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1997]

THE NEW GENETIC AGE: DO OUR GENES MAKE US
DISABLED INDIVIDUALS UNDER THE AMERICANS
WITH DISABILITIES ACT?

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I. INTRODUCTION

BREAKTHROUGHS in genetic research have created new opportunities for preventing and curing diseases once thought to be incurable.¹ Research in the area of genetics has led to new opportunities for preventing a myriad of health problems,² including

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1. See Mark A. Rothstein, *The Use of Genetic Information for Nonmedical Purposes*, 9 J.L. & HEALTH 109, 109 (1994-95). Rothstein states that the results of genetic research will "promis[e] to improve the quality of life and giv[e] hope that even some of the most dreaded diseases can be cured." *Id.*; see Richard A. Bornstein, *Genetic Discrimination, Insurability and Legislation: A Closing of the Legal Loopholes*, 4 J.L. & POL'Y 551, 610 n.3 (1996) (stating that "advances in the mapping of human genes will eventually mean that people could obtain a 'genetic passport' which would tell them what diseases they would likely suffer from in the f[ut]ure [sic]") (citations omitted); see also *Research Pointing the Way Forward in Asthma Prevention*, PULSE, Jan. 27, 1996, at 30 ("[G]enetic research is promising to revolutionize the treatment of certain diseases."); Michael Setz, *Financing Small Business: Financing is Increasing for Genetic-Information Firms*, WALL ST. J., June 11, 1996, at B2 (discussing United States genetic research project as "leading 'to models of how to prevent certain diseases the drug companies haven't been able to prevent or treat'").

2. See Gail Dutton, *If the Genes Fit . . . Genetic Testing and Employers and Insurance Firms*, MGMT. REV., Oct. 1995, at 25, 26 (identifying five main areas in which genetic testing is used: (1) carrier screening: used to determine whether "one is likely to pass on genetic diseases to offspring;" (2) prenatal diagnostic testing: used to determine "whether a fetus carries a disease-causing gene;" (3) predisposition testing: used to determine "one's susceptibility to certain diseases;" (4) confirmatory diagnostic testing: "confirms the presence of a suspected genetic disease;" and (5) forensic and identity testing: used to "determine paternity and criminal identification").

cystic fibrosis,³ breast cancer⁴ and lung disease.⁵ The Human Genome Project, an international fifteen year research effort, is currently attempting to map and sequence all of the human genome, including approximately 100,000 human genes.⁶ Although genetic research serves to improve all areas of medicine, including diagnosis, reproductive planning, disease prevention, treatment and research, the nonmedical uses of genetic research have caused some commentators to question whether the use of genetic information has the practical effect of harming those persons the research is attempting to benefit.⁷

3. See generally Elizabeth J. Thomson, *Ethical, Legal and Social Implications of the Human Genome Project*, 3 DICK. J. ENVTL. L. & POL'Y 55 (1994) (discussing impact of genetic research on determination of carrier gene for cystic fibrosis and potential impact this information, if disclosed, could have on employment and insurance coverage). Currently, genetic technology is being used to identify those individuals who carry a cystic fibrosis mutation, a common recessive genetic disorder in which one of every 25 caucasians carry a mutation. See *id.* at 60. Since the discovery of the cystic fibrosis gene, researchers have discovered over 350 different mutations of the gene. See *id.*

4. See *id.* Mapping of a gene on chromosome 17 (BRCA1) has shown a mutation that predisposes some women to breast cancer. See *id.* The mutation is estimated to be present in one of every 200 women. See *id.* Those with the mutation have an 85% chance of developing breast cancer sometime in their lives. See *id.*

5. See *id.* Genetic research has led to the discovery of alpha 1 antitrypsin deficiency. See *id.* This enzyme deficiency can result in severe lung and liver disease, especially when exposed to smoke, alcohol or other toxins. See *id.*

6. See Rothstein, *supra* note 1, at 109. After mapping and sequencing the entire human genome, the second goal of the Human Genome Project is to "make and sequence a number of model organisms" to "provide a model for the study of some human genetic disorders." Thompson, *supra* note 3, at 57. The third goal is the "development of computerized data collection, storage and handling." *Id.* The fourth goal of the project is "related to the ethical, legal and social issues" of genetic research. *Id.* The fifth goal is "to provide research, training, and to develop a cadre of researchers who are trained in the area of genome and genetic sciences." *Id.* Finally, the sixth goal is "technology development and transfer." *Id.*

7. See Bornstein, *supra* note 1, at 551-52 ("While genetic tests can be extremely helpful in preventing disease, they can also prevent many people from obtaining medical insurance . . . if genetic test results reveal a propensity for illness . . . [A] number of institutions . . . have discriminated on a genetic basis."); Paul F. Gerhart, *Employee Privacy Rights in the United States*, 17 COMP. LAB. L.J. 175, 195 (1995) (discussing physical examinations as mandated by employer as possibly being inclusive of genetic test results and stating that use of such results to deny employment is illegal discrimination); Frances H. Miller & Philip A. Huvos, *Genetic Blueprints, Employer Cost-Cutting, and the Americans with Disabilities Act*, 46 ADMIN. L. REV. 369, 371 (1994) (discussing dangers of employment decisions being weighted by genetic tests that indicate potential for future health problems). See generally Symposium, *Legal and Ethical Issues Raised by the Human Genome Project*, 29 HOUS. L. REV. 7, 8-10 (1992) (discussing impact Human Genome Project may have on equality of opportunity, conceptions of human responsibility and normality); Symposium, *The Human Genome Initiative and the Impact of Genetic Screening and Technologies*, 17 AM. J.L. & MED. 7 (1991) (discussing practical implications of genetic testing on individuals).

In particular, there is concern that genetic information will be impermissibly used by insurers and employers to exclude from coverage or employment those deemed by their genetic makeup as a higher risk for disease.⁸ Although many permissible uses of genetic information by employers exist, such as optional lead testing for women planning pregnancies and optional testing for ultraviolet (UV) exposure, the concern surrounding genetic discrimina-

8. See Bornstein, *supra* note 1, at 552-53. Bornstein states: [A] number of institutions, including health and life insurers, have discriminated on a genetic basis. People at risk for genetic discrimination include individuals who carry a gene that increases the probability that they will develop a disease but who are currently asymptomatic; individuals who are carriers for certain genetic conditions but who will remain asymptomatic; individuals who have genetic polymorphisms that are not known to cause disease; and relatives of individuals with known or presumed genetic characteristics.

Id. at 552-53.

tion has led to state⁹ and federal¹⁰ legislation that restricts genetic

9. For a comprehensive analysis of state legislation in the area of genetic testing, see *id.* at 589-606. At present, at least 12 states have enacted legislation that restricts genetic testing or use of genetic information in insurance practice. See *id.* at 553; see also ARIZ. REV. STAT. § 20-448 (1990 & Supp. 1995) (“No insurer shall refuse to consider an application for life or disability insurance on the basis of a genetic condition.”); CAL. CIV. CODE § 56.17 (West Supp. 1996) (providing sanctions for any person who wilfully or negligently discloses results of genetic testing to third party); *id.* § 1374.7 (West 1990 & Supp. 1996) (“No plan shall refuse to enroll any person or accept any person as a subscriber or renew any person as a subscriber after appropriate application on the basis of a person’s genetic characteristics that may . . . be associated with disability in that person or that person’s offspring.”); CAL. HEALTH & SAFETY CODE § 1374.9 (West Supp. 1996) (providing sanctions for violations of section 1374.7 of the California Civil Code); *id.* §§ 10123.3, 10140 (“No self-insured employee-welfare benefit plan shall refuse to enroll any person or accept person as subscriber or renew any person as a subscriber after appropriate application on the basis of that person’s genetic characteristics that may . . . be associated with disability in that person or that person’s offspring.”); *id.* § 10143 (“No insurance company licensed in this state shall refuse to issue or sell or renew any new policy of life or disability insurance after appropriate application solely by reason of the fact that the person to be insured carries a gene which may . . . be associated with disability in that person’s offspring.”); *id.* § 11512.95 (stating same as applied to nonprofit hospital service program); *id.* §§ 10123.31, .35, 10140.1, .5, 10146-49, 10149.1, 11512.96, .965 (providing penalties for violations of civil code); COLO. REV. STAT. § 10-3-1104.7 (1994) (providing comprehensive legislative declaration of genetic information as property of individual to whom it pertains and protection of such information); FLA. STAT. ANN. § 760.40 (West Supp. 1996) (providing that except under specified circumstances, “DNA analysis may be performed only with the informed consent of the person to be tested, and the results of such DNA analysis, whether held by a public or private entity, are the exclusive property of the person tested”); GA. CODE ANN. §§ 33-54-1 to -8 (Supp. 1995) (same); MD. CODE ANN., INS. § 223.1 (1994) (same); MINN. STAT. ANN. § 72A.139 (West Supp. 1996) (prohibiting health plan company from requiring or making inquiries into genetic testing of applicant in determining eligibility for scope of coverage or amount of premium); MONT. CODE ANN. § 33-18-206 (1995) (“An insurer may not refuse to consider an application for life or disability insurance on the basis of a genetic condition, developmental delay, or developmental disability.”); N.H. REV. STAT. ANN. §§ 141-H:2 to -H:5 (Supp. 1995) (prohibiting requests and requirements of genetic testing within parameters of employment and health insurance); OHIO REV. CODE ANN. §§ 1742.42, .43, 3901.49, .491, .50, .501 (Anderson Supp. 1995) (prohibiting health maintenance organizations from considering any information obtained from genetic screening in manner adverse to applicant); OR. REV. STAT. §§ 659.700, .705, .710, .715, .720, 746.135 (1995) (stating that one’s genetic information is property of individual that may only be obtained through informed consent); WIS. STAT. ANN. § 631.89 (West 1995) (stating that insurer, or county, city, village or school board that provides health care services may not require or request one to get genetic test or require or request any information from such test previously performed).

10. See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (prohibiting insurance companies from using genetic information as preexisting condition without diagnosis of condition related to genetic information). This newly enacted legislation, designed to “improve portability and continuity of health insurance coverage in the group and individual markets” and to “improve access to long-term care services and coverage,” specifically addresses the use of genetic information for insurance purposes. *Id.* preamble. For example, section 701 of the Act prohibits insurance companies from using genetic information as a preexisting condition, absent a diagnosis of

testing or the use of genetic information by insurers, including employers that are self-insured.¹¹ In addition, the potential for discrimination by employers has led some commentators to believe that the Americans with Disabilities Act (ADA)¹² should be interpreted to protect against discrimination based on genetic information.¹³

the condition relating to the genetic condition: "TREATMENT OF GENETIC INFORMATION.—Genetic information shall not be treated as a condition described in subsection (a)(1) in the absence of a diagnosis of the condition related to such information." *Id.* § 701(b)(1)(B). Section 701(a)(1) provides:

[A] group health plan and a health insurance issuer offering group health insurance coverage, may, with respect to a participant or beneficiary, impose a pre-existing condition exclusion only if: (1) such exclusion relates to a condition (whether physical or mental), regardless of the cause of the condition, for which medical advice, diagnosis, care, or treatment was recommended or received within the 6 month period ending on the enrollment date.

Id. § 701(a)(1).

Similarly, section 702 of the Act prohibits discrimination against individual participants and beneficiaries based on health status, particularly genetic information:

[A] group health plan, and a health insurance issuer offering group health insurance coverage in connection with a group health plan, may not establish rules for eligibility (including continued eligibility) of any individual to enroll under the terms of the plan based on any of the following health status-related factors in relation to the individual or a dependent of the individual:

...
(F) Genetic information.

Id. § 702(a)(1).

The definition of "group health plan" is broadly defined so as to include self-insured employers:

(a) GROUP HEALTH PLAN.—For purposes of this part—

(1) IN GENERAL.—The term 'group health plan' means an employee welfare benefit plan to the extent that the plan provides medical care (as defined in paragraph (2) and including items and services paid for as medical care) to employees or their dependents (as defined under the terms of the plan) directly or through insurance, reimbursement, or otherwise.

Id. § 706(a)(1).

11. See Dutton, *supra* note 2, at 26 (noting that Title II of the Civil Rights Act of 1964 makes it unlawful to knowingly expose fertile women to lead, thus leading commentators to believe that employers should inform employees of mutagenic properties of lead and provide for optional testing, explaining that employers should offer testing to persons who lack pigmentation because they may be more susceptible to UV light, and also commenting that employers should not mandate testing, or make hiring decisions based upon test results). Although beyond the scope of this Article, genetic testing in the workplace can be *properly* and *responsibly* used in two cases: (1) "to place individuals to avoid occupational illnesses" and (2) "to assess chromosomal damage after exposure." *Id.*

12. 42 U.S.C. §§ 12101-12213 (1994).

13. See, e.g., Miller & Huvos, *supra* note 7, at 375 (arguing for expansive reading of ADA to encompass asymptomatic individuals who possess certain genetic information). Miller and Huvos state:

This Article addresses whether the definition of disability under the ADA should encompass asymptomatic individuals with knowledge of their genetic makeup. In particular, this Article analyzes the legislative intent of the ADA and applicable statutory provisions and regulations to determine if the ADA currently contemplates coverage for such individuals.¹⁴ This Article concludes by stating that although justifiable reasons may exist to afford asymptomatic individuals with genetic information protection under the ADA, courts should exercise caution before unduly broadening the ADA's protection where recent federal and state legislation provide sufficient redress against potential genetic information discrimination in the workplace.¹⁵

II. THE ADA: WHO WAS IT INTENDED TO PROTECT?

Enacted in 1990, the ADA was designed to protect a "discrete and insular minority" who "as a group . . . are severely disadvantaged socially, vocationally, economically, and educationally."¹⁶ As the congressional findings reflect, Congress intended to protect those individuals who are:

faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a

A genetic anomaly is arguably a physiological disorder with *potential* for affecting one or more of several body systems. Furthermore, while the ADA specifically excludes certain arguably genetic conditions, such as homosexuality and kleptomania, from the definition of disability, it does not exclude genetic conditions generally. Thus, one could maintain, if Congress had intended categorically to exclude genetic conditions from characterization as disabilities, it likely would have said so in the legislation. However, even under the assumption that EEOC pronouncements to the contrary are correct, the door to ADA protection for genetic abnormalities still remains open for other reasons.

Id. at 375. For other commentary on whether the ADA should prohibit discrimination based on genetic information, see generally Larry Gostin, *Genetic Discrimination: The Use of Genetically Based Diagnostic and Prognostic Tests by Employers and Insurers*, 17 AM. J.L. & MED. 109, 109 (1991) ("[T]he Americans with Disabilities Act (ADA), may not sufficiently protect employees and insureds from genetic discrimination. . . . 'Genetic technologies' advent necessitates efforts to rectify state and federal statutory coverage gaps, strictly regulate employers and produce comprehensive guidelines regarding its use."); Charles B. Gurd, *Whether a Genetic Defect Is a Disability Under the Americans with Disabilities Act: Preventing Genetic Discrimination by Employers*, 1 ANNALS HEALTH L. 107, 116-17 (1992) (proposing National Genetic Anti-Discrimination Act to rectify shortcomings of ADA within parameters of genetic testing).

14. For a discussion of applicable statutory provisions, regulations and legislative history of the ADA, see *infra* notes 21-40 and accompanying text.

15. For a further discussion of why the definition of disability under the ADA should not be expanded, see *infra* notes 41-81 and accompanying text.

16. 42 U.S.C. § 12101(a)(6), (7).

position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.¹⁷

At the time Congress enacted the ADA, it was estimated that approximately 43,000,000 Americans had one or more physical or mental disabilities.¹⁸ Congress estimated that this number would increase as the population lives longer and experiences the disabling effects of aging.¹⁹ As this number clearly reflects, Congress referenced only those *presently* disabled, and not the millions of other asymptomatic individuals who only have knowledge of their genetic information and may never manifest symptoms.²⁰ Therefore, the question is whether the ADA's definition of disability should now be interpreted to cover additional individuals that possess only genetic information and are, for all intents and purposes, asymptomatic.

III. DEFINING DISABILITY

Under the ADA, disability is defined 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."²¹ This Part addresses whether there is support for coverage of individuals with genetic information under the alternative definitions of disability under the ADA.

17. *Id.*

18. *See id.* § 12101(a)(1) ("[S]ome 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.").

19. *See id.*

20. *See* Reginald Rhein, *Federal Disability Law Bans Genetic Discrimination*, BIOTECH. NEWSWATCH, May 1, 1995, at 1 (citing to at least one geneticist who has concerns about whether ADA is appropriate forum for addressing discrimination based on genetic information). As Paul R. Billings, a geneticist at the veterans hospital in Palo Alto, stated:

The ADA was constructed for people with basically phenotypic disabilities who had a long history of discrimination, and to redress that problem We are now diluting those people's interests with a large number of people who conceivably will argue that they are being perceived of as disabled even though they only have a gene for colon cancer, breast cancer, or Alzheimer's dementia, whatever the gene of the week is.

Id.

21. 42 U.S.C. § 12102(2) (A)-(C).

A. *A Physical or Mental Impairment That Substantially Limits One or More Major Life Activities*

Whether an individual's genetic information constitutes a disability under this first definitional standard is not directly addressed in the statute, regulations or legislative history.²² ADA Regulations and Interpretive Guidance promulgated by the Equal Employment Opportunity Commission (EEOC) ("Interpretive Guidance"), however, have indirectly tackled the issue.²³ For example, the ADA regulations state that a "characteristic predisposition to illness or disease" is not an impairment, and therefore, cannot be considered a disability under the ADA.²⁴ EEOC guidance elaborates by stating: "A person may be predisposed to developing an illness or a disease because of factors such as environmental, economic, cultural, or social conditions. This predisposition does not amount to an impairment."²⁵

Assuming, arguendo, that genetic information constitutes an impairment under the ADA's first definition of disability, an asymptomatic individual obviously does not possess an impairment that *substantially limits a major life activity*.²⁶ Substantially limiting impairments are impairments *presently* occurring, rather than those that may or may not occur in someone's lifetime.²⁷ The requirement of a present impairment becomes clear when one considers the fac-

22. *But see* [1993-1997 Transfer Binder] EEOC Compl. Man. (CCH) ¶ 6888 [hereinafter EEOC Compl. Man.]. The EEOC addressed the issue of genetic information in the context of the third definitional requirement, regarded as having a "substantially limiting impairment." *Id.* For a further discussion of the issue of genetic information in the context of "being regarded as having a substantially limiting impairment," see *infra* notes 32-40 and accompanying text.

23. EEOC guidelines are entitled to deference by courts. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 140 (1976). The guidelines, however, do not have the force of law, and some courts have refused to follow them. *See, e.g.,* Deckert v. City of Ulysses, No. 93-1295, 1995 WL 580074, at *7 (D. Kan. Sept. 6, 1995) (holding that when ADA creates specific method through which court is to determine existence of disability, EEOC guideline creating "checklist" of approved disabilities is invalid); Schmidt v. Safeway Inc., 864 F. Supp. 991, 998 (D. Or. 1994) (stating that to extent there is any inconsistency between EEOC Technical Assistance Manual and ADA, it must be resolved in favor of ADA); Coghlan v. H.J. Heinz Co., 851 F. Supp. 808, 813 (N.D. Tex. 1994) (rejecting EEOC guideline that made insulin-dependent diabetes disability per se as contrary to ADA).

24. 29 C.F.R. § 1630 app. 11 (1997).

25. EEOC Compl. Man., *supra* note 22, ¶ 6882.

26. 29 C.F.R. § 1630.2(i). Major life activities are defined as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.*

27. *See id.* § 1630.2(j) (defining substantially limits). "Substantially limits" is defined as:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

tors used to determine a substantially limiting impairment. The Interpretive Guidance lists three factors that are utilized to determine whether an individual is substantially limited in a major life activity: (1) "the nature and severity of the impairment;" (2) "the duration or expected duration of the impairment; and" (3) "the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment."²⁸ Put simply, these factors do not lend themselves to an analysis of whether asymptomatic individuals are substantially limited in any major life activity by their genetic information. For example, it is impossible to predict the "nature and severity" of an individual's genetic makeup if the person does not know whether he or she will ever manifest symptoms. Likewise, how does one determine the "duration or expected duration of an impairment" that may never exist? The inherent impracticality in applying these factors leads to the inescapable conclusion that a person's genetic information does not constitute a disability under the first prong of the ADA.

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

Id.

28. *Id.* § 1630.2(j)(2). In addition, the regulations also define "substantially limited" with respect to the major life activity of working:

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j) (2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Id. § 1630.2(j)(3).

B. *A Record of Such an Impairment*

The regulations define a record of impairment as “a history of, or [a] misclassif[ication] as having, a mental or physical impairment that substantially limits one or more major life activities.”²⁹ This portion of the ADA’s definition of a disability does not support the conclusion that genetic information can constitute a disability for two reasons. First, this part of the ADA’s definition of a disability is designed to protect those who have a history of an impairment (such as cancer or heart disease). Asymptomatic individuals do not, however, fall within this category of individuals.³⁰ Second, this definition of a disability under the ADA hinges on the underlying impairment constituting a disability under the ADA. Asymptomatic individuals do not, however, have an underlying impairment that, at one time, manifested itself, constituting a disability under the ADA.³¹

C. *Regarded as Having Such an Impairment*

If one were to argue that genetic information constitutes a disability under the ADA, one would no doubt maintain that it falls into the ADA’s third prong of the definition of a disability: “regarded as having such an impairment.”³² Under the third prong, an employee does not have to have a substantially limiting impair-

29. *Id.* § 1630.2(k).

30. *See id.* § 36.104. The regulations provide:

This test is intended to cover those who have a record of an impairment. As explained in paragraph (3) of the rule’s definition of disability, this includes a person who has a history of an impairment that substantially limited a major life activity, such as someone who has recovered from an impairment. It also includes persons who have been misclassified as having an impairment.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment is prohibited. Frequently occurring examples of the first group (those who have a history of an impairment) are persons with histories of mental or emotional illness, heart disease, or cancer; examples of the second group (those who have been misclassified as having an impairment) are persons who have been misclassified as having mental retardation or mental illness.

Id.

31. For a discussion of what constitutes “a physical or mental impairment that substantially limits one or more major life activities,” see *supra* notes 22-28 and accompanying text.

32. *See* 29 C.F.R. § 1630.2(1). The regulations define “regarded as” applying to a person who:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

ment, provided that an employer regards the applicant or employee as having a disability.³³ An asymptomatic individual with a genetic abnormality obviously fits comfortably within this definition because no disabling symptoms have yet manifested. As a result of the person's asymptomatic state, an employer could incorrectly perceive or regard an individual with a genetic abnormality as being substantially limited in some regard.

In addition, the Interpretive Guidance lends further support for the proposition that genetic information is appropriately addressed under the "regarded as" definitional prong.³⁴ The Interpretive Guidance explains:

This part of the definition of "disability" applies to individuals who are subjected to discrimination on the basis of *genetic information* relating to illness, disease, or other disorders. Covered entities that discriminate against such individuals on the basis of such *genetic information* are regarding the individuals as having impairments that substantially limit a major life activity. Those individuals, therefore, are covered by the third part of the definition of "disability."³⁵

(2) 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

(3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

Id.

33. See Miller & Huvos, *supra* note 7, at 377 (stating that definition of regarded as "stands out as having the most far-reaching potential because of its subjectivity"). Although Miller and Huvos argue in favor of using this definition because of its "subjectivity," it is this subjectivity that creates potential for abuse by litigants. For a discussion of the impact on litigation that inclusion of asymptomatic individuals under the "regarded as" prong would have, see *infra* notes 41-78 and accompanying text.

34. See EEOC Compl. Man., *supra* note 22, ¶ 6884 ("Because it is the employer's perception that is at issue, it is not necessary that the individual alleging discrimination actually have a disability or an impairment.").

35. *Id.* The EEOC guidance also provides an example:

CP's genetic profile reveals an increased susceptibility to colon cancer. CP is currently asymptomatic and may never in fact develop colon cancer. After making CP a conditional offer of employment, R learns about CP's increased susceptibility to colon cancer. R then withdraws the job offer because of concerns about matters such as CP's productivity, insurance costs, and attendance. R is treating CP as having an impairment that substantially limits a major life activity. Accordingly, CP is covered by the third part of the definition of "disability."

Id.

Although courts are not obligated to follow the Interpretive Guidance, the EEOC would no doubt pursue an administrative charge based on allegations of genetic information discrimination, and therefore, the Interpretive Guidance provides an important factor in determining whether genetic information should be covered under the ADA.³⁶

36. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (noting that EEOC's interpretation is not controlling on courts but does constitute body of experience and informed judgment to which courts may properly resort for guidance). Lower courts have followed the Supreme Court's reasoning. See, e.g., *Gile v. United Airlines, Inc.*, 95 F.3d 492, 498 (7th Cir. 1996) (relying on review of ADA, its regulations and EEOC's interpretive guidance on issue); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 487 (8th Cir. 1996) (deferring to EEOC's interpretive guidance on ADA and applying EEOC's broad definition of "substantial limitation"); *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) ("[I]t is true that we owe deference to the EEOC interpretation of [Title VII]."); *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1435 (N.D. Iowa 1996) (concluding that EEOC's interpretive regulations on ADA are entitled to substantial deference). Furthermore, compliance with EEOC interpretation is warranted in light of the fact that Congress charged the EEOC with providing technical assistance "regarding the laws and regulations enforced by the Commission." 42 U.S.C. § 2000e-4(j) (1994). Section 2000e-4(j) provides in pertinent part:

Technical Assistance Training Institute

(1) The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.

(2) An employer or other entity covered under this title . . . shall not be excused from compliance with the requirements of this title . . . because of any failure to receive technical assistance under this subsection.

Id.

As noted in the text, the EEOC's interpretation of a given statute is also indicative of how the EEOC will pursue an administrative charge. For a discussion of the EEOC's administrative process, see LEE M. MODJESKA, EMPLOYMENT DISCRIMINATION LAW § 2:3 (2d ed. 1988) (discussing administrative process for charges of unlawful employment practices). For example, in Title VII and ADA cases, charges of discriminatory practices may be filed with the EEOC within 180 days after the alleged discrimination occurred, by or on behalf of a person claiming to be aggrieved, or by a member of the EEOC. See *id.* The EEOC's investigative purpose is to determine whether there is reasonable cause to believe that the charge of discrimination is true. See 1 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW & LITIGATION at 12-29 (1996) (discussing EEOC administrative process). "Reasonable cause" means that the charge has sufficient merit to warrant litigation if the matter is not resolved." *Id.* The investigator is given substantial authority to obtain information. See *id.* at 13 (noting that investigator may require employees to furnish testimony under oath or affirmation). If the EEOC determines after its investigation that there is not reasonable cause, it must dismiss the charge and promptly notify the charging party and respondent of its action. See MODJESKA, *supra*, § 2:0 (discussing reasonable cause determinations). If the EEOC determines that there is reasonable cause, then the EEOC must attempt to conciliate the matter. See ROSSEIN, *supra*, at 12 (noting that EEOC attempts to assist charging parties and respondents in negotiating settlement). If attempts at conciliation fail, the EEOC may initiate a de novo civil action in federal district court, or in the alternative, may issue a right-to-sue notice to the aggrieved individual, who may then bring his

In addition to the Interpretive Guidance, there are also at least two references in the legislative history of the ADA that support the argument that use of genetic information to make employment decisions could fall within the "regarded as" definitional prong of disability.³⁷ In particular, some members of Congress expressed concern that those persons who suffered discrimination as a result of sickle cell screening programs in the 1970s³⁸ have some measure of protection under the ADA.³⁹ Aside from these brief remarks,

or her own civil action. See ABIGAIL COOLEY MODJESKA, *EMPLOYMENT DISCRIMINATION LAW* § 6.10 (3d ed. 1996).

37. See 136 CONG. REC. H4627 (daily ed. July 12, 1990) (statement of Rep. Waxman). Representative Waxman cosponsored H.R. 2273, the House version of the ADA, which was rejected when S. 933 became the version signed into law. Representative Waxman explained how persons with genetic information would be covered under the ADA:

I should not[e] that the employment protections of the ADA will be important, as well, for people who are identified through new genetic tests as being carriers of a disease-associated gene. As has been noted throughout the legislative process on this bill, a person who is regarded as having an impairment which substantially limits a major life activity is covered under this bill. Thus, an individual who is discriminated against, for example, in employment, on the basis of being a carrier of a disease-associated gene, would be covered under this third prong of the definition.

Under the ADA, a carrier of disease-associated gene is protected in employment as long as such individual is qualified for the job in question. The determination as to whether a person is qualified must be made, however, at the time of the particular employment decision—of hiring, firing, promotion, and so forth—and may not be based on speculation and predictions regarding the person's ability to be qualified for the job in the future.

Id.

38. See Dutton, *supra* note 2, at 25 (discussing congressional concern that sickle cell screening programs resulted in discrimination). Although employers may not have had bad intentions in implementing tests for sickle cell anemia, poor implementation of such programs can cause problems. See *id.* For example, the DuPont Company, in Wilmington, Delaware once offered tests for sickle cell anemia. See *id.* At first, employees and new hires had the option of refusing the test, which caused concern about coercion that received unwanted publicity. See *id.* DuPont ultimately changed the benefit so that employees had the option of volunteering and requesting the test, rather than refusing it. See *id.* As Dutton remarked, "the difference was subtle, but important." *Id.*

39. See 136 CONG. REC. H4623 (daily ed. July 12, 1990) (statement of Rep. Owens) (stating that protections of ADA should be made applicable to individuals discriminated against due to results of genetic testing). Representative Owens cosponsored H.R. 2273, the House version of the ADA and served as a member of the Conference Committee that amended S. 933, the version which became the ADA. Reflecting on past discrimination related to sickle cell testing, Representative Owens surmised:

These protections of the ADA will also benefit individuals who are identified through genetic tests as being carriers of a disease-associated gene. There is a record of genetic discrimination against such individuals, most recently during sickle-cell screening programs in the 1970s. With the advent of new forms of genetic testing, it is even more critical that the protections of the ADA be in place. Under the ADA, such individuals may

however, there is little else that concerns genetic information discrimination in the legislative history of the ADA. In fact, Congress's limited discussion of the subject has led more than one commentator to remark that Congress overlooked or disregarded the issue of genetic information discrimination in its drafting of the ADA.⁴⁰ Therefore, although the EEOC appears to support the proposition that genetic information is included within the "regarded as" prong of the definition of disability, the legislative history is inconclusive on the issue.

IV. THE PROBLEMS OF INCLUSION

Although there seems to be some support for including genetic information as a "regarded as" disability, the fact that an asymptomatic individual with access to genetic information could claim a disability under the ADA creates the potential for millions of new persons to join the protected class of disabled individuals under the ADA. Although protection is certainly needed for those that are in fact discriminated against based on their genetic condition, courts should proceed with caution in determining whether a person with genetic information is disabled under the ADA, given the potential for millions of individuals to have standing under the ADA.⁴¹

not be discriminated against simply because they may not be qualified for a job sometime in the future. . . . Moreover, such individuals may not be discriminated against because they or their children might incur increased health care costs for the employer.

Id.

40. See, e.g., Ellen Wright Clayton, *The Dispersion of Genetic Technologies and the Law*, HASTINGS CENTER REP. May 1, 1995, at 13, 14 ("In drafting the ADA, Congress said very little about genetic testing, an oversight that seems almost stunning now.").

41. For example, by including asymptomatic individuals with genetic abnormalities in the protected class under the ADA, an employer's litigation costs will no doubt increase. Particularly in this "decade of downsizing," reductions in force ("RIFs") as well as more individualized downsizing can create protracted and expensive litigation under the ADA, Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e. See Kevin G. Salwen, *Decade of Downsizing Eases Stigma of Layoffs*, WALL ST. J., Feb. 8, 1994, at B1 (discussing trend of corporate downsizing). Although RIFs have largely been subject to challenge under the ADEA and the Older Workers Benefit Protection Act ("OWBPA"), RIFs are also subject to challenge under the ADA and other statutes. See Amy Karff Halevy & W. Jackson Wisdom, *Managing a Reduction in Force: A Primer for the Corporate Counsel*, HOUS. LAW. Oct. 1994 at 21 (stating that RIFs "can be a catalyst for costly and complex litigation under a variety of federal and state employment statutes").

Although overt discriminatory motives in RIFs are rarely apparent, employers often give conflicting or inconsistent messages as to why a RIF or a more individualized downsizing is being implemented. See *id.* at 25 ([The] "more objective the

Some courts, realizing that a broad interpretation of the “regarded as” prong might include any employee whose employer had any knowledge of an employee’s medical condition, have taken a narrow interpretation of disability under this prong.⁴² According to these decisions, an employer must regard the impairment as *substantially limiting a major life activity*.⁴³ In other words, it is not

criteria for selection, the stronger the company’s position will be if the RIF is legally challenged.”). Faced with these inconsistent, but most likely nondiscriminatory reasons, employees that belong to a protected class often seek relief through litigation. Increasing the protected class of individuals under the ADA, therefore, can only serve to increase the already burdensome costs of litigation.

For example, if an employee can satisfy the prima facie case under the ADA, summary judgment in favor of the employer may be difficult to obtain. *See, e.g., Batey v. Stone*, 24 F.3d 1330, 1336 (11th Cir. 1994) (stating that summary judgment is often inappropriate in employment discrimination cases); *Hairston v. Gainesville Sun Publ’g Co.*, 9 F.3d 913, 921 (11th Cir. 1993) (stating that summary judgment is “generally unsuitable in Title VII cases in which the plaintiff has established a prima facie case”); *Lowe v. City of Monrovia*, 775 F.2d 998, 1009 (9th Cir. 1985) (concluding that summary judgment is inappropriate once prima facie case has been established). Even where more than the prima facie case is required to survive summary judgment, “any defendant seeking summary judgment in a well-prepared discrimination case will face a significant hurdle.” Honorable Joseph E. Irenas, *Summary Judgment In Disparate Treatment Discrimination Cases: The View From the Third Circuit*, A.L.I., Feb. 1996, at 993.

If summary judgment is not obtained, however, litigation costs only increase. *See Darrell S. Gay, The Importance of Summary Judgment in Defending Civil Rights Cases*, at 65, 69 (PLI Litig. & Admin. Practice Course Handbook Series No. 542, 1996) (“Motions for summary judgment can end litigation or sharply curtail its scope. In either case, such motions may dramatically reduce litigation costs . . . assist in evaluating claims and defenses, analyzing the admissibility of evidence and framing legal arguments.”). Not surprisingly, some employers are hesitant to litigate to the completion of a trial and, therefore, settle as many claims as possible.

42. *See, e.g., MacDonald v. Delta Airlines, Inc.*, 94 F.3d 1437, 1445 (10th Cir. 1996) (holding that employer airline did not regard employee as disabled when it disallowed employee from taxiing aircraft because of vision problems because taxiing aircraft is single particular job); *Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir. 1996) (“[W]e hold that the mere fact that an employer is aware of an employee’s impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that perception caused the adverse employment action.”); *Ray v. Glidden Co.*, 85 F.3d 227, 229 (5th Cir. 1996) (holding that employer did not regard employee as substantially limited in major life activity under same standard); *Duff v. Lobdell-Emerly Mfg.*, 926 F. Supp. 799, 806 (N.D. Ind. 1996) (rejecting plaintiff’s allegations that defendant regarded him as having impairment under ADA, stating, “the employer does not ‘regard the employee as disabled simply by finding the employee to be incapable of satisfying the singular demands of a particular job’” (quoting *Marshall v. Norfolk & Western R.R.*, 876 F. Supp. 1528, 1540-41, (N.D. Ind. 1995))); *see also Partlow v. Runyon*, 826 F. Supp. 40, 44 (D.N.H. 1993) (stating that test to determine “regarded as” “is whether the impairment, as perceived, would affect the individual’s ability to find work across the spectrum of same or similar jobs”).

43. *See, e.g., Day v. Excel Corp.*, No. 94-1439-JTM, 1996 WL 294341, at *2 (D. Kan. May 17, 1996) (“[R]egardless of whether the impairment actually exists, existed historically, or exists by reputation, the plaintiff still must demonstrate the impairment substantially restricts a major life activity.”). Thus, where an employer does not believe the genetic information or potential future condition as *presently*

enough that an employer knows, or even acts, on the basis of an individual's impairment if the employer believes that the employee is *presently* able to perform major life activities (such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working).⁴⁴ The reasoning employed in these decisions may be extended to encompass situations where the employer knows about a person's genetic abnormality, but perceives the individual as *presently capable* of performing his or her job.

A discussion of these cases illustrates the possible analogy. For example, in *MacDonald v. Delta Airlines, Inc.*,⁴⁵ the United States Court of Appeals for the Tenth Circuit found that the employer's knowledge of the plaintiff's impairment did not prove that the employer regarded the employee as disabled.⁴⁶ The plaintiff, Lennon MacDonald, was terminated from his position as an aircraft mechanic for Delta Airlines.⁴⁷ MacDonald alleged that Delta perceived him as disabled because his impaired vision prevented him from performing his job as an aircraft mechanic.⁴⁸ The district court rejected the plaintiff's claim of disability discrimination, finding that he was unable to meet the threshold requirement of membership in the protected class.⁴⁹

The Tenth Circuit affirmed the district court's decision.⁵⁰ First, the court reviewed the requirements of a "regarded as" claim under the ADA.⁵¹ The court explained that Delta had to regard the

substantially limiting, an employer can take action based on such information and not be regarding the employee as disabled.

44. See *MacDonald*, 94 F.3d at 1440 (holding that plaintiff failed to establish prima facie case under ADA even though employer was aware of his impairment).

45. 94 F.3d 1437 (10th Cir. 1996).

46. See *id.* at 1445.

47. See *id.* at 1440 (noting that plaintiff was forced to resign on July 23, 1993). The plaintiff alleged that he was forced to resign in violation of the ADA and the ADEA. See *id.* (noting that plaintiff filed ADA and ADEA charges against defendant).

48. See *id.* at 1444 (noting that plaintiff argued that he met requirements under ADA because Delta regarded him as substantially limited in his ability to perform job of airplane mechanic, which qualified as "a class of jobs").

49. See *MacDonald v. Delta Airlines, Inc.*, No. 95-4108, 1995 WL 674951, at *4 (D. Utah June 2, 1995) ("An impairment that an employer perceives as limiting an individual's ability to perform only one job is not a disability under the ADA.").

50. See *MacDonald*, 94 F.3d at 1440 ("Because Mr. MacDonald has failed to establish a prima facie case under either act, meaning that no reasonable jury could return a verdict in his favor, we uphold the district court's grant of summary judgment to the defendants on both claims.").

51. See *id.* at 1443-44 ("[W]e must define three terms that, by reference to § 12102(2)(A) [first prong of disability definition], are included in the definition [of regarded as disabled]: 'regarded as,' 'major life activities,' and 'substantially limits.'").

plaintiff as substantially limited in a major life activity because of his impaired vision.⁵² Because MacDonald claimed that Delta regarded him as substantially limited in the major life activity of working, the court examined the regulations with respect to proving a substantial limitation in one's ability to work.⁵³ The court stated that to succeed under this prong, the plaintiff was required to show that Delta regarded the plaintiff as being substantially limited from either a class of jobs or a broad range of jobs in various classes.⁵⁴ Reviewing the plaintiff's evidence, the court found that the plaintiff could not show that Delta regarded his vision problems as substantially limiting his ability to be an airplane mechanic.⁵⁵ Assuming that Delta knew about the plaintiff's eye problems, the court observed that Delta restricted the plaintiff only from taxiing aircrafts.⁵⁶ Despite this restriction, the court explained that taxiing aircraft "is neither 'a class of jobs,' nor 'a broad range of jobs in various classes,' but is instead 'a single particular job.'"⁵⁷ Thus, absent a finding that the employer actually perceived the plaintiff as substantially limited as a result of the medical condition, proof of knowledge of its existence was insufficient to survive summary judgment.

Similarly, in *Kelly v. Drexel University*,⁵⁸ the United States Court of Appeals for the Third Circuit also addressed the significance of an employer's knowledge of an employee's medical condition. The plaintiff, Francis Kelly, suffered from a degenerative joint disease of the right hip that caused him to have a noticeable limp.⁵⁹ After his diagnosis, Kelly's position at Drexel was eliminated, and he was fired.⁶⁰ After his termination, the plaintiff sued Drexel, alleging that his termination violated the ADA.⁶¹

52. *See id.* at 1444 ("The ADA's implementing regulations define 'major life activities' as 'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and *working*.'" (emphasis added)).

53. *See id.* (noting that plaintiff only alleged working as major life activity involved in suit).

54. *See id.* at 1444-45 (citing *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942 (10th Cir. 1994), *cert. denied*, 513 U.S. 1104 (1995)); 29 C.F.R. § 1630.2(j)(3)(i) (1997).

55. *See id.* (noting that plaintiff admitted that passing taxi physical was not necessary part of his job as aircraft mechanic).

56. *See id.* ("[T]axiing aircraft is neither 'a class of jobs,' nor 'a broad range of jobs in various classes,' but is instead 'a single, particular job.'").

57. *Id.* (quoting 29 C.F.R. § 1630.2 (j)(3)(i)).

58. 94 F.3d 102 (3d Cir. 1996).

59. *See id.* at 103.

60. *See id.*

61. *See id.* (noting that plaintiff brought claims under ADA, ADEA and Pennsylvania Human Relations Act).

One of his claims against Drexel rested upon a perceived disability theory.⁶² Specifically, the plaintiff alleged that he satisfied the first prong of the perceived disability definition because Drexel regarded his limp as a substantial limitation on his ability to walk.⁶³ As evidence of the employer's perception, the plaintiff argued that his supervisor knew about his hip problem and that the limp was "visible and apparent."⁶⁴ The court rejected the plaintiff's arguments and affirmed the district court's order granting summary judgment to Drexel.⁶⁵ The court explained that, "the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that perception caused the adverse employment action."⁶⁶

Given that these cases require a plaintiff to prove that the employer used its knowledge to regard the plaintiff as having an impairment that substantially limited a major life activity, it follows that the employer must regard them as disabled presently and not sometime in the future.⁶⁷ Nevertheless, several decisions, as well as the Interpretive Guidance on this issue, support the conclusion that an employer's concerns for an employee's *future* productivity, *future*

62. *See id.* at 109 (noting that plaintiff pursued actual disability claim and perceived disability claim). The plaintiff's actual disability claim failed because the court could not find that the plaintiff's limp substantially limited his ability to walk. *See id.* Nevertheless, the plaintiff could still make out a perceived disability claim, provided that the employer perceived the plaintiff's limp as a substantial limitation on his ability to walk. *See id.* (citing 29 C.F.R. § 1630.2(l)(1)).

63. *See id.* at 108 ("Our analysis of this claim [of perceived disability] focuses not on Kelly and his actual abilities, but rather on the reactions and perceptions of the persons interacting or working with him."). The plaintiff did not allege that the other two prongs of the perceived disability definition were applicable. *See id.* at 108 n.6.

64. *Id.* at 109.

65. *See id.* ("Overall, we are satisfied that Kelly is not disabled within ADA on either basis that he advances on this appeal.")

66. *Id.* The court explained:

If we held otherwise, then by a parity of reasoning, a person in a group protected from adverse employment actions[,] i.e., anyone, could establish a prima facie discrimination case merely by demonstrating some adverse action against the individual and that the employer was aware that the employee's characteristic placed him or her in the [protected] group, e.g., race, age, or sex.

Id.

67. For example, this conclusion follows from the fact that the court in *Kelly* looked to the nature of the plaintiff's condition at the time he was terminated, rather than the fact that the disease was degenerative in nature. *See id.* at 108-09 (citing employer's affidavit stating that employer did not perceive plaintiff's impairment as disabling). Nevertheless, the plaintiff did not raise his future problems as the basis for his "regarded as" claim under the ADA. *See id.* at 106 (describing plaintiff's present limitations in walking).

increased insurance costs and *future* attendance implicate the “regarded as” prong of the ADA.⁶⁸

For example, at least one court has held that an employee is disabled under the “regarded as” prong where an employer is concerned about an employee’s *future* productivity because of a sickle cell condition.⁶⁹ In addition, courts have held that the possibility of *future* increased insurance costs because of an employee’s long-term illness creates standing to sue under the “regarded as” prong of the ADA.⁷⁰

Although these cases and the Interpretive Guidance lend support to the argument that the ADA should protect individuals whose employers take their future health, productivity and insurance costs into account, one should question whether this interpretation of the ADA improperly extends the ADA’s protection to those who are already provided adequate protection under other statutes.⁷¹ For example, the recent passage of the Health Insurance Portability and Accountability Act⁷² [hereinafter “Portability Act”] makes the potential for employer discrimination in the area of ge-

68. See EEOC Compl. Man., *supra* note 22, ¶ 6884 (stating that employer is deemed to have regarded individual as disabled when employer discharges asymptomatic employee with known genetic condition because of “concerns about matters such as . . . productivity, insurance costs, and attendance”).

69. See *Jones v. Inter-County Imaging Ctrs.*, 889 F. Supp. 741, 744 (S.D.N.Y. 1995). In *Jones*, plaintiff alleged he was terminated by his employer, the defendant, because his employer believed that his sickle cell disease would adversely affect his future attendance. See *id.* at 742. Defendant moved to dismiss for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. See *id.* After deciding to treat the motion as one for summary judgment, the court denied it, holding that plaintiff had stated a valid claim. See *id.* at 744.

70. See, e.g., *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763, 769 (E.D. Tex. 1996) (finding that employer violated ADA when, in effort to decrease expenses, it changed group health providers to insurer that would never consider covering one of employees in group because of that employee’s disability); *Jones*, 889 F. Supp at 744 (holding that plaintiff stated valid claim when he alleged that his employer terminated him because it wished to avoid additional medical insurance costs associated with his sickle cell disease); *Niemiec v. H & K Inc.*, No. 94-C-553, 1995 WL 465683, at *2 (E.D. Wis. Apr. 26, 1995) (noting that terminating employee to avoid presumed potential for large insurance costs associated with employee’s disabled child would be unlawful discrimination); *Sawinski v. Bill Currie Ford, Inc.*, 866 F. Supp. 1383, 1387 (M.D. Fla. 1994) (finding that plaintiff stated valid claim of discrimination when he alleged that defendant terminated him because of impact of his disability on defendant’s cost of employee health insurance).

71. See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996). This legislation protects employees and prohibits insurers, including those employers who are self-insured, from discriminating against individuals and beneficiaries based on health status, particularly with use of genetic information. For a further discussion of the Health Insurance Portability Act of 1996, see *supra* note 10 and accompanying text.

72. Pub. L. No. 104-191, 110 Stat. 1936 (1996).

netic information less of a threat.⁷³ Under the legislation, insurance companies, as well as employers that self-insure, cannot make insurance decisions based on an employee's genetic information. The Portability Act prohibits insurance companies and those employers that self-insure from using genetic information as a preexisting condition, absent a diagnosis of a condition relating to the genetic condition.⁷⁴ In addition, the Portability Act prohibits discrimination against individual participants and beneficiaries based on health status, particularly based on genetic information.⁷⁵ If an employer were to discriminate against an asymptomatic individual with a genetic disorder, the reason presumably would be because of insurance costs. Now, because an insurance company or a self-insured cannot take this information into consideration, the threat of subsequent discrimination by an employer is largely eviscerated.

In addition, the Employee Retirement Income Security Act ("ERISA")⁷⁶ also affords protection to those with genetic abnormalities by prohibiting intentional discrimination or interference with an employee's benefits.⁷⁷ In particular, if an individual with genetic information was terminated or subjected to an adverse employment action to deprive the individual of future employment benefits, that individual would have a cognizable claim under section 510 of ERISA.⁷⁸ Given that section 510 of ERISA is designed to redress the precise type of discrimination that individuals with genetic information are likely to face, it does not make sense to afford duplicative recovery by expanding the number of protected individuals covered by the ADA exponentially.

73. *See id.*

74. *See id.* § 706(b)(1)(B).

75. *See id.* § 706(a)(1)(F).

76. 29 U.S.C. §§ 1001-1461 (1994).

77. *See id.* §§ 510, 1140. Section 510 of ERISA provides: "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." *Id.* § 510.

78. *See, e.g.,* *Wilson v. Wells Aluminum Corp.*, No. 95-2003, 1997 U.S. App. LEXIS 2331, at *19 n.5 (6th Cir. Feb. 7, 1997) (noting that diabetic plaintiff could have brought suit under section 510 of ERISA); *Salus v. GTE Directories Serv. Corp.*, 104 F.3d 131, 139 (7th Cir. 1997) (affirming district court's holding that plaintiff who suffered from stress-related headaches was discharged in violation of section 510 of ERISA); *Godfrey v. Bell South Comm., Inc.*, 89 F.3d 755, 758 (11th Cir. 1996) (holding employer's action of discharging employee because of her child's hydrocephalus violated ERISA).

V. CONCLUSION

The ADA was designed to protect a “discrete and insular minority,” who “as a group . . . are severely disadvantaged socially, vocationally, economically and educationally.”⁷⁹ Not every person who ultimately learns about his or her genetic makeup, however, is “severely disadvantaged socially, vocationally . . . and economically.”⁸⁰ Most people who learn of their genetic makeup, even if a potential abnormality exists, will have no problem working or performing any other major life activity within their lifetime. In addition, given that many more people are likely to inquire into their genetic makeup in the future, it seems the ADA should not be expanded to extend protection to every individual who believes that his or her employer acted on such information. Obviously, there will be situations where employers will wrongly discriminate against individuals on the basis of their genetic predisposition to disease. Fortunately, other federal statutes redress this type of discrimination.⁸¹ For this reason, and given that caution should be taken before unduly expanding the scope of the ADA, courts should refrain from interpreting the ADA to afford protection to those individuals who either have potential future impairments or mere knowledge of their genetic makeup.

79. 42 U.S.C. § 12101(a)(6)-(7) (1994).

80. *Id.*

81. For a discussion of section 510 of ERISA, see *supra* notes 76-78 and accompanying text. For a discussion of the Health Insurance and Accountability Act of 1996, see *supra* notes 71-75 and accompanying text.

