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EMPLOYEE TERMINATED/CAUSE OF ACTION DISMISSED: THE AMERICANS WITH DISABILITIES ACT PROVIDES NO HAVEN FOR EMPLOYEES HYPERSUSCEPTIBLE TO GENETIC ILLNESS

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ABSTRACT

Because modern technology allows an employer to evaluate an employee's genetic code, the potential practice of discriminating against employees determined to be hypersusceptible to genetic illness has become a realistic employment practice. Although these genetically classified employees may be subject to future employment discrimination based on the employer classifying them as "disabled," the employee will not be able to challenge such a discriminatory practice under the Americans with Disabilities Act. A genetically hypersusceptible employee does not possess the requisite "disability" necessary in order to have an actionable ADA claim against the employer.

Because of the developing ability to isolate DNA molecules and to interpret their genetic codes, employers are now capable of evaluating an employee's potential long-term productivity. With a simple blood or urine test, employers can detect whether an employee is "hypersusceptible to an occupational illness in a given job" [1, p. 181; 2, p. 771]. Because of this ability to detect an individual's hypersusceptibility to disease based on genetic information, the issue arises of whether an employer can deny employment, terminate employment, or hinder advancement within employment for a hypersusceptible employee [1, p. 181].

Litigation premised on genetic hypersusceptibility is unreported because employers are just beginning to explore its possible use within the employment field. The enactment of the Americans with Disabilities Act (ADA) [3] may provide one avenue in which a plaintiff may challenge an employer's practice of

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consulting genetic tests when making employment decisions. The apparent shortcoming of the Americans with Disabilities Act is its failure to directly address whether genetic hypersusceptibility to illness is a disability protectable under the provisions of the act. In order to proceed under the provisions of the ADA, the plaintiff must demonstrate that he is "impaired" to such an extent to render him disabled. Currently, litigation arising from the provisions of the ADA fail to address whether a genetically hypersusceptible-to-illness employee is "impaired" within the parameters of the Americans with Disabilities Act. A plaintiff who fails to achieve classification of an impaired status is barred from claiming disability discrimination under the act and, therefore, the employee can be terminated or denied advancement based on the employment-at-will doctrine. If hypersusceptibility to genetic illness is classified as an impairment rising to the level of a disability, the employer might be able to invoke the "undue hardship" defense of the ADA and escape liability for discriminatory employment practices [3, § 12112(b)].

After analyzing the above issue, this article concludes an employee with hypersusceptibility to genetic illness is not impaired to the level of disability according to the Americans with Disabilities Act. Even if the employee is capable of achieving the classification of "disabled," the employer has a great likelihood of defending the use of genetic tests based on "undue hardship" and "business necessity."

BACKGROUND

Since the enactment of Title VII of the Civil Rights Act of 1964 [4], the American legal system has prohibited discriminatory employment practices based on sex, color, race, religion, and national origin. However, during the time Title VII was being legislated, new technological advancements were being made. Thirty years later, these technological advancements are creating new possibilities for employment discrimination to pervade the realm of employment practices. Such employment practices or future employment practices are currently not addressed by Title VII. However, in 1990, with the enactment of the Americans with Disabilities Act, a plaintiff whose employment status was adversely affected by a genetic test was provided with new federal legislation through which to pursue vindication from discriminatory employment practices.

The ADA clearly prohibits discriminatory employment practices toward disabled employees. However, Congress, in recognizing that there existed perhaps limitless physical and mental conditions that could be classified as disabilities and thus fall within the parameters of the act, opted not to constrain the ADA by listing a catalogue of disabilities [5, p. 765]. Therefore, genetic hypersusceptibility to illness is not statutorily prescribed as a disability under the act. The statute and case law clearly reflect that the determination of who is a disabled employee under the act is best decided by a "case-by-case determination" [6, at 1100]. Hypersusceptibility to genetic illness is no exception to this general rule.

The ability to detect hypersusceptibility to a genetic illness is contingent on the employer's obtaining a blood or urine sample from the individual. Typically, a blood and urine sample are obtained in a physical examination. The Americans with Disabilities Act clearly prohibits preemployment physical examinations [3, § 12112(d)(A)]. Therefore, the implementation of genetic testing in the preemployment stage is unlikely to be an issue in the future. However, genetic information is an unresolved issue in the posthiring stage—may an employer use genetic information to discriminate against an individual employee by terminating him/her, demoting him/her from the current job position, or preventing the employee's potential for advancement within the company? With the widespread recognition of the employment-at-will doctrine, it would seem that such employment practices would be legal as long as they did not violate federal employment statutes like Title VII. However, employees subjected to this type of employment practice may find refuge in an unlikely source—the Americans with Disabilities Act. If genetic hypersusceptibility to illness constitutes a disability within the meaning of the ADA, the employee may be afforded protection from discriminatory employment practices based on genetic tests. If s/he is not classified as disabled, then s/he is subject to the common-law doctrine of employment at will and can be terminated for any or no reason. To understand the issue of whether genetic hypersusceptibility to illness is a disability under the Americans with Disabilities Act, it is necessary to understand the provisions of the act, the development of gene technology, and its potential use in employment practices.

AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act was enacted in the summer of 1990. It was expected to affect an estimated forty-three million disabled Americans; thus its description as a "declaration of independence" for disabled people [5, p. 760]. The act "prohibits disability-based *discrimination in employment*, public accommodations and services offered by private entities, public services offered by governmental entities, and telecommunications services" [5, p. 760 (emphasis added; citations omitted)]. The act is the first federally enacted legislation that "prohibit[s] discrimination in public and private employment on the basis of disability" [7, p. 33].

The general provision of the act concerning employment provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment [3, § 12112(a)].

The act then defines discriminatory employment practices—

> the term "discriminate" includes—
> (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
> . . .
> (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
>
> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;
> . . .
> (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity . . . [3, § 12112(b)].

It is clear from the act that an employer who affects an individual's employment, in any manner, based on the employee's disability violates the general provision of the act. Therefore, if a genetically hypersusceptible-to-illness employee is deemed to be "disabled" under the provisions of the act, the hypersusceptible employee may proceed with a cause of action alleging employment discrimination in violation of the ADA. However, the crucial issue to be resolved is whether a genetically hypersusceptible individual is "disabled" according to the act.

Although the act clearly provides protection for such disabilities as blindness, deafness, or paralysis, it is unclear from the statutory provisions whether a person classified as an individual with a genetic hypersusceptibility to illness is a "disabled" person protected under the act. In the drafting of the ADA, congressional debate over the applicability of the act to genetic testing was only briefly considered and, therefore, genetic hypersusceptibility to illness is not addressed within the statutory provisions of the act [7, pp. 33, 39].

Despite the failure of the act to clearly identify genetic hypersusceptibility as a disability, the Americans with Disabilities Act provides a possible means of protection for individuals claiming employment discrimination based on genetic tests. If being genetically hypersusceptible to illness is classified as a disability

within the provisions of the act, Title I of the act will protect the employee from being discriminated against by his/her employer.

Title I of the act "prohibits covered employers, labor organizations, employment agencies and joint labor-management committees from discriminating against qualified disabled individuals on the basis of their disability with respect to hiring, termination, promotions, hiring application procedures, compensation, training, and other terms and conditions of employment" [5, p. 762 (citations omitted)]. Title I also provides that applicable employers "must reasonably accommodate 'otherwise qualified individual[s] with a disability" [5, pp. 762-763 (quoting [3, § 12112(b)(5)(A) (Supp. 1991)]. Disability is defined by the act as: "(A) a physical or mental *impairment* that substantially limits one or more of the major life activities of the individual; (B) a record of such an *impairment*; or (C) being regarded as having such an *impairment*" [3, § 12102(2)(Supp. II 1990) (emphasis added)].

As demonstrated above, "impairment" serves as the definitive term in the definition of disability in the Americans with Disabilities Act. Impairment is not defined in the act, nor is a list of impairments provided. Examples of impairment are not provided for—"largely because Congress did not want to risk excluding from the statute's protections new conditions or diseases that may be recognized by medical science in the future" [5, p. 765].

Because of the general consensus that Congress intended to be liberal in its definition of disability, as demonstrated in its plan not to explicitly define the term "impairment" so as not to deny future litigants protection under the act, the Americans with Disabilities Act may become a source of protection for hypersusceptible-to-genetic-illness employees who are discriminated against in their employment pursuits.

Without explicit guidance from the act on the method of determining impairment and because litigation focusing on the proper interpretation of this provision is nonexistent, consulting the legislative history and litigation arising under the Vocational Rehabilitation Act of 1973—a statute the ADA was modeled after—provides guidance in interpreting what Congress intended by the term "impairment" [5, p. 765]. These two sources reveal that

> In general, a physical impairment consists of a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of the biological systems of the body. . . . A mental impairment consists of any mental or psychological disorder, such as mental retardation, emotional and mental illness, or specific learning disabilities [5, p. 765 (footnotes omitted)].

Using the same sources, a list of examples of what constitutes an impairment can be generated. It has been stated that examples of physical or mental impairments include:

> orthopedic, visual, speech, and hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; tuberculosis; mental retardation; cancer; emotional or mental illness; multiple sclerosis; infection with the Human Immunodeficiency Virus; heart disease; and diabetes . . . dyslexia, suicidal tendencies; hearing impairments; posttraumatic stress disorder; an amputated leg; unusual sensitivity to cigarette smoke; a congenital abnormality of the back; severe depression; asthma; and acquired immune deficiency syndrome (AIDS) [5, p. 766 (footnotes omitted)].

Even if the employee can demonstrate an impairment, according to the Americans with Disabilities Act, that person may not possess the requisite disability. The act provides that "an impairment constitutes a disability only if it substantially limits one or more of an individual's major life activities" [5, p. 768]. The legislative history of the act indicates that "major life activities include caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing, walking, learning, and *working*" [5, p. 769 (emphasis added)]. An impairment, therefore, is something that

> substantially limits a major life activity if it prevents an individual from performing an activity that an average person in the general population can perform. An impairment would also be substantially limiting if it significantly restricts the condition, manner, or duration under which an individual can perform a major life activity as compared to the condition, manner, or duration under which an average person in the general population can perform that activity [5, p. 769 (footnotes omitted)].

Evaluation of the Act

Because the Americans with Disabilities Act is a recent congressional enactment, litigation arising under the statute is minimal. However, the ADA was patterned after the Rehabilitation Act of 1973; therefore, the Rehabilitation Act provides guidance in the proper interpretation of "handicapped individual."

Under the Rehabilitation Act, " 'a handicapped individual' is defined broadly to include 'any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment [1, p. 198 (quoting § 706(7)(B); 41 C.F.R. § 60-741 (1986))].

The most notable Supreme Court decision interpreting the term "handicapped" under the Rehabilitation Act, is the *School Board of Nassau County, Florida v. Arline* [8] decision [1, p. 199]. In *Arline*, the Court was confronted with deciding whether a person infected with tuberculosis, a contagious disease, could be considered a handicapped person within the meaning of the Rehabilitation Act. The Court stated:

> By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment" [1, p. 199 (quoting 107 S. Ct. at 129 (footnote omitted))].

It has been contended that courts, in recognition of the *Arline* decision, may conclude that "hypersusceptibility because of a genetic deficiency is a handicap under the [Rehabilitation] Act" [1, p. 199]. It is argued from this decision and others that, although the employee may never contract or demonstrate any physical or mental abnormalities as a result of the genetic defect, the "employer may nevertheless regard him as having the disease" [1, p. 199]. Under the Rehabilitation Act, an employer who regards an employee as having a disease is preempted from acting upon this belief. By correlation, the same can be contended under the Americans with Disabilities Act.

The issue in dispute is whether an employer can base an employment decision on genetic tests. Therefore, the question arises of how does the employer gain access to information that classifies the individual employee as hypersusceptible to genetic illness? The employer, typically, gains access to this information through the employee's participation in a physical examination. The statutory language of the Americans with Disabilities Act clearly prohibits preemployment medical screenings and allows posthiring medical examinations only if job-related or voluntary [3, § 12112(d)]. In determining whether a hypersusceptible employee is disabled under the Americans with Disabilities Act, the manner in which the employer obtains genetic information regarding an individual employee makes no difference. In fact, in most instances employees will consent to the posthiring examinations prescribed by the employer. The issue arises when an employer obtains the results of a genetic test and acts on the results of it [3, § 12113]. If genetic hypersusceptibility creates a condition or possible condition that is job-related, the employer is at liberty to terminate the employee, according to the act [3, § 12113(a)]. However, if genetic hypersusceptibility is not job-related, the employer may be limited in his ability to act on such information. If the courts determine that genetic hypersusceptibility constitutes an impairment under the provisions of the act and the impairment rises to the level of a disability, the employer may not adversely affect the employee's employment based on the genetic test unless the genetic hypersusceptibility creates a situation in which the employer can claim one of the section 12113 defenses. The section 12113 defenses include the discrimination of an individual who possesses a disability based on the individual's inability to perform a job-related function without excessive accommodation or based on business necessity [3, § 12113]. If the courts do not recognize genetic susceptibility as an impairment under the act, the

employer is at liberty to affect the employee's employment status based on the genetic information under the doctrine of employment at-will.

The debate revolves around the technological advances being made in genetic testing. It is beneficial, therefore, to have a general understanding of the theory behind the employment practices in controversy in this debate.

GENETIC TESTING

Genetic testing is the analysis of an individual's genes. It has been contended that "[g]enes provide the blueprint for the biological component of human individuality" [9 at 24]. Therefore, "genes determine the unique characteristics of every human being and make *homo sapiens* a heterogenous and variegated species" [7, p. 24].

Genes provide valuable clues into a person's existence; therefore, genetic testing has become a valuable tool by which to discover all types of information—past and present—regarding an individual. It has been noted that "[r]esearch in genetics . . . has produced new possibilities for detecting subtle biological differences among individuals . . . for predicting potential for diseases long before any symptoms are manifested" [9, p. 241]. Genetic markers, numbering in the hundreds, are currently used to "indicate predispositions towards hereditary diseases, mental illness, personality traits and disorders, and even addictions" [9, p. 241]. The development of this technology is not static, and in fact, scientists every year are discovering more markers and making more associations to potential future illnesses [9, p. 241].

Gene technology is no longer constrained by the laboratory walls. Today, this technology is pervading everyday life. Gene technology is currently being used to diagnose susceptibility to such things as alcoholism and cancer. It is being used in procreation matters where genetic testing is used to analyze the probability of an individual conceiving a child with a birth defect. Gene technology also has entered the courtroom. Paternity cases are being resolved through the use of genetic tests. Gene technology has also enjoyed over ten years of widespread acceptance in the criminal prosecution area [10]. Analysis of DNA left at the crime scene often can connect the criminal defendant with the commission of the crime [10]. Although these are all interesting areas in which gene technology is being used on a frequent basis, the focus of this article is on the use of genetic testing by employers on employees to determine their potential hypersusceptibility to genetic illness. Thus, genetic testing is being used in employment practices to screen employees for potential problems and eventually to make employment decisions based on these predictions. Armed with the ability to analyze an individual's genetic make-up, employers possess the power to select their ideal workforce through hiring, termination, or advancement of individual employees. For perspective employees who are selected for employment based on their genetic make-up, no controversy exists because there is no discriminatory practice in regard to those individuals.

Because the ADA specifically prohibits nonjob-related physical inquiries in the preemployment stage, the use of genetic testing is likely to appear only after hiring—the posthiring stage [3, § 12112(d)]. The posthiring stage includes such employment practices as the termination, demotion, and promotion of an individual employee. The primary motivation for employers to implement standard genetic screening procedures is based on economics. Advocates of genetic testing "argue that the new technology will prove useful in reducing occupational illness" [1, p. 181]. They claim that

> [t]hrough the use of such test, certain job applicants or employees predisposed to specific types of occupational illness can be identified. Preventive measures can then be directed at those individuals to reduce the risk of occupational illness. Not only could job-related health risks be reduced for individual workers but costs might be cut for medical care, insurance premiums, and time lost from work" [1, pp. 181-182].

Opponents of genetic testing in employment situations argue that "genetic tests could be used to unfairly exclude applicants or employees from employment" [1, p. 182]. Thus, it is claimed that "the use of genetic tests will result in invidious discrimination creating a new class of undesirable workers" [1, p. 182].

As the economic burden of genetically testing employees diminishes and the accuracy of the tests reaches indisputable standards, it is foreseeable that employers will be inclined to adopt procedures or broaden currently existing procedures regarding genetic testing, especially if these tests accurately identify employees who may be at a higher risk to succumb to genetic illness [11]. The attraction for employers to utilize genetic testing procedures is that genetic testing can "make distinctions between individuals and create classifications into which those individuals may be placed" [9, p. 241]. Therefore, genetic testing, in theory, is a powerful and beneficial scientific tool in the area of public health, but in application in certain arenas, as in employment, it is contended that its "application . . . may seriously impinge upon individual freedoms" [9, p. 241].

The extent of genetic testing in employment decisions is in dispute. A 1982 Office of Technology Assessment (OTA) survey, polling "the nation's largest industries, public utilities, and unions, [and] fifty-nine corporations [,] reported they would begin some form of genetic screening within the next five years; seventeen reported they had previously used genetic screening; and six reported they used it currently" [1, p. 185]. In 1983 the OTA reported that genetic testing was being used by six companies, but fifty-five companies reported that they were considering implementing genetic testing in the future [2, p. 772]. A 1990 report, conducted by the same office, surveyed the *Fortune* 500 companies, the fifty largest utilities, and the thirty-three major unions [7, p. 26]. The report indicated that of the 330 companies that responded to the survey, only twelve companies reported presently using genetic information to make employment decisions and

none of the companies reported any plans to implement genetic testing in the next five years [7, p. 26]. Although genetic testing, according to the OTA, had not achieved widespread use, the OTA also reported, in 1991, that forty-two percent of the companies considered a prospective employee's health and related health insurance risks as a factor in determining the applicant's employability [7, p. 27]. Thus, the Office of Technology Assessment determined that health insurance considerations, focusing on cost containment, indicated a likelihood that the use of genetic testing would be expanded in the future [7, pp. 27-28]. The OTA report concluded:

> 'The growing concern among employers over the rising costs of employee health insurance, and the increased efforts to reduce those costs to the employer, are likely to increase the scope of health insurance screening in the workplace. To the extent that genetic monitoring and screening can identify employee and dependent risk to the atypical subsequent health care demands, cost-effectiveness as a means of employee monitoring and screening may be increased' [7, p. 28, quoting Office of Technology Assessment, U.S. Congress, Genetic Monitoring and Screening in the Workplace 45 (1990)].

Although genetic testing is not a widely used tool for employers in evaluating their workforce, the increase in health care costs and the slow economy, which mandate efficiency, may spur employers to begin exploring this option to ensure the retention and promotion of healthy and efficient workers and the termination or demotion of hypersusceptible and potentially chronic absentee employees.

If employers decide to explore this avenue of utilizing new technology to manipulate their workforce, they will conduct procedures called genetic screening. Genetic screening is "the search in an asymptomatic population for persons at elevated risk of genetic disease" [11, p. 686]. In other words it is "a one-time test to determine an employee's susceptibility to a given illness" [1, p. 183]. This susceptibility is determined by examining DNA and noting "the presence or absence of certain genetic traits in an individual's genotype" [1, p. 183]. Therefore, genetic screening seems an efficient device to decrease the potential harm to the workforce and to buttress the economic efficiency of the employer's business. However, the inherent problem with genetic screening is that it "measures potential susceptibility but does not predict future illness. Therefore, it is possible to possess a genetic predisposition to a specific illness yet never contract the illness" [1, pp. 183, 197]. At best, "[g]enetic screening . . . identifies an individual who is a member of a class of persons who may be more susceptible to a given illness" [1, pp. 204-205].

As indicated, genetic research allows a person to "predict the presence of a variety of inherited diseases" [12, p. 2082]. Currently, the most common genetic traits looked for in a genetic screening are the G-6-PD deficiency, the sickle-cell trait, heterozygous serum alpha antitrypsin (SAT), and cystic fibrosis

[1, pp. 184-185; 11, p. 684]. The G-6-PD deficiency is a potential genetic condition in which the deficiency of an enzyme, G-6-PD, may "interfere with the energy-generating process . . . [and] may cause clinically significant hemolytic anemia" [1, p. 184]. Sickle-cell anemia is a blood disorder affecting the red blood cells [13, p. 1385]. The result of sickle cell anemia is that an individual's blood vessels clog and impede the proper flow of oxygen to the body [13, p. 1385, n. 20]. This condition has been contended to affect a person's ability to perform "taxing work . . . in high altitudes or other areas of limited oxygen" [1, p . 184]. The SAT deficiency indicates a "susceptibility to pulmonary ailments such as emphysema and chronic obstructive pulmonary disease" [1, p. 185]. Thus, an employer has an interest in preventing such an individual from prolonged exposure to respiratory irritants [1, p. 185]. Finally, cystic fibrosis is recognized as the "most common fatal autosomal recessive disease in the American population" [11, p. 684].

Genetic screening provides the avenue by which employers can gain information concerning these occupational illnesses as well as hypersusceptibility to hundreds of others. Frequently, in the employment setting, the posthiring stage includes a strongly encouraged physical examination. Although these examinations are typically not mandatory, and thus voluntary in nature, often the employee perceives no real choice in refusing a physical examination [13, p. 1411]. It is estimated that preemployment physical examinations are given to over half of the nation's employees [2, pp. 777-778]. As indicated above, the Americans with Disabilities Act prohibits medical examinations unless they are job-related or voluntary [3, § 12112(d)]. However, the statistic that over half of the nation's workforce is subject to physical examinations prescribed by their employers, seems to indicate that the ADA fails to act as a hindrance to the employer's legally gaining genetic information concerning an individual employee.

THE RELATIONSHIP OF GENETIC TESTING AND THE AMERICANS WITH DISABILITIES ACT

An employee proceeding under the Americans with Disabilities Act, alleging discrimination based on genetic testing, has four obstacles to overcome before successfully claiming an ADA violation. First, the employee must demonstrate that the employer's decision to affect his/her employment position was based on information gathered from a genetic test. Second, the employee must convince the reviewing court that the practice implemented by the employer was discriminatory in nature. Third, the court must classify the employee as impaired to the level of a disability under the act. Finally, the employee's claim must survive the "undue hardship" and "business necessity" claims the employer may invoke as defenses to the employee's allegations of disability discrimination [3, § 12112(6)(5)(A); § 12113(a)].

An employee claiming disability discrimination based on a genetic test must first demonstrate that the decision of the employer, which caused the alleged

discriminatory practice, was based on information derived from genetic screening. If it is demonstrated that an individual was denied employment based on a medical test which indicates a physical or mental condition not relevant to the applicant's ability to perform job-related functions, the employer may be in violation of the Americans with Disabilities Act. However, even the first hurdle may be impossible for the employee to overcome because "[e]mployers are extremely reluctant to reveal these factors [(discrimination based upon a physical or mental condition)], especially regarding genetic screening techniques" [13, p. 1423]. Therefore, once an employee has consented or was required (based upon a job-related inquiry) to participate in a physical examination, employment decisions based on the results of this examination will not likely be reflected in the official employer's decree regarding termination, demotion, or denial of promotion. In such a situation, the employer is more likely to base the employment decision on the employment-at-will doctrine rather than admit the employment decision is based on information gained through the use of a physical examination. Thus, even if a decision to affect an employee's employment status was based on genetic information, the employee is unlikely to discover this reasoning and, therefore, will be limited in pursuing any action under such legislative decrees as the Americans with Disabilities Act. If the employee successfully demonstrates that the employer's decision was based on the results of a genetic test, the employee must then convince the court that such practice had a discriminatory impact.

The potential result of employers implementing the use of genetic testing to minimize economic harm caused by genetic illness is that it allegedly creates unfair employment practices [14, p. 597]. Although the Americans with Disabilities Act provides the limiting language of job-relatedness in hindering an employer from refusing to hire a disabled person, "some courts [have] allow[ed] employers a great deal of latitude within which to operate" [13, p. 1446 (referring to National Railroad Passenger Corp. (AMTRAK) v. Commonwealth, 452 A.2d 301 (Pa. Commw. Ct. 1982)]. Employment discrimination, based not upon Title VII characteristics, "has long been legally, ethically, and socially acceptable" [7, p. 25]. The average employer on a regular basis discriminates against potential employees or existing employees in rendering decisions affecting the employees' employment [7, p. 25]. Every time an employer considers such characteristics of a job applicant's or employee's educational background, physical ability to perform the job, leadership abilities, and past employment record, the employer is implementing discriminatory employment practices [7, p. 25]. It can be contended that every employment decision rendered by an employer is discriminatory in nature, but such discrimination has always been held to be acceptable within the workforce. Society has only looked disfavorably on "some specific forms of invidious discrimination, such as discrimination based on race, color, religion, sex, national origin, age, or disability" [7, p. 25]. Thus, if the employee can successfully claim the employment decision that aggrieved the employee was

based on disability discrimination, the employee has elevated his/her cause of action beyond the traditionally accepted employment discrimination practices. To overcome this burden the employee must prove that s/he is disabled within the meaning of the word in the ADA. Such a feat depends on the employee illustrating to the court that s/he is impaired.

To pursue a cause of action under the ADA, the most critical hurdle for an employee whose employment status has been affected by a genetic test is to prove that the employer's classification of him/her as a genetically hypersusceptible to illness individual has rendered him/her "impaired." If an employee with a genetic hypersusceptibility to illness is classified under the Americans with Disabilities Act as "impaired," the employee could claim protection against the discriminatory employment practice. If the employee does not meet the requisite "impairment" characteristic mandated by the ADA, that employee is barred from pursuing an ADA action and is subject to the employment-at-will doctrine. Thus, the employee is terminable based on his genetic profile.

If an employee is classified as impaired, the employer, according to section 12112(b)(5)(A), may be able to claim that continuing to employ or providing for advancement for a particular employee creates an "undue hardship" for the employer. This defense represents the fourth hurdle the aggrieved plaintiff must be able to overcome in pursuing an ADA claim. A finding that an "impaired" employee creates an "undue hardship" on the employer would bar the plaintiff employee from seeking relief under the ADA.

The above illustrates the four hurdles necessary to overcome if an employee is to succeed under an Americans with Disabilities Act claim. If one of these four burdens is not met, the employee fails and the employer is free to act, absent any other federal or state regulation, pursuant to the employment-at-will doctrine.

Before proceeding through the act analyzing whether a genetically hypersusceptible employee can be deemed to be "impaired" under the provisions of the act and whether, on a finding that the individual is impaired under the act, the employer can defend its employment practices by implementing the "undue hardship" and "business necessity" defenses of the act, it may be helpful to provide a hypothetical example:

> A thirty-five-year-old employee at a small electronics company is up for promotion. The new job would entail manufacturing an intricate navigational system, mostly manually, and the employee is especially good with her hands. The company physician does a computer scan of the employee's genetic profile, which the company obtained when it employed her nearly a decade earlier. The scan shows the DNA marker for Huntington's disease, indicates a high degree of certainty that the employee will begin to develop the degenerative disease (which results in loss of motor control and ultimately death) in about five years. The employee's condition eventually will be debilitating and require costly medical care. At this point, although the employee does not

> manifest symptoms of the disease, the employer would probably refuse to promote her and might even terminate her employment [ ]. The rationale is that her medical condition would become an economic drain on workers' compensation and on company health insurance and long-term disability policies. In addition, promoting and training her would waste valuable company resources with no hope of reward [9, p. 244].

EVALUATION

Discrimination

The Americans with Disabilities Act directly addresses employment discrimination based on the employer's classifying the employee as disabled. The act mandates that

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment [3, § 12112(a)].

The statutory language, "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment," unequivocally provides that the ADA seeks to regulate those areas most likely to be affected by an employer utilizing genetic screening. Such a conclusion is based on the contention that employers use or will be likely to use in the near future genetic information to render decisions regarding hiring, termination, demotion, or advancement of an employee.

According to the act, an employee would be participating in discriminatory practices in utilizing genetic testing to make employment decisions if the affected employee was to be classified as a "qualified individual with a disability," as provided for in section 12112(a). The act provides that discrimination includes:

> (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee
>
> . . .
>
> (3) utilizing standards, criteria, or methods of administration—
>
> (A) that have the effect of discrimination on the basis of disability; or
>
> (B) that perpetuate the discrimination of others who are subject to common administrative control;

> (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association
>
> . . .
>
> (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity . . .

According to these statutory provisions, employment practices that use the results of genetic testing as a criterion in hiring, termination, demotion, or advancement procedures are deemed discriminatory in nature. However, the ADA does not seek to abolish all forms of discriminatory labor practices. In fact, the Americans with Disabilities Act has a limited scope, seeking to protect only "a qualified individual with a disability" [3, § 12112(a)]. Thus, for an employee to proceed under the provisions of the ADA, the employee must qualify as a "qualified individual with a disability" [3, § 12112(a)]. This statutory provision contains two key words to unlocking the dilemma of whether an employee subject to discriminatory employment practices based on a genetic test that classifies the individual as hypersusceptible to genetic disease is covered by the act.

Disability

The ADA specifically defines a "qualified individual with a disability" in section § 12102(8). This section, in part, provides:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

This definition of a "qualified individual with a disability" is incomplete without considering the statutory definition of "disability" codified at section 12102(2). The act defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment" [3, § 12102(2) (Supp. II 1990)]. The classification of an individual as having a "disability" depends on showing the individual has "a physical or mental *impairment*, "a record of such an *impairment*," or "regarded as having such an *impairment*" [3, § 12102(2) (Supp. II 1990)].

It can be contended that a person with a genetic hypersusceptibility is impaired within the meaning of the act. Such an individual fits the definitional section of "disability" as outlined in section 12102(2). Under the first prong of that section

the employee can claim a genetic predisposition to occupational illness is a "physical or mental impairment that substantially limits one or more of the major life activities of such individual," for example employability [3, § 12102(2) (Supp. II 1990); 7, p. 46]. Under the third prong of the definition, if the employer affects the employee's employment in any negative regard based on a genetic test, it can be contended that the employer regards the employee as having an impairment [3, § 12102(2) (Supp. II 1990); 7, p. 46]. Thus, it can be contended that an individual employee with hypersusceptibility to genetic illnesses is a "qualified individual with a disability" under the act [7, p. 46].

Although the above contentions are based on a reasonable interpretation of the ADA, such an interpretation has not been the trend. Currently, the Equal Employment Opportunities Commission (EEOC) views genetic testing and the possible resulting classification, genetically hypersusceptible to illness, as not protected under the ADA. In rejecting the contention that genetic hypersusceptibility is an "impairment," the EEOC has stated:

> Everyone has hereditary genetic characteristics that predispose them to the onset of particular illnesses or diseases that could become disabilities under the ADA. If your grandmothers had heart disease, you may have a predisposition to heart disease. And if your father has cancer, you may be predisposed to developing cancer. However, the presence of these genetic characteristics does not indicate that an individual has an impairment or a record of an impairment, or necessarily that the individual may develop an impairment in the future. Consequently, the Commission determined that a characteristic predisposition to illness, like that revealed in a family history, is not an impairment covered by the ADA [7, p. 46 (quoting Letter from Ronnie Blumenhal, Acting Director of Communications and Legislative Affairs, EEOC, to Rep. Bob Wise, Chairman, House Subcommittee on Government Information, Justice and Agriculture (Nov. 22, 1991) (on file with the *Houston Law Review*))].

Assuming arguendo that an aggrieved employee can hurdle this EEOC interpretation of the ADA anddddd its applicability to predispositions to illnesses, the employee must be able to demonstrate through other sources that s/he is "impaired" within the meaning of the ADA.

"Impairment" is not defined in the act; therefore, the act offers no guidance for the employee [5, p. 765]. This absence of a definition of "impairment," as indicated earlier, was a result of Congress not desiring to risk excluding from the ADA's statutory provisions "new conditions or diseases that may be recognized by medical science in the future" [5, p. 765]. Therefore, it is necessary to consult other sources to determine the proper interpretation of "impairment" in light of the Americans with Disabilities Act. There exist three primary sources of guidance in regard to this matter. The first is the ADA's legislative history. The second source of information consists of interpretations and decisions rendered by the EEOC.

Finally, judicial decisions can indicate the current judicial trend toward genetic hypersusceptibility to illness. There exist two sources of case law relevant to this inquiry. Obviously, decisions interpreting the ADA in regard to its "impairment" provision constitute one source of guidance. However, this resource is limited by virtue of the act's short existence in American jurisprudence. Because the ADA was modeled after the Rehabilitation Act of 1973, decisions rendered under that legislative enactment also serve as a source of relevant information [5, p. 764 (referring to 29 U.S.C. § 706(8)(B) (Supp. II 1990))]. After consulting these sources of information, it can be concluded that "a physical impairment consists of a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of the biological systems of the body . . . [and] [a] mental impairment consists of any mental or psychological disorder, such as mental retardation, emotional and mental illness, or specific learning disabilities" [5, p. 765].

The ADA mandates that an impairment rises to the level of a disability if "it substantially limits one or more of an individual's major life activities" [5, p. 768]. Legislative history indicates what constitutes "one or more of the major life activities of such individual" [3, § 12102(2)(A)]. It has been stated that "[t]he legislative history indicates that major life activities include caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing, walking, learning, and *working* [5, p. 769 (emphasis added)]. It is further contended that "[a]n impairment substantially limits a major life activity if it prevents an individual from performing an activity that an average person in the general population can perform" [5, p. 769]. "[The] severity of the impairment, the duration or expected duration of the impairment, and the permanent or long-term impact of the impairment" [5, p. 769] are also relevant inquiries to consider in determining if the individual's impairment "substantially limits one or more of the major life activities of such individual" [3, § 12102(2)(A)].

The question arises of whether employment is a major life activity according to the ADA. The legislative history indicates it is. Therefore, a person classified as impaired by his/her employer "suffers some limitation in the major life activity of working" [5, p. 770 (referring to statements made during floor debate in the House of Representatives and recorded at H.R.Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 53 (1990))]. This source of legislative history seems to indicate that if a person's employability is affected in any manner, the employee is "impaired." However, such practices are the source of all employment decisions. Every employment decision affects some individual's ability to work; thus, every individual who attempts to enter the workforce or who is currently in the workforce could be classified as "impaired" based on the employer's rendering traditional employment decisions regarding hiring, termination, demotion, and promotion. Therefore, the fact that an employment decision affects an individual's employment status does not raise the affected person to the level of impairment necessary to reach the threshold "disability" classification prescribed by the ADA. To evaluate

the degree of impairment and whether it rises to the level of a disability, several inquiries may be considered.

One test proposed to determine whether discrimination from employment constitutes a substantial limitation of one of life's major activities is:

> If an individual's impairment would significantly restrict him in the ability to perform either an entire class of jobs, or a broad range of jobs in various classes, as compared to the average person having comparable training, skills, and abilities, he would be substantially limited with respect to his ability to work. However, if an individual's impairment prevents him from working only on one particular job or from performing a specialized job or profession requiring extraordinary skill, talent, or prowess, he would not be substantially limited in the major life activity of working [5, p. 770].

Such an inquiry is reflected in case law, which indicates that a relevant inquiry into whether the employee's impairment rises to the level of a disability protectable under the act is to consider "the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual's job expectations and training" [15, p. 932 (quoting *Jasany v. United States Postal Service*, 755 F.2d 1244, 1249 (6th Cir. 1985))]. To demonstrate that an impairment substantially limits the employee to work, the employee must be capable of not only demonstrating that his impairment made him " 'incapable of satisfying the singular demands of a particular job,' but that it 'foreclose[d] generally . . . [the employee's opportunity to obtain] the type of employment involved" [16 at 205 (first alteration in original) (quoting [15, at 934])].

The second prong of section 12102(2) provides that disability means "a record of such an impairment" [3, § 12102(2)(B)]. It has been generally recognized that Congress provided this statutory provision to address the situation of an individual who has a family history of such illnesses as cancer, heart disease, and mental illness [7, p. 50; 5, p. 770]. The EEOC provided guidance in interpreting this provision [9 at 50]. Its regulations state, " '[h]as a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities' " [7, p. 50 (quoting Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,735 (1991) (alteration in original))].

Genetic screening can be considered to create a genetic record of the individual. If the genetic profile of the individual employee is considered an impairment by the employer, section 12102(2) may be a source of protection for the genetically hypersusceptible employee. A person classified as having a genetic hypersusceptibility toward illness can allege that an employer, by denying the benefits frequently associated with employment, is misclassifying that individual as possessing "a mental or physical impairment that substantially limits one or more major

life activities" [7, p. 50]. A genetic test provides documentation of susceptibility to certain genetic conditions, similar to a family history that indicates propensities to certain illnesses. Thus, according to the EEOC regulations, it might be possible to classify genetic hypersusceptibility as a disability if the employer considers the employee to have a record of such an impairment.

The third prong of section 12102(2) seemingly is a catch-all provision. Section 12102(2)(C) provides that an individual has a disability if he is "regarded as having such an impairment" [3, § 12102(2)(C)]. Although the third prong appears to be the congressional catch-all phrase, the EEOC has limited its interpretation of section 12102(2)(C) to three precise situations:

> (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;
> (2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or
> (3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment [7, p. 51 (quoting Fed. Reg. App. at 35,742)].

The terms provided for in section 12102(2) of the ADA closely parallel those statutory terms implemented in the Vocational Rehabilitation Act of 1973, which defines the term "individuals with handicaps" [5, p. 764 (referring to 29 U.S.C. § 706(8)(B) (Supp. II 1990))]. As reflected in the legislative history in comments made by cosponsors of the ADA, the concepts embodied in that act were intended to be bound to the judicial and administrative interpretations already decided under provisions of the Rehabilitation Act [5, pp. 764-765]. Because the Rehabilitation Act of 1973 has enjoyed over twenty years of existence, case law pertaining to this legislative enactment is well-developed.

One such case interpreting impairment under the Rehabilitation Act is *Chandler v. City of Dallas* [17]. The court in *Chandler* stated:

> [A] person is regarded as having an impairment that would constitute a handicap if he
> (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by [an employer] as constituting such a limitation;
> (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
> (C) has none of the [above described impairments] but is treated by [an employer] as having such an impairment [17, at 1390 (second and third alteration in original)].

The court explained that, in deciding whether an employee's impairment limits an individual's employment potential, several factors must be considered [17, at 1392]. The court ruled these factors included: "the number and type of jobs from which the individual was disqualified, the geographic area to which he has reasonable access, and the individual's employment qualifications" [17, at 1392]. The court concluded: "An impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one" [17, at 1392 (quoting *Jasany v. United States Postal Service*, 755 F.2d 1244, 1249 n. 3 (6th Cir. 1985))].

Although the impairment provision of the Rehabilitation Act has been the subject of substantial litigation, even after twenty years of enforcement the act has been minimally invoked in cases of an employee being denied employment opportunities based on a predisposition to illness. Perhaps the most notable case and perhaps the only "true" case addressing the issue of whether a predisposition to an occupational illness constitutes an impairment within the meaning of the word as found in the Rehabilitation Act is *E. E. Black, Ltd. v. Marshall* [6].

In *Black*, the defendant, Black, required all apprentice carpenter applicants to take preemployment physical examinations, which included back x-rays [6, at 1091]. Crosby applied for an apprenticeship, but was denied employment based on a physician's conclusion that Crosby suffered from "a congenital back anomaly" [6, at 1091]. Crosby sought protection from this employment discrimination under the Rehabilitation Act of 1973. The issue at the forefront of the *Black* litigation focused on whether Crosby's predisposition to potential back problems made him "impaired" according to the Rehabilitation Act. The court stated that "the term impairment meant any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity" [6, at 1098 (internal quotations omitted)]. The *Black* court noted the Supreme Court decision in *Southeastern Community College v. Davis*, which stated:

> A person who has a record of, or is regarded as having, an impairment may at present have no actual incapacity at all. Such a person would be exactly the kind of individual who could be "otherwise qualified" to participate in covered programs. And a person who suffers from a limiting physical or mental impairment still may possess other abilities that permit him to meet the requirements of various programs. Thus, it is clear that Congress included among the class of "handicapped" persons covered by § 504 a range of individuals who could be "otherwise qualified" [6, at 1098 (quoting *Southeastern Community College*, 442 U.S. at 405-06 n. 6)].

The *Black* court continued its analysis of the act and its applicability to Crosby by stating that " 'a handicapped individual is "substantially limited" if he or she is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap' " [6, at 1099 (quoting 41. C.F.R. § 60-741.2)]. The court

ruled that Crosby was "a qualified handicapped individual as that term is used in § 503 of the Act," and therefore, Black's actions were in violation of the Rehabilitation Act [6, at 1103].

Although not definitively addressing the issue of predisposition to illness being classified as an impairment, the court in *Teahan v. Metro-North Commuter Railroad Company* [18] alluded to the issue of whether a predisposition to an illness constitutes an impairment. It is well accepted that substance abuse is a "handicap" under the Rehabilitation Act, but the *Teahan* court was confronted with an employee challenging an employment decision that terminated him seemingly for his predisposition to substance abuse [18, at 518].

This case's applicability to this discussion is contingent on an understanding of the facts surrounding the *Teahan* litigation. Teahan was employed by Metro-North Commuter Railroad Company and was disciplined on numerous occasions for excessive absenteeism [18, at 513]. Teahan attempted to correct his abuse problem and absenteeism problem by checking into a substance abuse center but was unable to complete the program. Teahan notified Metro of his substance abuse problem, and Metro allowed Teahan to continue his employment with the company. Teahan continued to miss work, and he again checked into an abuse clinic [18, at 513]. This time Teahan was successful in completing the program and remained a reliable employee for about three-and-one-half months before Metro discharged him.

It can be contended in considering the facts surrounding this case that Teahan was terminated because of a propensity for alcoholism. The court rejected the employer's termination of Teahan by stating, "It would defeat the goal of § 504 [of the Rehabilitation Act] to allow an employer to justify discharging an employee based on past substance abuse problems that an employee has presently overcome" [18, at 518].

The decisions rendered in *Black* and *Teahan* indicate that predispositions to certain illnesses may constitute a handicap protectable under provisions of the Rehabilitation Act.

Another consideration in determining whether genetic susceptibility to illness is a disability under the Americans with Disabilities Act is considering the statutory provisions regarding the applicability of the act to HIV-infected persons. It is specifically mentioned in the Americans with Disabilities Act that persons infected with the HIV virus are "disabled" within the provisions of the act [19, at 130]. Case law deriving from interpreting the Rehabilitation Act supports this contention. Two cases best illustrate this correlation.

In *Severino v. North Fort Myers Fire Control District* [19] the court ruled the contagious nature of AIDS "brings AIDS within the definition of a handicap" [19, at 1183]. Accepting the general notion that HIV-infected people are handicapped within the meaning of the Rehabilitation Act, the court in *Doe v. District of Columbia* [20] reasoned that such a judicial decision is based on the finding that an HIV-infected person "has a physical impairment that substantially limits life

activities such as procreation, sexual contact, and normal social relationships" [20, at 568].

Correlating the HIV virus with the situation at issue in this article, genetic hypersusceptibility to illness, it can be contended that a person classified as HIV-positive is similar to a person who is classified as genetically hypersusceptible to illness. Both persons presently may not be inflicted with any physical or mental disabilities associated with their status; however they are regarded as impaired by the employer. The HIV-positive person has the propensity to contract AIDS, but HIV status does not ensure that the individual will contract AIDS. The same situation is evident in the genetically hypersusceptible person. This person may have the genetic code that makes it likely for him/her to acquire a genetic illness in the future, but at the present time demonstrates no physical or mental limitations and, in fact, may never manifest any conditions or contract the genetic illness. The correlation ends there.

The substantial difference between HIV-positive and genetic hypersusceptibility is that the mere possession of the HIV virus substantially limits life activities. As indicated by the *Doe* court, an HIV-infected person is limited in ability to conduct sexual affairs and even simple personal relationships. A genetically hypersusceptible person is not limited by his/her classification until, if at all, s/he acquires the genetic illness. Therefore, until the genetic illness manifests itself in the individual, the individual is not substantially limited or limited in any respect in pursuing life activities.

If a genetically hypersusceptible employee is not determined to be disabled within the meaning of the Americans with Disabilities Act, the employer, absent other statutory provisions, is free to affect the individual employee's employment in any manner. Therefore, an employer who legally gained genetic information can terminate, demote, or withhold from advancement any employee who tests positive for hypersusceptibility to genetic illness. This type of employer action would be based on the employment-at-will doctrine. Assuming arguendo that the hypersusceptible-to-genetic-illness employee can qualify as manifesting an impairment capable of classification as a disability within the parameters of the ADA, the employer would be preempted from invoking the protection of the employment-at-will doctrine in making employment decisions based on genetic screening. A finding, however, that a genetically hypersusceptible individual is disabled does not automatically indicate a violation of the Americans with Disabilities Act.

"Impairment" Demonstrated Through the Hypothetical Example

The hypothetical employee is faced with possible discrimination based upon her hypersusceptibility to the genetic condition, Huntington's disease. Assuming the employee is able to sufficiently demonstrate that the employer intends to discriminate against her based on her genetic profile, the employee must demonstrate

she is impaired to the level of a disability to be provided the protections of the ADA.

To reach the requisite impairment classification, the employee would certainly be advised to argue the EEOC statement providing, "The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment" [7, p. 51 (quoting Fed. Reg. App. at 35,742)].

The employer, in arguing the employee is not impaired to the level of required disability, will certainly argue based on judicial decisions that "[a]n impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one" [17, at 1392 (quoting *Jasany v. United States Postal Service*, 755 F.2d 1244, 1249 n. 3 (6th Cir. 1985))]. Therefore, the employer can claim that, although the employee suffers a disability through her genetic profile, it does not substantially affect one of the major life activities, because she can continue employment where intricate manual labor is not involved and excessive training is not necessary.

When the hypothetical example is analyzed in terms of " 'the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual's job expectations and training' " [15, at 932 (quoting *Jasany v. United States Postal Service*, 755 F.2d 1244, 1249 (6th Cir. 1985))], it would seem the employee is not substantially affected in one of life's major activities; thus, she is not disabled and cannot pursue relief for the employer's practice of utilizing genetic test under the ADA.

Employer Defenses upon the Employee Being Classified as "Impaired"

Even if it can be demonstrated that an employee categorized as hypersusceptible to genetic illness is "impaired" to the extent of disability within the meaning of the act, the employer can still escape liability under the ADA. First, the employer can defend an ADA action by claiming the employment decisions were based on job-relatedness and are a business necessity [3, § 12113(a)]. The job-related defense is beyond the scope of this article. The employer has another defense to invoke under the provisions of the ADA. Section 12111(10) indicates that if employing the disabled person creates an "undue hardship" for the employer, s/he may still participate in practices tending to discriminate against that individual employee, including termination [3, § 12102(2)(A)]. The ADA defines "undue hardship" as:

> an action requiring significant difficulty or expense, when considered in light of the factors set forth . . . In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include

> (i) the nature and cost of the accommodation needed under this chapter;
>
> . . . .
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees. . . . [3, §§ 12102(2)(A); 12102(2)(B)].

During congressional consideration of the Americans with Disabilities Act, the "undue hardship" standard originally introduced required a high standard of proof [21, p. 1448]. As introduced, the act required that "an accommodation would not be unreasonable unless it threatened the continued existence of the employer's business" [21, p. 1448]. However, protest from the business community influenced Congress to lessen the burden required of an employer to demonstrate "undue hardship" [21, p. 1448].

The Code of Federal Regulations provides guidance in further defining the term "undue hardship." The code provides that "[t]he term 'undue hardship' means significant difficulty or expense in, or resulting from, the provision of the accommodation" [22]. The code expands on this definition by providing that " '[u]ndue hardship' refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business" [22]. The code provides that a proper consideration of "undue hardship' "takes into account the financial realities of the particular employer" [22].

The code provides several factors to be analyzed in determining whether the covered entity has adequate financial resources to provide for the accommodation. The code provides for the following inquiries:

> (i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;
>
> (ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
>
> (iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its faculties;
>
> (iv) The type of operation or operations of the covered entity, including the composition, structure and facilities of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

> (v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business [22, § 1630.2].

In sum, the code provides a simple inquiry requiring the employer to demonstrate that "the cost is undue as compared to the employer's budget" [22, § 1630, App.].

As indicated, even if an employee can make the requisite showing that s/he was terminated, demoted, or restricted from promotion based on genetic testing that indicated a hypersusceptibility to genetic illness and achieved the requisite "disability" classification, the employer under the Americans with Disabilities Act still has an avenue of protection. The employer can claim it is impractical to accommodate the employee in the workforce. This rationale of the employment decision to affect the normal progression of an employee's employment is most likely to be based on an economic foundation [14, p. 590]. A term has been coined to label this economic defense—"business necessity." In fact, this term is used in the statutory language of the ADA and serves, according to section 12113(a), as a complete defense against discriminatory practices. The "business necessity defense" and the "undue hardship" defense in this situation focus on the same factor—the economic impact the continuation of employee's employment would have on the entity.

This defense is implemented to "screen out qualified handicapped individuals" [13, p. 1445]. Employers may be tempted to "exclude high-risk individuals from the workforce because these individuals are believed to be more likely to suffer from an occupational injury or illness, resulting in the employer's expense" [13, p. 1475]. It is contended that an employer will suffer economic hardships based on "[i]ncreased medical and insurance premiums, absenteeism, lowered productivity, increased risk in the line of duty, and liability for workers' compensation" [12, p. 2089; 23, p. 1029; 13, p. 1475].

To support these claims of "business necessity," statistics may be of assistance. It is estimated that in 1981 occupational illness diminished the United States economy by more than 850,000 workdays [2, p. 775]. Another study estimated that work-related injuries and illnesses in the United States cost close to twenty-three billion dollars annually [2, p. 804]. It is also widely accepted that the health status of an employee affects the employee's productivity on the job and absenteeism from the job [2, p. 804]. Therefore, it has been contended that "[h]ypersusceptible employees arguably would take more sick leave and be responsible for a higher turnover rate, necessitating expenditures in hiring and training new workers" [2, p. 804]. It is alleged that "[t]he most common and notorious form of aggressive cost-cutting [an employer can participate in] is to terminate employees who become seriously ill or injured" [23, p. 1030].

Statistical analyses indicate that health insurance costs have seen drastic increases over the past years. In 1985 employer health insurance costs per

employee were $1,724 [7, p. 28]. In 1991 that figure rose to $3,605 per year per employee [7, p. 28]. This trend of drastic increases in health insurance is sure to continue. Therefore, could an employer faced with such insurance costs for the average worker claim that an employee hypersusceptible to genetic illness would drive health insurance costs even higher to the point where they became an undue burden on the employer? Or, can the employer claim that a genetically hypersusceptible-to-illness employee is too costly to advance in the company because genetic tests indicate that by the time the training and mentoring process comes to fruition the likelihood that the employee will succumb to genetic illness is very high?

Because the ADA is a recent legislative development, extensive case law is absent, therefore leaving a void in judicial interpretations concerning the "undue hardship" provision. Therefore, it remains to be determined how ironclad a defense, if at all, the "undue hardship" and "business necessity" defense will be for an employer alleged to have discriminated against an employee because of the employee's genetic hypersusceptibility to illness. However, it can be hypothesized how the courts may consider such a defense to employment discrimination based on disability.

The act provides that "undue hardship means an action requiring significant difficulty or expense" when considering several factors. In considering health care costs and the costs of training an employee who is likely not to provide the necessary commitment for the employer to compensate the employer for his expenditures in training the employee, it seems that an employer, especially in regard to the smaller employer with less capital at his disposal, may be protected from the provisions of the act based on "undue hardship" and "business necessity." The act specifically provides that in considering "undue hardship" the court must consider the following: "the nature and cost of the accommodation," "the overall financial resources of the facility or facilities involved," "the overall financial resources of the covered entity," and "the overall size of the business of a covered entity with respect to the number of its employees" [3, § 12102(10)(B)].

The "Undue Hardship" and "Business Necessity" Defense Applied to the Hypothetical Case

In the hypothetical example, there is an employee at a small company who is up for a promotion. The employee has been diagnosed through genetic screening to possess the genetic profile of a Huntington's disease person. The onset of this disease will decrease her motor skills, and it will eventually hospitalize the employee, probably until her death. Statistically, Huntington's disease affects people in their middle years, and the employee in this case is thirty-five years old. The employer refuses to promote the employee because of the potential health care costs and long-term disability payments the employer could be liable for in continuing the employee's employment. In addition, the promotion the employee

is up for requires costly advanced training, and if the disease manifests itself in the employee, it is likely the costs of training will not be recovered from her performing the responsibilities associated with the promotion.

In this hypothetical case, could the employer refuse to promote the employee and even terminate her based on her genetic profile without violating the Americans with Disabilities Act? There is a great likelihood s/he could. Assuming arguendo the employee could meet the requisite "impairment" qualification and could meet the other statutory provisions required to establish a prima facia case of discrimination in violation of the ADA, the employer could rebut the plaintiff employee's allegation with the "undue burden" defense. In considering the employer's resources, a court would have to note that the employer is a small company without many assets and limited capitalization. The employer employs only a small workforce and provides health care benefits for all of its employees. In continuing to employ an employee hypersusceptible to Huntington's disease, this employer would subject the company to tremendous economic burdens and be forced to spread the costs of insuring and providing other benefits to the employee through either diminishing the other employees' health benefits, requiring the other employees to pay higher dividends for their coverage, or passing the cost of insuring the genetically susceptible employee to the consumer. In any manner, when the employer decides to offset the economic burden the employee places upon the firm, s/he subjects other parties to increased economic burdens. An even more convincing defense is the employer's potential claim that promoting the employee to a position requiring advanced training would deplete the financial resources of the company with little hope of a payoff because of the employee's likelihood of developing a debilitating disease within the next few years.

It is pure speculation on how the "undue hardship" defense can be implemented by an employer faced with defending an employment decision based on genetic profile. At the present time, most of the litigation focusing on the "undue hardship" provision pertains to accommodations in facilities for employees classified as impaired. To the employer using or considering using genetic testing, it is fortunate the "undue hardship" provision of the act is more likely to be developed through litigation pertaining to other matters, and that the employer may never have to invoke the defense if precedence indicates that genetic hypersusceptibility to illness is not an impairment rising to the level of disability under the terms of the Americans with Disabilities Act.

Policy Arguments for Courts Not to Include Genetic Hypersusceptibility to Illness as a Disability

The first argument against the judicial branch deciding whether genetic hypersusceptibility to illness is an impairment rising to the level of a disability is that the judicial branch is not the branch of government, under a federalist system, to decide the matter. Judicial decrees mandating that genetic hypersusceptibility to

illness be classified as a disability under the Americans with Disabilities Act borders on judicial legislation. It has been contended that

> In deciding whether hypersusceptibility is a handicap, one must address general policy questions and should amass numerous facts. This process is one best reserved for a legislature. The ad hoc and retrospective process, which is the essence of the American judicial system, is improper to resolve the issues of an emerging technology. This shortcoming is not due to incompetencies but to the nature of the American judicial system. Courts exercise the power on a case-by-case basis. Therefore, although the courts may be headed in the right direction, it necessarily takes them longer to reach a policy objective than it would the legislature. Unfortunately, society may not have the luxury of time when confronted with the hazards of an emerging technology.
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> An ad hoc and retrospective approach to the issues presented by genetic screening will be burdensome on the courts and unfair to those employers, employees, and job applicants who were not parties to the particular case before the court. . . . Courts must by their very nature decide the case before them and do not have the luxuries afforded the legislature, such as endless hours of expert testimony or the discretion to avoid the issues entirely [1, pp. 200-201].

Adopting this approach does not contradict the holding in *E. E. Black*, where the court ruled that such cases should be decided on a "case-by-case" basis because of the fact-specific nature of such inquiries. The above philosophy does not mandate that the legislature decide which genetic profiles should be classified as a disability—the above theory only proposes that it is a legislative responsibility to determine whether genetic hypersusceptibility to illness is a disability protectable under the Americans with Disabilities Act and it is the courts' responsibility to determine if a person is a hypersusceptible person and if s/he was discriminated against based on that classification.

If the original purpose in enacting the Americans with Disabilities Act is implemented by Congress in revisiting the ADA, it is unlikely that Congress will amend the act to include genetic hypersusceptibility as a disability. The act provides a "findings and purpose" section [3, § 12101(2)]. This provision states that "Congress finds that some 43,000,000 Americans have one or more physical or mental disabilities" [3, § 12101(2)]. The scientific community has discovered hundreds of genetic markers that indicate an individual's hypersusceptibility toward hereditary diseases, mental illnesses, personality traits and disorders, and even addictions [see 9, p. 241]. If the common population carries "five to seven lethal recessive genes as well as a still undetermined number of genes that make [them] susceptible to developing diseases based on interactions with the environment," then Congress' estimate of the influence of the ADA is too low [11, p. 690].

The EEOC has stated that "[e]veryone has hereditary genetic characteristics that predispose them to the onset of particular illnesses or diseases that could become disabilities under the ADA" [7, p. 46]. Analyzing this statement, it can be concluded that the EEOC's policy is not to recognize hypersusceptibility as a disability under the ADA, at least until the time the genetic disorder manifests itself as an illness or disease within the individual employee. Thus, it seems it is EEOC policy not to protect hypersusceptible individuals until they achieve the requisite impairment rendering a disability.

It is argued that "the use of genetic tests will result in invidious discrimination creating a new class of undesirable workers" [1, p. 182]. The "most compelling reason for prohibiting employment discrimination based on susceptibility to occupational illness is that susceptibility is often 'an immutable characteristic determined solely by the accident of birth.' The law has traditionally viewed with disfavor any differentiation in treatment based on immutable characteristics like race, sex, alienage, and legitimacy" [13, p. 1495]. In the abstract, such policy arguments provide strong support for including genetically-hypersusceptible-to-illness employees within the disability definition of the Americans with Disabilities Act. However, in application such reasoning creates a circular system. Both sides of the issue do not dispute that "[g]enes provide the blueprint for the biological component of *human individuality*" [7, p. 24]. Because genetic codes make up who the person is and will be in the future, every time an employer makes an employment decision based on a person's individual characteristics, such as education, timeliness, and efficiency, the employer is making a decision based on the person's genetic profile. Adopting the philosophy that employment decisions based on genetic information create invidious discrimination, creates, in itself, invidious employment practices. Taken to the extreme such a statement would require the employer to make posthiring decisions simply based on seniority, because the employer considering any other characteristic of the employee would be basing a decision on the person's genetic make-up. Even basing employment decisions on seniority creates invidious discrimination, because it is contended the law has traditionally viewed with disfavor any differentiation in treatment based on immutable characteristics. Age, which in most likelihood would determine seniority, is an immutable characteristic determined solely by birth.

CONCLUSION

In sum, the Americans with Disabilities Act seeks to protect qualified individuals with a disability. Hypersusceptibility to genetic illness does not create an impairment within the individual, in terms of the act, until the genetic disease actually manifests itself through physical or mental conditions. A genetically-hypersusceptible-to-illness employee does not reach the requisite level of a "qualified individual with a disability" [3, § 12112(2)]. Although a genetically hypersusceptible employee may be denied employment for a particular position

within a particular company, it does not exclude the individual from pursuing other employment opportunities.

It is not suggested that the practice of employers testing individual employees for genetic hypersusceptibility to genetic illnesses should go unfettered. In fact, that is quite the contrary to the theme of this article. Employers should not be allowed to create a "super" workforce, but they should be allowed some latitude to select and minimize their future liabilities in regard to genetic illness. If genetic hypersusceptibility to illness is to develop into a class of impairment within the meaning of the ADA, it is only a matter of time that all employment decision-making factors are classified as creating an impaired class of people—thus resulting in the dilution of the integrity of the act. Although discriminating against an individual employee based on his/her genetic profile should not be prohibited by the Americans with Disabilities Act, if the original purpose of the act is to be maintained, independent legislation should be proposed and enacted that specifically addresses genetic testing in the employment area, if such genetic practices are integrated into mainstream employment practices. The Americans with Disabilities Act should be limited in its protection to traditional disabilities that are easily recognized and thus deserving of protected-class status.

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ENDNOTES

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2. *See also* E. R. Pierce, *The Regulation of Genetic Testing in the Workplace—A Legislative Proposal*, Ohio St. L.J. 771 (1985).
3. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (Supp. 1991).
4. Title VII, *as amended by* Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e, 1982.
5. T. H. Christopher and C. M. Rice, *The Americans With Disabilities Act: An Overview Of The Employment Provisions*, 33 S. Tex. L. Rev. 759 (1992).
6. E. E. Black, *LTD v. Marshall*, 497 F.Supp. 1088 (D. Haw. 1980).
7. M. A. Rothstein, *Genetic Discrimination in Employment and the Americans with Disabilities Act*, 29 Hous. L. Rev. 23 (1992).

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13. M. A. Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness*, 81 Mich. L. Rev. 1379 (1983).
14. *See* R. Wachbroit, *Making The Grade: Testing For Human Genetic Disorders*, 16 Hofstra L. Rev. 583 (1988).
15. *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986).
16. *Gupton v. Commonwealth of Virginia*, 14 F.3d 203, 205 (4th Cir. 1994).
17. *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993).
18. *Teahan v. Metro-North Commuter Railroad Comp.*, 951 F.2d 511 (2d Cir. 1991), *cert. denied*, 113 S.Ct. 54 (1992).
19. *Severino v. North Fort Myers Fire Control District*, 935 F.2d 1179 (11th Cir. 1991).
20. *Doe v. District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992).
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