



The Second Shoe Drops: EEOC Files Second GINA Lawsuit

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On May 16, 2013, the Equal Employment Opportunity Commission (“EEOC”) filed a lawsuit against [Founders Pavilion, Inc.](#), a New York nursing house, for violations under Title II of the Genetic Information Nondiscrimination Act of 2008 (“GINA”).^[1] This most recent lawsuit comes on the heels of the EEOC’s first ever lawsuit under GINA, [EEOC v. Fabricut, Inc.](#), and the concurrent settlement of that suit, just nine (9) days earlier.^[2]

GINA prohibits the use of genetic information in any employment-related decisions. GINA also precludes employers from “requesting, requiring, or purchasing” genetic information on an applicant or employee. Such genetic information includes, among other things, an applicant’s or employee’s family medical history. Thus, GINA generally prohibits employers from collecting an applicant’s or employee’s family medical history and/or using such information in employment-related decisions.

In the suit against Founders, the EEOC alleges that the employer violated GINA by requesting applicants’ family medical histories during post-offer pre-employment medical examinations. The EEOC further alleges that the employer violated GINA by collecting information on employees’ family medical history during employees’ annual medical exams and as part of employees’ return to work paperwork. Similarly, in [Fabricut](#), the EEOC alleged that the employer’s post-offer medical examination questionnaire improperly asked the employee to disclose whether there was any history in her family of heart disease, hypertension, cancer, tuberculosis, diabetes, arthritis, or “mental disorders.” The EEOC contended that such requests for family medical history violated GINA’s prohibition against employers requesting or requiring disclosure of employees’ genetic information.

This unprecedented surge in GINA lawsuits by the EEOC is consistent with the EEOC’s recently released Strategic Enforcement Plan (“SEP”), which describes the EEOC’s six (6) national priorities for 2013-2016. These priorities include addressing emerging and developing issues in equal employment law, including genetic discrimination. In light of the EEOC’s identification of genetic discrimination as a current priority and the above-mentioned recent GINA lawsuits brought by the EEOC, it would be prudent for employers to review their policies regarding employee medical inquiries to ensure that they

are compliant with GINA. Moreover, employers would also be well-served by reviewing the SEP priorities. Please see [here](#) for our recent newsletter article on the EEOC's SEP priorities.

[1] [EEOC v. Founders Pavilion, Inc. d/b/a Founders Pavilion](#), Case No. 6:13-cv-06250 (W.D.N.Y)

[2] [EEOC v. Fabricut, Inc.](#), No. 13-Civ. 248 (CVE)(PJC) (N.D. Okla. May 7, 2013) (The lawsuit and the consent decree settling the case were both filed on May 7, 2013. The settlement agreement included a \$50,000 payment by Fabricut, and agreement by Fabricut to take certain actions to prevent future discrimination.)

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