state laws would have to be implemented in order to guarantee confidentiality and protect against discrimination.

have begun to confirm, that AIDS is a protected handicap under state and federal handicap discrimination legislation. Those statutes generally shield from discrimination not only persons who are presently disabled (interpreted broadly to encompass any deficiency in physiological or mental functioning), but also those with a record or history of disability, and those who are merely perceived or regarded as disabled by others. Under this broad definition, almost any discrimination among employees even partly predicated on concern about disability probably falls within the coverage of such legislation. Thus, whether or not they have the disease, male homosexuals and intravenous drug users today receive protection under most handicap discrimination laws to the extent they are discriminated against due to fears about AIDS.

Similarly, it is likely that an individual with genetic impairments but no outward manifestation thereof would still be deemed a handicapped individual if discriminated against in any way on the basis of a positive test for predisposition to genetic diseases (i.e., on the basis of a perceived, if not actual, disability)[7/] However, most handicap statutes prohibit discrimination only against "otherwise qualified

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7/ Although the Supreme Court has explicitly left unanswered whether an asymptomatic carrier of a contagious disease qualifies as a handicapped individual, its recent decision in Arline v. School Board of Nassau County leaves little doubt that it would so designate such an individual if the question was placed squarely before it.

handicapped individuals," that is, individuals who can meet the essential requirements of their jobs, though perhaps with some accommodation for their disability. Under most statutes, an employer may in fact discriminate against handicapped individuals who are unqualified (i.e., those who cannot perform the essential functions of their job without reasonable accommodation, pose an unreasonable safety risk, or cannot be accommodated without imposing severe financial and other burdens on the employer). In the case of genetic infirmities, however, one would expect that while large numbers of people might somehow fall within the definition of a 'handicapped individual' for employment purposes (again, in most cases as a result of the test-giver's perceptions of disability) the vast majority would still be 'qualified' and therefore protected from discrimination.

With AIDS testing, and perhaps even more so with genetic screening, the use of test data to make employment decisions (including insurability determinations) would almost invariably constitute prima facie handicap discrimination, since there is no necessary logical relation between the two (a predisposition to one or more genetic disorders would not necessarily render a person unqualified for a given job). Indeed, several courts interpreting various handicap statutes have specifically held that risk of future incapacitation does not constitute a sufficient basis for a refusal to hire or promote. Thus,

several state anti-discrimination agencies have deemed the AIDS antibody test impermissible in most employment contexts, since the disease is not transmissible through normal workplace activities, and since all but the most obviously ill individuals will currently be capable of performing the essential functions of their jobs.

Even apart from handicap discrimination issues, employers who were to engage in genetic testing could expose themselves to various other kinds of statutory or common law liability. As noted above, such testing could well trigger an invasion of privacy suit. It could also trigger a defamation action based not only on the unwarranted dissemination of test results, but possibly also on the administration of the test itself, if that were known to certain third parties. Employers who give such tests could also court assault and battery suits grounded on employee's fear of being tested for a certain defect, or on the actual testing, respectively.[8/] Moreover, if the manner in which a company administered an involuntary genetic test were

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[8/] Thus far it appears that an employee forced to submit to an AIDS test against his or her will can certainly set forth assault and/or battery claims against an employer.

In the drug context, one employee sued his employer for assault, defamation, and invasion of privacy because he was accused of being a drug user, was physically searched, and given blood and urine tests. The assault claim was based on the physical search and the blood test. Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985).

extremely arbitrary and callous, the employer could well face a separate claim for intentional infliction of emotional distress.[9/]

In addition to common law liability, employers may potentially also face a number of statutory barriers in proceeding to implement a genetic testing program. Although there are presently no such statutes on the books, some can be expected in the near future, and it is likely that many will be patterned on the AIDS experience. The most obvious problem that a genetic testing law might address is reliability. In the AIDS area, the serologic test for the AIDS antibody still has certain reliability problems, and in any event, seropositivity (which only indicates infection by the AIDS virus) does not reveal whether a person has the disease, will ever develop the disease, or is contagious. For these reasons, although a positive test result may justify a decision to dispose of a

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[9/] A recent example shows the extent to which an employer may expose itself to all kinds of common law claims by ignoring the interests of its employees in a testing situation. In March of this year, an employee of the Prudential Insurance Company of America filed suit charging that he was tested for the AIDS antibody without his consent, and that when the test yielded a positive finding, the company not only refused to sell him a life insurance policy but disseminated the information publicly. The suit asks for a total of $2.2 million in compensatory and punitive damages for breach of implied contract, tortious disclosure of confidential information, negligence, fraudulent misrepresentation, intentional infliction of emotional distress and deceptive business practices.

blood product on the chance that it might prove infectious, this result in and of itself cannot indicate the existence of a condition that would interfere with job performance. Hence, several states have specifically passed laws prohibiting such tests for employment purposes. Society can expect that, whatever the progress made in the accuracy of genetic screening or its correlation with various performance factors, residual problems will continue to make its use in employment settings problematic for the near future.

Legislation may also soon be forthcoming concerning the use of genetic tests for insurance purposes. In the AIDS area, insurance companies and HMOs which carry or administer employee benefit plans have sought to limit their exposure by refusing the claims of employees who are suffering from AIDS or who have tested positive for exposure to AIDS. Or, they have requested that the employer condition employment or plan eligibility on the results of a specific screening. Several states have thus far barred the use of serologic tests for the AIDS antibody as a condition of insurability, and it is likely that similar legislation may be forthcoming with respect to genetic testing. Even at the present time, employers and/or benefit plan administrators may violate the Employment Retirement Income Security Act (ERISA) if they take adverse action against an employee in order to avoid a certain economic impact on an employee benefit plan.

It seems clear that with rare exceptions, suits based on the foregoing common law or statutory grounds would probably prove successful, since neither society at large, nor an individual employer, generally has the kind of urgent, significant need for test information in the genetic testing area that obtains in the drug and alcohol contexts. Thus, while testing for a genetic predisposition to heart attacks may be appropriate for airline pilots, or for other individuals whose jobs directly implicate public safety, it is difficult to conceive of many other situations where an employee's or applicant's statutory or common law rights could be justifiably abridged. Under these circumstances, few employers, much less third parties, have any reason to obtain, or disseminate such information. While genetic testing may consequently become commonplace in health care settings, its use in or for the workplace will necessarily remain quite limited for the foreseeable future.

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