

The Impact of the Genetic Information Nondiscrimination Act on Sports Employers: A Game of Balancing Money, Morality, and Privacy

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I. Introduction

On Sunday morning, January 18, 2010, Chicago Bears’ starting defensive end Gaines Adams went into cardiac arrest and later died. Adams was just 26 years old and was in great physical condition.¹ He died of a genetic condition known as hypertrophic cardiomyopathy (“HCM”), a heart condition that is the leading cause of sudden deaths among athletes.² Adams’ sudden death begs the question: could this tragedy have been prevented if the Bears required Adams to take a simple genetic test? The answer to this question is probably yes, but Congress, through its passage of the Genetic Information Nondiscrimination Act of 2008 (“GINA”), makes it illegal for employers to compel an employee to provide genetic information.³ The Act prevents employers from using an employee’s genetic information in making hiring, firing, and other decisions.⁴ It is easy to see how the privacy requirements of GINA benefit employees. If GINA were not in place, the Bears could have required Adams to take a genetic test that

¹ Melissa Isaacson, *Adams was a Great Kid*, January 18, 2010, available at http://sports.espn.go.com/chicago/nfl/columns/story?columnist=isaacson_melissa&id=4834706.

² Melissa Isaacson, *Sometimes There are No Answers*, January 24, 2010, available at http://sports.espn.go.com/chicago/nfl/columns/story?columnist=isaacson_melissa&id=4837804.

³ 42 U.S.C.A. § 2000ff (West 2008).

⁴ *Id.*

would have disclosed his condition. Based upon the test results, the Bears might have opted to not sign Adams at all, or placed restrictions on his play. The test results would inevitably circulate through the National Football League (“NFL”), or prompt other teams to test Adams after seeing that the Bears released him. A positive test result would likely foreclose any future employment opportunities in the NFL, and Adams’ professional football career would have been over.

However, at the expense of protecting privacy rights, GINA may frustrate the moral obligation that a team has to its players. If a team sees that a player has symptoms of a potential genetic heart condition, under GINA the team cannot do anything about it. The player would have to make the decision to get tested, and the team could do nothing to compel this decision. Players may be unwilling to go through with genetic tests because of the privacy concerns discussed in the hypothetical Adams situation. This battle between moral obligations and privacy rights is one of several debates that the passage of GINA has sparked in the context of professional sports.

This article explores the use of genetic testing in sports before the passage of GINA and the effects that GINA will have on these methods of testing. Part II of this article defines and examines the importance of genetic information and genetic testing. Part III discusses Major League Baseball’s (“MLB”) use of genetic testing to verify the age and identity of Latin American prospects. Part III also examines the National Basketball Association’s (“NBA”) proposed use of genetic testing on Eddy Curry to rule out HCM. Part IV looks at the specific language of GINA including the reasons for its enactment and the protections it offers. Lastly, Part V analyzes the effect that GINA will have on the two different types of genetic testing in sports.

II. Understanding the Importance of Genetic Information and Genetic Testing

A. Definition of Genetic Information and Genetic Testing

GINA defines ‘genetic information’ as “with respect to any individual, information about, (i) such individual's genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of such individual.”⁵ GINA’s definition of genetic information expressly excludes information about the sex or age of an individual.⁶ It is unclear why information about age and sex is not included, but it is likely due to the fact that other federal statutes prohibit discrimination based on age and sex and, therefore, GINA does not need to include it in its statutory language.⁷

B. Significance of Genetic Testing

Genetic testing is a controversial practice, which has been thought to have great benefits as well as frightening consequences. There are many forms of genetic testing, however, the most controversial form of testing involves examining a person’s Deoxyribonucleic acid (“DNA”) to determine if there are

⁵ 42 U.S.C.A. § 2000ff (defining ‘genetic test’ as “an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes”).

⁶ *Id.* (stating “The term “genetic information” shall not include information about the sex or age of any individual”).

⁷ 42 U.S.C.A. §2000e et seq. (prohibiting employment discrimination based on sex); *see also* 29 U.S.C.A. §621 et seq. (prohibiting employment discrimination based on age for people over 40).

any mutated sequences that could be markers for susceptibility to a particular disease.⁸ DNA is the hereditary material in humans and contains information about how a human will develop biologically throughout life.⁹ The usefulness of genetic testing has been challenged in many instances because DNA reveals only the probability of development or susceptibility to a certain disease.¹⁰

One obvious and important benefit that comes from genetic testing is that people will be able to take proactive steps towards preventing the onset of a disease if they know that they are susceptible to it.¹¹ This is significant for athletes because if an athlete learns that he is susceptible to a certain disease, and that his participation in athletics exacerbates the onset of that particular medical condition, the athlete can make the choice to stop participating in athletics in an effort to prevent the disease. Another benefit of genetic testing is that siblings and children who have the same genetic makeup as the person tested may also be encouraged to take proactive steps towards determining if they are susceptible to any health risks or genetic conditions.¹² Children receive perhaps the greatest benefit of genetic testing. A couple contemplating having a child can get screened for genetic diseases to make sure they will not pass anything on to the child.¹³ Similarly, a couple who is expecting a child can test the fetus to determine if the child has any genetic diseases that they should prepare for.¹⁴

Notwithstanding the aforementioned benefits associated with genetic testing, the possibility that others can easily exploit genetic tests in discriminatory ways is a terrifying consequence from a civil rights perspective.¹⁵ Health insurance companies and employers who have access to the results of genetic tests may use these results to deny coverage or refuse to hire someone based on their genetic defects.¹⁶ This significant consequence of genetic testing formed the basis for the passage of GINA.

III. Genetic Testing in Sports

In the context of sports, genetic testing is used by teams and leagues for two main purposes; (1) to determine a potential player's age; or (2) to ascertain any genetic defects or predispositions to disease that an individual may have.¹⁷ Genetic testing is particularly beneficial to employers in the sports industry because employee-athletes are expected to be in peak physical condition to perform strenuous activities

⁸ Michael A. McCann, *Professional Sports and Collective Bargaining: The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. Pa. J. Lab. & Emp. L. 819, 850 (2006).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Jenn Savedge, Genetic Test Could Uncover Fatal Childhood Diseases, January 21, 2011, <http://www.mnn.com/family/babies-pregnancy/blogs/genetic-test-could-uncover-fatal-childhood-diseases>.

¹⁴ *Id.*

¹⁵ McCann, *supra* note 8 at 851.

¹⁶ Paul Steven Miller, *Is There a Pink Slip in My Genes? Genetic Discrimination in the Workplace*, 3 J. Health Care L. & Pol'y 225, 226 (2000).

¹⁷ See generally Rhonda B. Evans, "Striking Out": *The Genetic Information Nondiscrimination Act of 2008 and Title II's Impact on Professional Sports Employers*, 11 N.C. J. L. & Tech. 205 (2009); see also Ilya Gilman, *Implications of the Genetic Information Nondiscrimination Act (GINA) on Professional Sports* (2009), available at [http://www.law.illinois.edu/bljournal/post/2009/11/03/Implications-of-the-Genetic-Information-Nondiscrimination-Act-\(GINA\)-on-Professional-Sports.aspx](http://www.law.illinois.edu/bljournal/post/2009/11/03/Implications-of-the-Genetic-Information-Nondiscrimination-Act-(GINA)-on-Professional-Sports.aspx).

daily.¹⁸ Employers in the sports industry invest tremendous amounts of money into athletes with the expectation that these athletes can perform to the best of their abilities on a daily basis.¹⁹ If an athlete is predisposed to a certain disease and will not be serviceable after a couple of years, it would be a waste of capital for a team to invest millions of dollars for his services for the next ten years. It is this fear of waste and bad investments that drives employers in the sports industry to request genetic tests of potential and current employee-athletes.

A. MLB's Use of Genetic Testing to Determine the Age of Potential Employees

In 2008, starting shortstop for the Houston Astros and perennial All-Star, Miguel Tejada, admitted that he was 19 when he signed with the Oakland Athletics in 1993.²⁰ Tejada, a Dominican Republic native, told the Athletics that he was 17 at the time of his signing.²¹ In February 2009, an MLB investigation determined that 19-year-old Washington Nationals prospect Esmilyn Gonzalez was four years older than he claimed, and that his legal name was actually Carls David Alvarez Lugo.²² Also in 2009, MLB investigated Jose Ozoria, a 17-year-old Dominican Republic prospect who signed with the Cleveland Indians in 2008. MLB found that Ozoria was actually 20-year-old Wally Bryan.²³ In some industries, an age discrepancy of two, three, or four years would not be a big issue however, in the sports industry, the difference between a 19-year-old prospect and a 23-year-old prospect is monumental.²⁴ Furthermore, these prospects who lied about their ages were given substantial monetary bonuses because teams were willing to pay for their respective potential.²⁵ It is uncontested that the potential of a 19-year-old Latin American prospect is much greater than that of a 23 year old.²⁶ One reason for this is that grooming Latin American prospects into successful MLB players can take several years. By the time a 23-year-old-prospect is ready to be a productive MLB player, he may already be 27, whereas a 19-year-old prospect may be productive at 23. In recent years, hundreds of MLB prospects have been caught lying

¹⁸ Andrew E. Rice, *Eddy Curry and the Case for Genetic Privacy in Professional Sports*, 6 Va. Sports & Ent. L.J. 1, 47 (2006).

¹⁹ *Id.*

²⁰ Michael S. Schmidt and Alan Schwartz, *Baseball's Use of DNA Tests on Prospects Finds Controversy, Too*, N.Y. Times, July 22, 2009, at A1.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* (Quoting anonymous international scout, "In the eyes of baseball, there's a huge difference between 16 and 19 years old... It's night and day.").

²⁵ *Id.* Carlos David Alvarez Lugo received a signing bonus of \$1.4 million from the Washington Nationals before his true identity was discovered. Wally Bryan received a \$575,000 signing bonus from the Cleveland Indians before his true identity was revealed.

²⁶ David Gassko, *Catching Baseball Players Who Lie About Their Age*, <http://www.bookofodds.com/Daily-Life-Activities/Sports/Articles/A0133-Catching-Baseball-Players-Who-Lie-About-Their-Age> (last visited April 13, 2010). After learning his true age and identity, the prospect-tracking magazine, Baseball America, downgraded Gonzalez from a top ten Nationals prospect to outside of the top 30.

about their ages to make themselves more appealing to MLB teams.²⁷ This has led to the proliferation of DNA testing by MLB teams to ensure that they get what they are paying for.

In a July 2009 written statement, MLB stated that it used genetic testing “in very rare instances and only on a consensual basis to deal with the identity fraud problem that the league faces in [the Dominican Republic].”²⁸ Furthermore, MLB ensured the public that it did not use the results from these DNA tests for any other purpose than age and identity verification.²⁹ While the rate of occurrence of genetic testing by MLB is in question, MLB’s 2009 statement serves as an admission to genetic testing of potential ballplayers.

MLB analyzes DNA to verify identity and bone scans to determine a prospect’s age range.³⁰ MLB teams have investigators that look into whether a prospect is the age that he claims.³¹ If the results of this investigation are inconclusive, the team requests that the prospect take a DNA test to clear up any concerns.³² The prospect has to pay for the test himself and he is only reimbursed if the results show that he was telling the truth.³³ It also appears that MLB and MLB teams test prospects’ families as well. Miguel Sano, a 16-year-old prospect from the Dominican Republic said that the Pittsburgh Pirates asked his 17-year-old sister to undergo a bone scan to ensure that she was in fact his older sister, rather than a younger sister who used a false birth certificate to make Sano seem younger.³⁴ DNA tests cannot determine a player’s age, but they can determine whether a player is actually the son of his claimed parents.³⁵ This is useful for teams because prospects “have been known to find families willing to lend a younger child’s birth certificate so that a player can appear younger.”³⁶ As will be discussed later, MLB has come under heavy scrutiny after the passage of GINA due to the privacy and ethical concerns that surround its use of genetic testing.³⁷

B. NBA’s Use of Genetic Testing to Examine Genetic Defects in a Current Employee: The Case of Eddy Curry

Age verification is not the only reason a sports entity would require a genetic test from an athlete. The Chicago Bulls of the NBA demanded that their center, Eddy Curry, take a DNA test before they gave him a new contract to ensure that Curry’s heart discomfort would not affect the quantity and quality of his play.³⁸ During the 2004-2005 season, Curry began establishing himself as a quality low post player for the

²⁷ Schmidt and Schwartz, *supra* note 20. After September 11, 2001, the US government began checking foreign visas much more carefully. Through this intense scrutiny, the government found that over 300 players in the major and minor leagues used falsified birthdates to make themselves more appealing to teams.

²⁸ Alan Schwartz, *A Future In Baseball, Hinging on DNA*, N.Y. Times, July 23, 2009 at B11.

²⁹ *Id.*

³⁰ *Id.*

³¹ Schmidt and Schwarz, *supra* note 20.

³² *Id.*

³³ *Id.*

³⁴ Schwartz, *supra* note 28.

³⁵ Schmidt and Schwartz, *supra* note 20.

³⁶ *Id.*

³⁷ Schmidt and Schwartz, *supra* note 20; Schwartz, *supra* note 28.

³⁸ McCann, *supra* note 8 at 819.

Bulls.³⁹ He led the league in field-goal percentage and led the Bulls to the playoffs.⁴⁰ However, on March 30, 2005, just weeks before the playoffs, Curry began to feel sick.⁴¹ He was diagnosed with an irregular heartbeat and was sidelined for the rest of the season, including the postseason.⁴² After the season, many cardiologists tested Curry.⁴³ One of these cardiologists refused to clear Curry to engage in physical activity and recommended that the Bulls force him to take a DNA test to determine if he had HCM.⁴⁴ The Bulls followed the cardiologist's recommendation and required Curry to take a genetic test before signing him to a long-term contract.⁴⁵ Bulls Executive Vice President for Basketball Operations, John Paxson, said that he requested that Curry take a genetic test out of concern for Curry's health.⁴⁶ Allegedly, Paxson offered Curry \$20 million, \$400,000 a year for 50 years, if Curry tested positive for the HCM gene.⁴⁷ We will never know if Paxson's statement was true because Curry and his attorney, Alan Milstein, challenged the genetic test.⁴⁸ Milstein argued that the Bulls were violating Curry's privacy by compelling him to take a genetic test.⁴⁹ Milstein knew that if Curry took a genetic test and was found to have the HCM gene, he would be essentially unemployable for NBA teams. Milstein may have also imagined a situation where a genetic test proved that Curry did not have the HCM gene, but showed instead that he had a predisposition to a different heart disease or alcoholism.⁵⁰ These findings would likely make Curry less attractive to NBA teams as well.

Just as Milstein and Curry's challenge was beginning to gain momentum the Bulls decided to trade Curry to the New York Knicks.⁵¹ The Knicks did not ask Curry to take a genetic test for two reasons. First, the Knicks' medical chief felt that DNA testing was inconclusive and would not show beyond a shadow of a doubt that Curry would develop HCM.⁵² Secondly, New York state law does not allow employers to require genetic tests as a condition of employment.⁵³ Had Milstein and Curry's challenge reached an arbitrator, the arbitrator may have granted the NBA power to require genetic tests as a condition of employment. However, even if the NBA possessed this power, they would not have been able to use it since many states had laws against requiring genetic tests as a condition of employment that

³⁹ Rice, *supra* note 18 at 2.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 3.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Rice, *supra* note 18 at 6.

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 6.

⁴⁹ *Id.*

⁵⁰ McCann, *supra* note 8 at 854.

⁵¹ Rice, *supra* note 18 at 2.

⁵² *Id.* at 7.

⁵² *Id.* at 8.

⁵³ *Id.* at 14. North Carolina was the first state to pass a law prohibiting genetic discrimination in 1975. However, North Carolina's statute was limited to apply to sickle cell and hemoglobin C only. In 1989, Oregon passed a much broader statute, which banned "genetic screening." In 1991 Wisconsin adapted the most comprehensive statute of any state. Wisconsin provided privacy protections for employees by banning "workplace discrimination and employer access to genetic test results."

predate GINA.⁵⁴ Therefore, it would have been impossible for the NBA to adopt a universal rule allowing requests for genetic tests as a condition of employment because teams like the Knicks would be violating state law.

While the test the Bulls required from Curry was different than an age and identity verification test, the motivation for the test appears to be the same. The Bulls, like the teams in MLB, wanted to ensure that they were not making a bad investment. However, requiring a genetic test as a condition of employment to rule out a genetic disease is clearly more invasive of privacy and ethical rights than the actions of MLB. Conversely, if Paxson was being truthful and required the test out of concern for Curry's health, genetic testing for diseases may be seen as a justifiable intrusion to prevent players from dying during physical activity.⁵⁵ Even if Paxson's intentions were good, the argument can be made that decision to have a genetic test should be left to the employee, not the employer. The fear that the wide dissemination of a genetic test would spark possible employment discrimination fueled the creation and enactment of GINA.

C. The Genetic Information Nondiscrimination Act of 2008

1. Background and Language of GINA

It took thirteen years for New York Representative Louise Slaughter's bill prohibiting genetic discrimination to become law.⁵⁶ As mentioned previously, the motivation for the law was to prevent employers and health insurance providers from discriminating against a person who was found to have a predisposition to a genetic disease.⁵⁷ Slaughter likely worried that the results of genetic tests would be misinterpreted by employers and health insurance providers so that predisposition to a disease would be considered an automatic manifestation of the disease. Title II of GINA addresses the use of genetic information in the context of employment.⁵⁸ Title II makes it illegal for an employer "to fail to refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee."⁵⁹

2. Reasons for GINA

The breadth and complexity of the arguments surrounding GINA probably contributed through its thirteen-year enactment process. The first and most appealing reason for the passage of GINA is that all humans are potentially at risk for genetic discrimination.⁶⁰ The reason for this is that we all have genes that predispose us to some medical condition that, depending on the industry in which we work, could

⁵⁵ *Id.* at 6.

⁵⁶ Lauren Elizabeth Nuffort, *The Genetic Information Nondiscrimination Act of 2008: Raising a Shield to Genetic Discrimination in Employment and Health Insurance*, 21 *Health Lawyer* 1, 9 (2009). GINA was enacted on May 21, 2008.

⁵⁷ Perry W. Payne, Jr., *Genetic Information Nondiscrimination Act of 2008: The Federal Answer for Genetic Discrimination*, 5 *J. Health & Biomed. L.* 33, 34 (2009).

⁵⁸ 42 U.S.C.A. § 2000ff (West 2008).

⁵⁹ *Id.*

⁶⁰ Payne, *supra* note 57 at 37.

make us less attractive to a potential employer.⁶¹ One criticism of this reasoning is that if we are all predisposed to some genetic conditions and an employer required all potential employees to disclose genetic information, there would be a level playing field and no discrimination. However, this criticism neglects the fact that some medical conditions are much more costly than others from an employment standpoint.⁶² For example, signing a basketball player with a predisposition to HCM could prove much more costly to a team than signing a basketball player with a predisposition to diabetes, a disease that is not exacerbated by physical activity. Another counterargument is that we can decrease our susceptibility to certain diseases.⁶³ For example, dietary changes can reduce the risk of heart disease.⁶⁴ Therefore, there is no guarantee that a person will develop a disease just because a genetic test says they are predisposed to it.⁶⁵

Another reason for the passage of GINA is that historically, fear of genetic discrimination has curbed the use of genetic testing, thus frustrating scientific progress.⁶⁶ A Cogent Research poll of Americans showed that 54% of people were concerned about genetic testing because they feared that their employers would find a way to access the genetic information.⁶⁷ Furthermore, the poll revealed that 72% of people favored federal legislation to protect the privacy of genetic information, and 85% believed that without the legislation, employers would genetically discriminate against employees.⁶⁸ A survey by the American Management Association (AMA) backed up these fears with data.⁶⁹ The AMA survey found that of the employers that used genetic information for employment purposes, 1% used sickle cell anemia information, .8% used information about Huntington's disease, and 5.5% used family histories.⁷⁰ One objection to this reasoning is that people have many reasons for not getting genetic tests and that they may just choose discrimination on surveys because it is an easy option to pick.⁷¹ Another counterargument is that fear should not be the catalyst for creating legislation.⁷² However, one could argue that fear has been a driving force behind much of Congress' legislation, especially in the last decade.

⁶¹ *Id.*; see also, Louise M. Slaughter, *The Genetic Information Nondiscrimination Act: Why Your Personal Genetics are Still Vulnerable to Discrimination*, 88(4) *Surgical Clinics of North America*, Aug. 2008, 723, 725 (stating that "all humans are genetically predisposed to between 5 and 50 serious disorders").

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 37-38.

⁶⁶ Payne, *supra* note 57 at 38. (Explaining, "A study of hereditary non-polyposis colon cancer in the late 1990's demonstrated that when people from families known to have genetic risk factors for this deadly disease were asked to undergo genetic testing, 39% of them declined and cited fears about the misuse of genetic information by insurance companies as the reason.")

⁶⁷ *Id.*; see also, Slaughter, *supra* note 56 at 727; citing Cogent Research, *Americans' Attitudes Towards Genetic Discrimination*, 3-4 (2006).

⁶⁸ Payne, *supra* note 57 at 38-39; see also, Slaughter, *supra* note 56 at 727; see also Cogent Research, *Americans' Attitudes Towards Genetic Discrimination*, 3-4 (2006).

⁶⁹ Payne, *supra* note 57 at 39; see also, Slaughter, *supra* note 56 at 725.

⁷⁰ Payne, *supra* note 57 at 39; see also, Slaughter, *supra* note 56 at 725; see also Williams, *supra* note 70 at 10.

⁷¹ Payne, *supra* note 57 at 39.

⁷² *Id.*

3. Protections Offered by Title II of GINA

Title II of GINA applies to employers and their employees, employment agencies, unions, and other labor organizations.⁷³ GINA makes it unlawful for employers to discriminate against employees when it comes to decisions about hiring, firing, promotion, or other terms and conditions of employment.⁷⁴ GINA also prevents employers from segregating, limiting, or classifying employees in any way that would adversely affect their employment status.⁷⁵ Lastly, GINA makes it illegal for employers to request, require, or purchase genetic information about an employee or any member of the employee's family.⁷⁶ There are five exceptions to this last rule. They include:

Where an employer inadvertently requests or requires family medical history of the employee or family member of the employee ... health or genetic services are offered by the employer, including such services offered as part of a wellness program ... where an employer requests or requires family medical history from the employee to comply with the certification provisions of [the Family and Medical Leave Act] ... where the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace ... the employee provides prior, knowing, voluntary, and written authorization.⁷⁷

GINA also provides some confidentiality protection for genetic information that an employer already possesses.⁷⁸ If an employer has genetic information about employees, the employer must maintain the information on separate forms and in separate medical files.⁷⁹ The employer must treat this information as a confidential medical record.⁸⁰ GINA enumerates six instances where an employer can disclose an employee's confidential genetic information: (1) if the employee files a written request for their information; (2) if a health researcher conducting research in compliance with federal laws requests the information; (3) if a court orders the information; (4) if government officials investigating compliance with GINA requests the information; (5) in order to comply with the Family and Medical Leave Act; and (6) if a public health agency surveying the spread of contagious diseases requests it.⁸¹

D. GINA's Impact on the Genetic Testing in Sports

After reading and analyzing the statutory language, it seems that GINA would definitively make both types of genetic testing employed in the sports industry illegal. This is likely true for testing to ascertain any genetic defects or predispositions to disease that an individual may have, which has been employed by the NBA in the past. However, testing to determine a prospect's age was still being used by

⁷³ William J. McDevitt, *I Dream of GINA: Understanding the Employment Provisions of the Genetic Information Nondiscrimination Act of 2008*, 54 Vill. L. Rev. 91, 108 (2009); *see also* 42 U.S.C.A. § 2000ff (West 2008).

⁷⁴ 42 U.S.C.A. § 2000ff-1 (West 2008).

⁷⁵ *Id.*

⁷⁶ 42 U.S.C.A. § 2000ff-1(b) (West 2008).

⁷⁷ 42 U.S.C.A. § 2000ff-1(b)(1)-(5) (West 2008).

⁷⁸ *Id.* 42 U.S.C.A. § 2000ff-5 (West 2008).

⁷⁹ *Id.* 42 U.S.C.A. § 2000ff-5(a) (West 2008).

⁸⁰ 42 U.S.C.A. § 2000ff.

⁸¹ 42 U.S.C.A. § 2000ff-5(b)(1)-(6) (West 2008).

MLB after the passage of GINA and may still be used today.⁸² MLB may very well be using genetic testing illegally and against GINA, but it is not as clear-cut as the illegality of the NBA's use of genetic testing on Eddy Curry. That being said, there may be strong arguments for allowing both forms of genetic testing in sports and even if these arguments fail, the impact of GINA on the sports industry is probably not as significant as it appears on its face.

1. GINA's Impact on Testing for the Purpose of Age and Identity Verification

MLB's use of genetic testing to verify a prospect's age and identity before giving him a contract seems to be expressly prohibited by GINA, since GINA forbids employers from using DNA information to make hiring decisions.⁸³ After hearing about MLB's use of genetic testing, GINA's sponsor, Representative Slaughter, said, "I don't like the sound of this at all ... I wrote this law specifically to prevent DNA from being used against employees by employers."⁸⁴ However, MLB may have a few arguments that GINA does not prohibit its use of genetic testing.

The first argument MLB could make is that GINA expressly excludes information about age and sex of an individual from its definition of genetic information.⁸⁵ MLB could thus argue that this exclusion legalizes its use of genetic information to confirm age and identity.⁸⁶ This argument does not seem to have merit, however, because one of the purposes of GINA is to prevent employers from discriminating against employees by making hiring and firing decisions based on employees' genetic information.⁸⁷ By asking a prospect to take genetic tests to verify his age and identity and using that information in deciding whether to sign the prospect, MLB appears to be violating this basic tenet of GINA.⁸⁸ The unclear statutory language does leave this issue open for interpretation by the Equal Employment Opportunity Commission ("EEOC"), courts, and arbitrators.⁸⁹

Next, MLB could argue that their testing is voluntary because they simply ask players to take DNA tests to confirm their ages.⁹⁰ MLB does not require that players take genetic tests. This argument is also likely to fail because it ignores the fact that GINA is not only concerned with an employer's procurement of genetic information, but also the use of genetic information that an employer already possesses.⁹¹ GINA prohibits employers from using genetic information about an employee when making hiring and firing decisions.⁹² MLB could argue that if the information is provided consensually, GINA should not apply. However, this exception to GINA seems to only apply when an employee provides

⁸² See generally Schmidt and Schwartz, *supra* note 20; Schwartz, *supra* note 28.

⁸³ 42 U.S.C.A. § 2000ff-1(a) (West 2008).

⁸⁴ Schwartz, *supra* note 28.

⁸⁵ 42 U.S.C.A. § 2000ff.

⁸⁸ Dan Vorhaus, *MLB's Genetic Testing Program at the Plate Again*, Genomics Law Report (July 29, 2009), <http://www.genomicslawreport.com/index.php/2009/07/28/mlbs-genetic-testing-program-at-the-plate-again>.

⁸⁷ Vorhaus, *supra* note 88; see also 42 U.S.C.A. § 2000ff.

⁸⁸ Vorhaus, *supra* note 88.

⁸⁹ *Id.* (Congress put the EEOC in charge of interpreting Title II of GINA).

⁹⁰ Schmidt and Schwartz, *supra* note 20.

⁹¹ 42 U.S.C.A. § 2000ff. 42 U.S.C.A. § 2000ff-5 (West 2008).

⁹² *Id.*

genetic information to an employer prior to any request.⁹³ Since MLB asks for genetic information and then the prospect consents to providing such information, MLB's method of procuring genetic information does not fall under this exception to GINA.⁹⁴ One way MLB could fall into this exception is if they created a voluntary genetic testing culture. It is virtually impossible to prove genetic discrimination because an employer can provide any number of reasons why it chose not to hire a potential employee.⁹⁵ Therefore, MLB could employ the same tactics and create an unstated rule that essentially blacklists those Latin American prospects who do not voluntarily submit their genetic information.⁹⁶ If MLB created such a culture, prospects would be forced to submit DNA information or risk not being signed by any team in MLB.

Lastly, MLB could argue that GINA's provisions should not extend outside the borders of the United States. This argument would be beneficial to MLB since much of the testing it does is done abroad. MLB uses separate Dominican companies to perform genetic testing on Latin American prospects.⁹⁷ This may shield MLB's use of genetic testing from GINA's reach because GINA, unlike the Civil Rights Act, does not contain an extraterritoriality provision, which expressly prohibits activity abroad by a foreign entity controlled by a U.S. entity.⁹⁸ Without such a provision, courts may not be willing to apply GINA to activity abroad.⁹⁹ Conversely, courts may hold that MLB controls the Dominican testing entities, thus making MLB liable for the testing entities' GINA violations.¹⁰⁰ Most likely, courts will not even have to worry about this statutory interpretation because MLB appears to still violate GINA by accepting genetic information from the Dominican entities and using such information to make hiring and firing decisions. Therefore, while MLB may argue that GINA does not apply to its use of genetic testing, courts likely will find that it does.

2. GINA's Impact on Testing for the Purpose of Ascertaining Genetic Diseases

GINA is designed to prevent the exact situation that the Bulls nearly forced Eddy Curry to endure because they feared his new contract might be a bad investment. Unlike with age and identity verification, there are really no statutory loopholes that leagues and teams can exploit when it comes to genetic testing for diseases. However, from a morality standpoint this may not be the best result. Recall that John Paxson's purported reasoning for requiring a genetic test from Eddy Curry was to protect Curry's health.¹⁰¹ If a team wants to test a player to make sure that player will not die due to a health condition

⁹³ Nathaniel Grow, *MLB Confirms Use of Genetic Testing on Latin American Prospects*, Sports Law Blog, (July 23, 2009), <http://sports-law.blogspot.com/search?q=genetic+testing>.

⁹⁴ *Id.*

⁹⁵ Shaun Assael, *Genetic Property: A New Law Protecting Genetic Information Could Butt Heads with an MLB Policy*, ESPN, (October 7, 2009), <http://insider.espn.go.com/espn/insider/new/story?id=4537203>. (Quoting baseball agent Robert Plummer, "I have so many teams back out of deals for so many reasons, how could I ever prove that DNA testing was one of them? If I even tried to make the case, a GM would just turn around and say, 'Oh, I just don't like your guy for all these other reasons.'")

⁹⁶ *Id.* (Quoting baseball agent Robert Plummer, "Sure they're called voluntary, but do you want to be the one guy who doesn't show up?")

⁹⁷ Grow, *supra* note 95.

⁹⁸ *Id.* See also 42 U.S.C.A. § 2000ff.

⁹⁹ Grow, *supra* note 95.

¹⁰⁰ *Id.*

¹⁰¹ Rice, *supra* note 18 at 6.

exacerbated by physical exertion, GINA stops it from doing so. Balancing the privacy protections offered by GINA against the ethical dilemma faced by teams concerned with the health of their players is a valid and challenging battle, and one that GINA does not address.

An interesting approach to this problem would be the addition of a direct threat exception to GINA.¹⁰² The Americans with Disabilities Act (“ADA”) contains a direct threat exception, which states “that an individual shall not pose a direct threat to the health or safety of the individual.”¹⁰³ If a direct threat exception existed under GINA, employers could argue that they required a genetic test from an individual as a condition of employment because they were concerned that the individual may have an ailment that would be exacerbated by the strenuous nature of the job. If this were the case, John Paxson could argue that he ordered Curry to take a DNA test because he was concerned that if Curry had HCM, it would be a direct threat to his health to continue to play basketball. The concern that sports teams would abuse the direct threat exception by requiring testing of all players because they thought players might have a directly threatening genetic disease may be unfounded.¹⁰⁴ This is because “the standard of proof for an ADA claim . . . is significant and requires a showing that an employer regards the employee as substantially limited in his or her ability to work by finding the employee’s impairment to foreclose generally the type of employment involved.”¹⁰⁵ This strict standard of proof may quell the fear of those who believe employers would abuse a direct threat exception to GINA. A direct threat exception would be an outstanding amendment to GINA for sports teams and leagues. Under the direct threat exception, teams would be able to test players who have symptoms of possible genetic diseases, thus protecting their investment in the player, and ensuring that future investments in the player’s performance are successful.

IV. Conclusion

GINA creates some unique issues for employers in the sports industry. Owners often argue that sports should be treated differently from other industries because player salaries are so high. In the context of GINA, owners would argue that players should have less privacy rights, and owners should be given more deference in thoroughly examining players before signing them. Because they spend millions of dollars investing in players, the risk that one of them will not be able to play due to a genetic disease should be enough to justify a team's use of genetic testing. Owners could make this argument, but they might not need to since GINA’s effect on sports could be mitigated if two changes were implemented. First, GINA’s impact on age verification testing by MLB would be non-existent if MLB could create a voluntary testing culture in which prospects, who refused to submit genetic information voluntarily, would be ignored by teams. Secondly, GINA’s effect on leagues and teams who want to screen a player for a genetic disease would be mitigated if a direct threat exception existed in GINA. If a direct threat exception existed, leagues and teams could comply with the provisions of GINA and fulfill their moral obligation to protect at-risk players from death or serious injury by requiring them to get a genetic test before they physically exert themselves. As it stands, GINA has a huge impact on genetic testing in sports because it illegalizes both types of testing that have historically been used in sports. However, this impact can be significantly tapered if teams and leagues implement the safeguards provided above. Moreover, the

¹⁰² See generally Evans, *supra* note 17 at 215-19.

¹⁰³ *Id.*; see also 42 U.S.C. § 12111(3) (West 2009).

¹⁰⁴ Evans, *supra* note 17 at 218.

¹⁰⁵ Daniel Schlein, *New Frontiers for Genetic Privacy Law: The Genetic Information Nondiscrimination Act of 2008*, 19 Geo. Mason U. Civ. Rts. L.J. 311, 321 (2008-2009).

implementation of these safeguards would effectively balance GINA's protection of privacy interests with employers' financial interests and moral obligation to protect the health of their employees.