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## There Will Be Blood ... Testing: The Intersection of Professional Sports and the Genetic Information Nondiscrimination Act of 2008

Jesse A. Bland

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# There Will Be Blood . . . Testing: The Intersection of Professional Sports and the Genetic Information Nondiscrimination Act of 2008

## ABSTRACT

*Genetic testing, professional baseball, and employment discrimination seldom intersect. This Note changes that. Thanks to scientific breakthroughs in genetic research over the past half-century, genetic testing is a powerful tool for producing rich, individualized information. Progress comes at a price, however. As genetic testing has advanced and become more prevalent, so too has the potential misuse of genetic information. A recently enacted federal law—the Genetic Information Nondiscrimination Act of 2008 (GINA)—seeks to eliminate one such threat by prohibiting the improper use of genetic information in employment decisions. While the law gained congressional momentum after tales of abuse in blue-collar industries, this Note explores the Act’s potential impact on an industry at the other end of the compensation spectrum: professional sports. To be sure, genetic testing is far from widespread in the professional sports landscape. The enormous potential value of genetic testing in this industry, however, ensures that genetic information will play an increasingly relevant role in professional sports. Accordingly, the Act raises a number of implications for sports organizations that use genetic information in hiring decisions. This Note explores GINA’s potential impact on professional sports by analyzing the relevant statutory exceptions and practical obstacles that threaten to impede the statute’s applicability in this context. Ultimately, it argues that, regardless of any statutory or practical barriers, the Act should protect professional athletes just as it protects stadium custodians.*

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Professional sports teams are out for blood. Literally. Just ask Miguel Sano, a sixteen-year-old Major League Baseball (MLB) prospect from the Dominican Republic, who recently underwent DNA testing to confirm his age.<sup>1</sup> If Miguel turns out to be the shy type, though, surely his parents will boast about the results, which confirmed paternity,<sup>2</sup> or, maybe his sister can describe her bone-scan experience.<sup>3</sup>

Eddy Curry can also provide some guidance. Curry is a National Basketball Association (NBA) player whose former team demanded he take a DNA test before it would renew his contract.<sup>4</sup> After experiencing heart discomfort during the 2005 season, doctors

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1. Michael S. Schmidt & Alan Schwarz, *Baseball's Use of DNA Raises Questions*, N.Y. TIMES, July 21, 2009, at A1, available at <http://www.nytimes.com/2009/07/22/sports/baseball/22dna.html>.

2. *Id.*

3. *Id.* (reporting she was also tested "to help confirm that she was his older sister, and not a younger sibling whose birth certificate was used to falsify Sano's age"); see also *Bone Scan: What You Can Expect*, MAYO CLINIC, <http://www.mayoclinic.com/health/bone-scan/MY00306/DSECTION=what-you-can-expect> (last visited Nov. 1, 2010).

4. See Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819, 819 (2006).

diagnosed Curry with a benign case of “athlete’s heart,” yet the Chicago Bulls kept him off the court for the remainder of the season.<sup>5</sup> Worried that his condition would increase the chance of a fatal heart attack while playing for the team, the Bulls insisted on a DNA test during contract negotiations.<sup>6</sup> Curry never took the test, instead nixing the Bulls and rushing to the New York Knicks, which did not require Curry to submit to any genetic testing.<sup>7</sup>

These are but two examples of the growing use and importance of genetic information in sports and, more generally, employment. Not only do these practices raise privacy concerns, they also create the potential for misuse.<sup>8</sup> What if, for example, teams used Miguel’s DNA samples not just to confirm his age, but to determine his susceptibility to genetic diseases or disorders? More to the point, what if coaches and team owners attempted to use players’ genetic information to predict their medical futures and, accordingly, how much—or whether—a team would pay them?<sup>9</sup>

Though at first blush these practices might appear confined to the sports law context, at their core they raise fundamental employment issues.<sup>10</sup> As such, they leave professional sports organizations, such as MLB and NBA, standing on the tracks of an oncoming train: the Genetic Information Nondiscrimination Act of 2008 (GINA).<sup>11</sup> A recently enacted federal law designed to prohibit the improper use of genetic information in health insurance and employment decisions,<sup>12</sup> GINA sweeps broadly across the employment arena, covering employers,<sup>13</sup> employment agencies,<sup>14</sup> labor organizations,<sup>15</sup> and joint labor-management committees.<sup>16</sup>

This new law—effective November, 2009<sup>17</sup>—raises a number of interesting legal questions in the professional sports context, because

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5. *Id.* at 819.

6. *Id.* at 819–20.

7. *Id.* at 820; *Bulls Re-Sign Curry, Complete Sign-and-Trade with Knicks*, CHICAGO BULLS, [http://www.nba.com/bulls/news/curry\\_traded\\_051004.html](http://www.nba.com/bulls/news/curry_traded_051004.html) (last visited Nov. 1, 2010).

8. *See infra* Part II.

9. *See infra* Part I.B.2.

10. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified in scattered sections of 26, 29, and 42 U.S.C.).

11. *Id.*

12. DEPT’ OF HEALTH AND HUMAN SERVS., THE GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008: INFORMATION FOR RESEARCHERS AND HEALTH CARE PROFESSIONALS 1 (2009), available at <http://www.genome.gov/Pages/PolicyEthics/GeneticDiscrimination/GINAInfoDoc.pdf> [hereinafter HHS INFORMATION SHEET].

13. 42 U.S.C. § 2000ff-1 (2006).

14. *Id.* § 2000ff-2.

15. *Id.* § 2000ff-3.

16. *Id.* § 2000ff-4.

17. *See* § 213, 122 Stat. at 920.

it presumably bars genetic testing in professional sports to the extent that test results must not factor into employment decisions.<sup>18</sup> Though GINA's applicability in the sports context remains unclear, enforcing the statute could prove problematic for a number of reasons.<sup>19</sup> Not only does the statute itself leave potential loopholes for professional sports organizations,<sup>20</sup> but significant practical hurdles could also diminish GINA's effectiveness.<sup>21</sup>

This Note explores GINA's potential impact on professional sports by analyzing the relevant statutory exceptions and practical obstacles that threaten to impede the statute's applicability in this context. Part I discusses the background of GINA, focusing on factors relevant to its enactment and its role in employment discrimination. Part I also examines the potential conflict between professional sports practices and GINA's prohibitions. Part II analyzes the legal and practical obstacles standing in the way of GINA's effective enforcement in the professional sports context. Related to the question of whether GINA will apply in these situations is whether it *should*. Part III discusses this issue and proposes that GINA be enforced in professional sports, but in a way that recognizes the unique nature of employment, as well as the economic realities underlying contract negotiations, while still preserving the congressional purpose behind GINA: shielding genetic information from employment decisions.<sup>22</sup>

## I. FROM LAB TO LAW: AN OVERVIEW OF GINA AND GENETIC INFORMATION IN THE WORKPLACE

Rapid development in genetic research over the past five decades has drastically increased the usefulness of genetic information.<sup>23</sup> While the benefits of progress appear limitless, they come with potential detriments. These threats manifest themselves in situations where an employer makes—or an employee believes the employer will make—an employment decision based on an employee's genetic information. As discussed below, Congress enacted GINA to combat this possibility and provide a uniform system for regulating a unique form of employment discrimination.<sup>24</sup>

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18. See *infra* Part I.B.
  19. See *infra* Part II.
  20. See *infra* Part III.
  21. See *id.*
  22. See § 2, 122 Stat. at 881.
  23. See *id.*
  24. See *infra* discussion Part I.A—B.

*A. New Discrimination: The Impetus Behind GINA*

## 1. Advances in Genetics and Medical Progress

While just fifty years ago scientists knew very little about the genetic factors that contribute to human disease, today they have identified over 1,800 genes associated with known diseases.<sup>25</sup> These discoveries are due in large part to the Human Genome Project (HGP), the brainchild of the National Institutes of Health (NIH), the Department of Energy, and other international partners that sought to sequence a complete set of human DNA.<sup>26</sup> The HGP sought to “provide researchers with powerful tools to understand the genetic factors in human disease, paving the way for new strategies for their diagnosis, treatment and prevention,” and as a result of its efforts, more than 1,000 genetic tests now exist for human conditions.<sup>27</sup>

Genetic testing carries clear benefits. For one, it has already dramatically improved a number of lives.<sup>28</sup> Take, for example, the case of Rebecca Raezer, a New Jersey mother who underwent genetic testing after her sister warned her that they both carried a gene mutation linked with cancer in women.<sup>29</sup> These tests prompted Raezer to seek an ultrasound that revealed breast cancer.<sup>30</sup> Further, genetic testing can function in at least two ways immediately relevant to the sports and employment contexts: diagnosing a particular ailment based on its symptoms,<sup>31</sup> and ascertaining the inherited disposition of an asymptomatic person for a certain disease.<sup>32</sup> However, while these medical advances create an enormous potential benefit of genetic testing, they also increase the risk of discrimination

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25. NAT'L INSTS. OF HEALTH, HUMAN GENOME PROJECT FACT SHEET 1, *available at* <http://www.nih.gov/about/researchresultsforthepublic/HumanGenomeProject.pdf> [hereinafter NIH FACT SHEET].

26. *Id.*

27. *Id.*

28. *Human Genome Project Information*, OAK RIDGE NAT'L LAB., [http://www.ornl.gov/sci/techresources/Human\\_Genome/medicine/genetest.shtml#procon](http://www.ornl.gov/sci/techresources/Human_Genome/medicine/genetest.shtml#procon) (last updated Sept. 17, 2010) (“Some tests are used to clarify a diagnosis and direct a physician toward appropriate treatments, while others allow families to avoid having children with devastating diseases or identify people at high risk for conditions that may be preventable.”).

29. See Deborah Huso, *Rebecca Raezer's Instinct Saved Her Life*, AOL HEALTH, <http://www.aolhealth.com/condition-center/breast-cancer/rebecca-raezer-breast-cancer> (last visited Nov. 1, 2010).

30. *Id.*

31. *Frequently Asked Questions about Genetic Testing*, NAT'L INSTS. OF HEALTH, <http://www.genome.gov/19516567> (last updated Apr. 14, 2010).

32. *Id.*

and social stigmatization—especially true in the workplace.<sup>33</sup> Indeed, Congress realized that “[t]hese advances give rise to the potential misuse of genetic information to discriminate in health insurance and employment.”<sup>34</sup> This perverse incentive can also lead to a chilling effect:

Congress believed that individuals were not taking advantage of genetic tests that could inform them whether they are at risk of acquiring certain conditions, because of concerns about discrimination by insurers or employers with access to their genetic information. Moreover, without [GINA], Congress believed individuals might be reluctant to participate in beneficial genetic research.<sup>35</sup>

Thus Congress sought to ensure that the development of beneficial genetic testing proceeded with workplace regulations that prevent discrimination.<sup>36</sup> Further, as discussed below, Congress decided that filling the gaps in the existing employment discrimination regime would most effectively accomplish this goal.<sup>37</sup>

## 2. Inadequate Federal and State Discrimination Laws

Congress also felt compelled to enact GINA because of the inadequate treatment of genetic information by the employment discrimination framework,<sup>38</sup> as evidenced by the patchwork nature of federal and state law in this area.<sup>39</sup>

By enacting GINA, Congress recognized that, while multiple federal statutes prohibited employment discrimination, none effectively protected genetic information at that time.<sup>40</sup> For instance, while Title I of the Americans with Disabilities Act (ADA) and similar disability-based anti-discrimination laws, such as the Rehabilitation Act of 1973, provide limited protections in the workplace, they do not

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33. §§ 2(1)—(5), 122 Stat. at 882—83 (finding, in § 2(3), “many genetic conditions and disorders are associated with particular racial and ethnic groups and gender. Because some genetic traits are most prevalent in particular groups, members of a particular group may be stigmatized or discriminated against as a result of that genetic information”) [hereinafter GINA Congressional Findings].

34. *Id.* §2(1).

35. *Meeting on Notice of Proposed Rulemaking Implementation of Title II of the Genetic Information Non-Discrimination Act of 2008*, EQUAL EMP’T OPPORTUNITY COMM’N, (Feb. 25, 2009), <http://www.eeoc.gov/eeoc/meetings/2-25-09/kuczynski.cfm> (statement of Christopher J. Kuczynski).

36. *See* GINA Congressional Findings, *supra* note 33.

37. *See* § 2, 122 Stat. at 881.

38. *See id.*

39. *See id.* § 2(5).

40. *See* §2(5), 122 Stat. at 882 (“Federal law addressing genetic discrimination in health insurance and employment is incomplete in both the scope and depth of its protections.”).



explicitly address genetic information.<sup>41</sup> Prior to GINA, only the Health Insurance Portability and Accountability Act of 1996 (HIPAA) directly addressed the issue of genetic discrimination at the federal level.<sup>42</sup> Pursuant to HIPAA, the Department of Health and Human Services (HHS) drafted a Privacy Rule stating that genetic information, in the absence of a current diagnosis of illness, shall not be considered a pre-existing condition.<sup>43</sup> However, this applies only to employer-based and commercially issued group health insurance.<sup>44</sup> Finally, Title VII of the Civil Rights Act of 1964 (Title VII) arguably prohibits genetic discrimination based on “racially or ethnically linked” genetic disorders.<sup>45</sup> However, under Title VII, “protection is available only where an employer engages in discrimination based on a genetic trait that is substantially related to a particular race or ethnic group . . . [and] a strong relationship between race or national origin has been established for only a few diseases.”<sup>46</sup>

Congress also found that, much like federal law, state prohibitions inadequately protected employees and job applicants from discrimination based on genetic information:

While many States have enacted some type of genetic non-discrimination law, these laws vary widely with respect to their approach, application, and level of protection. Congress has collected substantial evidence that the American public and the medical community find the existing patchwork of state and federal laws to be confusing and inadequate to protect them from discrimination.<sup>47</sup>

Thus, Congress intended GINA to establish a “national and uniform basic standard . . . to fully protect the public from discrimination and allay their concerns about the potential for discrimination, thereby allowing individuals to take advantage of genetic testing, technologies, research, and new therapies.”<sup>48</sup> Accordingly, GINA does not preempt any more stringent state law, but

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41. *Existing Federal Anti-Discrimination Laws and How They Apply to Genetics*, NAT’L INSTS OF HEALTH, <http://www.genome.gov/12513979> (last updated Mar. 10, 2010) (noting that, under current interpretation, entities that discriminate on the basis of genetic predisposition are treating the individuals as having impairments, which would make such individuals covered by the ADA).

42. *Id.*

43. *See* 45 C.F.R. §§ 160, 162, 164 (2009), *available at* <http://www.hhs.gov/ocr/privacy/hipaa/administrative/privacyrule/adminsimpregtext.pdf> (last visited Nov. 1, 2010).

44. *Id.*

45. *See* NAT’L INSTS OF HEALTH, *supra* note 41.

46. §2(5), 122 Stat. at 882.

47. *Id.*

48. *Id.*

rather serves as the national baseline, which states are free to buttress with additional protections.<sup>49</sup>

### B. GINA: An Overview

On May 21, 2008, President Bush signed into law H.R. 493,<sup>50</sup> intended to “protect Americans against discrimination based on their genetic information when it comes to health insurance and employment.”<sup>51</sup> The bill—originally introduced by Representative Louise Slaughter in 1995<sup>52</sup>—passed on a 414-1 vote in the House after thirteen years of debate.<sup>53</sup>

Some might question why a law with such obvious benefits would take thirteen years to move from bill to statute.<sup>54</sup> The delay likely reflects the relatively infrequent abuse, to that point, of genetic information. Although the public increasingly fears discrimination based on genetic information,<sup>55</sup> few cases have reported employers using genetic testing in any fashion, let alone refusing to hire or otherwise discriminating on the results of these tests.<sup>56</sup> As discussed

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49. *Genetic Information Nondiscrimination of 2008 Fact Sheet*, NAT'L INSTS. OF HEALTH, <http://www.genome.gov/10002328> (last reviewed Sept. 28, 2010) (“The federal law sets a minimum standard of protection that must be met in all states. It does not weaken the protections provided by any state law.”).

50. H.R. 493, 110th Cong. (2008) (enacted), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_public\\_laws&docid=f:publ233.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ233.110.pdf)

51. *Genetic Information Nondiscrimination Act (GINA) of 2008*, NAT'L INSTS. OF HEALTH, <http://www.genome.gov/24519851> (last reviewed June 28, 2010) [hereinafter *GINA Information*]; see also Press Release, The White House, President Bush Signs H.R. 493, the Genetic Information Nondiscrimination Act of 2008 (May 21, 2008), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/05/20080521-7.html>.

52. See *Slaughter's Quest Undone by "Dr. No": Senator Blocks Bill on Gene Profile Bias*, BUFFALO NEWS, Aug. 14, 2007, at A1, available at <http://www.votelouise.com/news/376/slaughters-quest-undone-by-dr-no-senator-blocks-bill-on-gene-profile-bias> (describing Congressional battles to enact GINA).

53. See *GINA Information*, supra note 51 (The Bill passed with a 95-0 vote in the Senate on April 14, 2008 and the House approved the Senate amendments with a 414-1 vote on May 5, 2008).

54. See *The Genetic Information Nondiscrimination Act: Congressional Record—Extension of Remarks*, 110th Congress E120 (2007), available at [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2007\\_record&page=E120&position=all](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2007_record&page=E120&position=all) (speech of Rep. Louise Slaughter) (noting that “[i]n the past, some have called this legislation ‘a solution in search of a problem’ and suggest [sic] that genetic discrimination is rare, if it even happens at all”).

55. See S. Baruch, D. Daufman, & K. Hudson, *U.S. Public Opinion on Uses of Genetic Information and Genetic Discrimination*, GENETICS & PUB. POLICY CTR., 2 (Apr. 24, 2007), [http://www.dnapolicy.org/images/reportpdfs/GINAPublic\\_Opinion\\_Genetic\\_Information\\_Discrimination.pdf](http://www.dnapolicy.org/images/reportpdfs/GINAPublic_Opinion_Genetic_Information_Discrimination.pdf) (finding over 90% of Americans concerned about potential misuse of their genetic information).

56. Dan Vorhaus, *MLB Meets GINA*, GENOMICS LAW REPORT (July 22, 2009), <http://www.genomicslawreport.com/index.php/2009/07/22/mlb-meets-gina>.

above, however,<sup>57</sup> Congress responded to the “current explosion in the science of genetics,”<sup>58</sup> and the threat of cases like *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*,<sup>59</sup> where an employer singled out blacks and females by requiring blood and urine samples—which tested for syphilis, sickle-cell trait, and pregnancy—as a condition of employment.<sup>60</sup>

As discussed below, Title II of GINA, which prohibits employment discrimination based on genetic information, will become increasingly relevant to the discussion of whether sports organizations’ practices constitute employment discrimination.<sup>61</sup>

### 1. Structure and Relevance: GINA’s Framework and Title II’s Prohibition of Employment Discrimination

GINA contains two major titles, each of which addresses discrimination in one of the statute’s target areas: health insurance and the workplace. Title I prohibits genetic discrimination in health insurance<sup>62</sup> and took full effect in May, 2010.<sup>63</sup> The relevant provisions for professional sports, however, fall under Title II, “Prohibiting Employment Discrimination on the Basis of Genetic Information.”<sup>64</sup> Title II became effective eighteen months after GINA’s enactment, on November 21, 2009.<sup>65</sup> Professional sports organizations must closely analyze Title II, as it prohibits certain practices by any “employer,” “employment agency,” or “labor organization.”<sup>66</sup> Because professional teams can only be characterized as employers under GINA, this Note will focus on “employer” practices under the statute.

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57. See *supra* Part I.A.

58. Genetic Information Nondiscrimination Act, Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified in scattered sections of 26, 29, and 42 U.S.C.).

59. 135 F.3d 1260, 1269 (9th Cir. 1998).

60. *Id.*

61. See *infra* Part II.

62. §§ 101–106, 122 Stat. at 882.

63. The effective date of the insurance provisions is not the same in all cases because for group health plans, Title I took effect at the start of the “plan year” beginning one year after GINA’s enactment. Because some health plans do not designate their “plan years” to correspond to a calendar year, there were variations among plans as to when Title I took effect for the plans. However, for individual health insurers, GINA took effect May 22, 2009. HHS INFORMATION SHEET, *supra* note 12.

64. §§ 201–213, 122 Stat. at 882; 42 U.S.C.A. §§ 2000ff–2000ff-11 (West 2009).

65. § 213, 122 Stat. at 882.

66. See 42 U.S.C.A. § 2000ff.

*a. Who is Subject to GINA?*

GINA defines the term “employer” in five ways.<sup>67</sup> Four of the five definitions pertain to government-related employers.<sup>68</sup> The fifth definition, which includes professional sports teams, lies in § 2000e(b).<sup>69</sup> It defines an “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.”<sup>70</sup> In accordance with regulations issued by the Equal Employment Opportunity Commission (EEOC)—the agency tasked with implementing GINA—Title VII of the Civil Rights Act of 1964<sup>71</sup> provides the definition of “employer.”<sup>72</sup>

Professional sports organizations clearly qualify as “employers” under GINA. First, each organization qualifies as a “person” whether organized as a partnership, association, corporation, mutual company, joint-stock company, or unincorporated organization.<sup>73</sup> Second, each team clearly “affects commerce,”<sup>74</sup> as each has contributed to the professional sports industry’s recent growth into a national cash cow.<sup>75</sup>

*b. Unlawful Employer Practices Under GINA*

Section 2000ff-1 details the lawful—and unlawful—employer practices relating to genetic information.<sup>76</sup> First, employers are

67. *Id.* §§ 2000ff(B)(i)—(v).

68. *Id.* §§ 2000ff(B)(ii)—(v) (“Employer” also means: “(ii) an entity employing a State employee described in section 2000e-16c(a) of this title; (iii) an employing office, as defined in section 1301 of Title 2; (iv) an employing office, as defined in section 411(c) of Title 3; or (v) an entity to which section 2000e-16(a) of this title applies.”).

69. *Id.* § 2000ff(B)(i).

70. *Id.* § 2000e(b).

71. Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended in 42 U.S.C. § 2000e *et. seq.*).

72. 29 C.F.R. § 1601.2 (2009), available at [http://edocket.access.gpo.gov/cfr\\_2010/julqtr/29cfr1601.2.htm](http://edocket.access.gpo.gov/cfr_2010/julqtr/29cfr1601.2.htm).

73. *See* 42 U.S.C. § 2000e(a).

74. Under § 701 of Title VII, the term commerce “means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.” 42 U.S.C. § 2000e(g). Further, the term “industry affecting commerce” means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry “affecting commerce” within the meaning of the Labor- Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 *et. seq.*], and further includes any governmental industry, business, or activity. 42 U.S.C. § 2000e(h).

75. *See infra* Part I.B.2.

76. 42 U.S.C. § 2000ff-1.

barred from discriminating against an employee on the basis of genetic information.<sup>77</sup> According to Christopher Kuczynski, assistant legal counsel for the EEOC, “[t]here’s an absolute ban on the use of genetic information to make any kind of decision about employment.”<sup>78</sup> Specifically, this section forbids an employer:

(1) to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee; or (2) to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.<sup>79</sup>

Second, unless one of the explicitly enumerated exceptions applies, “[i]t shall be an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee or a family member.”<sup>80</sup> Exceptions are limited and generally require either the employee’s consent or compliance with other federal laws.<sup>81</sup> For example, the “water cooler exception” would not prohibit the case of an employer’s use of an employee’s genetic information if the employer overheard an employee tell someone about his family’s history of heart problems.<sup>82</sup> Nor would it be unlawful for an employer to obtain this information from an obituary about an employee’s family member.<sup>83</sup> Finally, employers may acquire genetic information if an employee provides “prior, knowing, voluntary, and written authorization.”<sup>84</sup>

Of course, none of this matters unless professional athletes are considered “employees” under the statute. As with the term “employer”, GINA defines “employee” in five different ways,<sup>85</sup> and four of the five concern government-related employment.<sup>86</sup> The fifth

77. *Id.* § 2000ff-1(a).

78. Steven Greenhouse, *Law Seeks to Ban Misuse of Genetic Testing*, N.Y. TIMES, Nov. 16, 2009, at B5, available at <http://www.nytimes.com/2009/11/16/business/16genes.html>.

79. 42 U.S.C. § 2000ff-1(a).

80. *Id.* § 2000ff-1(b).

81. *Id.*

82. *Id.* § 2000ff-1(b)(1) (not unlawful “where an employer inadvertently requests or requires family medical history of the employee or family member of the employee”).

83. *Id.* § 2000ff-1(b)(4) (not unlawful “where an employer purchases documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books, but not including medical databases or court records) that include family medical history”).

84. *Id.* § 2000ff-1(b)(2)(B).

85. *See id.* § 2000ff (2)(A).

86. *Id.* §§ 2000ff (2)(A)(ii)—(v) (“Employee” means “(ii) a State employee (including an applicant) as defined in . . . 42 U.S.C. § 2000e-16c(a)”; “(iii) a covered employee (including an applicant), as defined in . . . 2 U.S.C. § 1301” ; “(iv) a covered employee (including an applicant), as defined in section 411(c) of title 3;” or “(v) an employee or applicant to which . . . 42 U.S.C. 2000e-16(a) applies.”).

definition, applicable to professional athletics—borrowed from Title VII—defines “employee” in a circular fashion: “[A]n individual employed by an employer.”<sup>87</sup> So, as long as an athlete’s team—or prospective team since “applicants” are also covered<sup>88</sup>—satisfies the definition of “employer” discussed above, Title II protects that individual. It is hard to imagine a professional sports organization employing fewer than fifteen individuals.<sup>89</sup> Accordingly, all professional teams must comply with Title II and all players and prospects are protected by it.

Pursuant to the statute, the EEOC enforces GINA and promulgates regulations thereunder.<sup>90</sup> While interim final regulations for Title I were released in October 2009,<sup>91</sup> the EEOC has only issued proposed regulations for Title II.<sup>92</sup> The uncertainty surrounding these regulations and GINA’s applicability raises significant implications for a number of professional sports organizations.<sup>93</sup> MLB provides the most relevant example.<sup>94</sup> In reaction to the falsification of the personal information—including age and name—of many Latin American players,<sup>95</sup> MLB now conducts genetic tests on some players and their families.<sup>96</sup> Because such testing ultimately relates to an employment decision, GINA would presumably control.<sup>97</sup> Legal,

87. See 42 U.S.C. § 2000ff (2)(A)(i) (defining “employee” as “an employee (including an applicant), as defined in . . . section 2000e(f),” which states “[t]he term ‘employee’ means an individual employed by an employer”).

88. See *id.* §§ 2000ff (2)(A)(ii)—(v).

89. See Len Pasquarelli, *Schedules, Rosters Likely to Grow Together*, ESPN.COM, May 20, 2009, [http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli\\_len&id=4186072](http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli_len&id=4186072); *Article XXIX - 2005 Collective Bargaining Agreement*, NBA PLAYERS ASS’N (Dec. 16, 2009), <http://www.nbpa.org/sites/default/files/ARTICLE%20XXIX.pdf> (each team must have at least 12 players on its roster); *MLB Roster Analysis*, ESPN.COM, [http://espn.go.com/mlb/stats/rosters/\\_/sort/null/order/false](http://espn.go.com/mlb/stats/rosters/_/sort/null/order/false) (last visited Nov. 1, 2010).

90. 42 U.S.C. §§ 2000ff(1), 2000ff-10.

91. HHS Interim Final Rules, 45 C.F.R. §§ 144, 146, 148, 160, 164 (Oct. 7, 2009).

92. Regulations Under the Genetic Information Nondiscrimination Act of 2008 (proposed Mar. 2, 2009) (to be codified at 29 C.F.R. pt. 1635), available at <http://edocket.access.gpo.gov/2009/E9-4221.htm> (last visited Nov. 2, 2010).

93. 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) (discussing the problems that GINA creates for professional sports and proposing several solutions).

94. See Schmidt & Schwarz, *supra* note 1.

95. See, e.g., Bill Ladson, *Nats’ Top Prospect Falsified Age, Name*, MLB.COM (Feb. 18, 2009, 11:30 AM), [http://mlb.mlb.com/news/article.jsp?ymd=20090218&content\\_id=3843196&vkey=news\\_mlb](http://mlb.mlb.com/news/article.jsp?ymd=20090218&content_id=3843196&vkey=news_mlb) (revealing Washington Nationals prospect Esmailyn Gonzalez, 19, who had received a \$1.4 million bonus, was actually Carlos David Alvarez Lugo, age 23).

96. See Schmidt & Schwarz, *supra* note 1.

97. HHS INFORMATION SHEET, *supra* note 12.

social, and cultural factors, however, present hurdles—if not complete practical barriers—to GINA’s application in such a context.<sup>98</sup>

## 2. The Collision: Genetic Information in Professional Sports

Professional sports poses a unique opportunity for exploitation of genetic information, since athletic ability and physical health often determine employment decisions. On the one hand, information about athletic potential provides an enormous benefit, as all sports require and reward physical performance. At least one outspoken sports figure—U.S. women’s national rowing team coach Harmut Buschbacher—is not shy about the potential role genetic testing could play in sports decisions: “As a coach, I’m interested in performance, and if this information would give me a better opportunity to select the athletes for my team, I would like to use that.”<sup>99</sup>

On the other hand, such information could be abused in the increasingly cutthroat, what-have-you-done-for-me-lately world of professional athletics. Of course, the obvious response remains: “So what?”<sup>100</sup> This sentiment might reflect a crass pragmatism among the public to accept ethically questionable practices so long as they bring about success. Or it could just reflect the difficulty of sympathizing with a guy earning a minimum of \$400,000 per year.<sup>101</sup> While legislators arguably had in mind someone earning closer to the minimum wage when it drafted GINA, professional athletes are still “employees” and, accordingly, enjoy the protections of the statute.<sup>102</sup>

Whatever its merits, the use of genetic information in professional sports is on the rise.<sup>103</sup> As mentioned above, both MLB and the NBA have encountered situations where a team has asked a player or prospect to undergo genetic testing.<sup>104</sup> But prying into athletes’ genetic information extends beyond these organizations. For example, genetic information has directly factored into lineup

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98. See *infra* Part I.B.2.

99. Tom Farrey, *Genetic Testing Beckons*, ESPN.COM (June 3, 2008), <http://espn.go.com/otl/athlete/monday.html>; see also Matt Scott, *One Club Wants to Use a Gene-test to Spot the New Ronaldo. Is This Football's Future?*, THE GUARDIAN April 26, 2008, available at <http://www.guardian.co.uk/football/2008/apr/26/genetics> (stating that at least one professional English soccer team sees potential in genetic testing).

100. See, e.g., Tom Weir, *Bill James Says 'So What' About Steroids*, USA TODAY (Jul. 22, 2007, 5:51 PM) <http://content.usatoday.com/topics/post/Bill+James/68495135.blog/1> (discussing steroid use in MLB).

101. MLB Frequently Asked Questions, MLB PLAYERS ASS’N, <http://mlbplayers.mlb.com/pa/info/faq.jsp#minimum> (last visited Nov. 2, 2010).

102. HHS INFORMATION SHEET, *supra* note 12.

103. Evans, *supra* note 93.

104. See Schmidt & Schwarz, *supra* note 1; McCann, *supra* note 4.

decisions in America's most popular sport,<sup>105</sup> professional football. Ryan Clark, a free safety for the Pittsburgh Steelers of the National Football League (NFL), suffers from a unique sickle-cell trait.<sup>106</sup> In fact, Clark almost died during a 2007 game in Denver when his rare blood disease and the Rocky Mountain altitude created a near-lethal combination.<sup>107</sup> His condition prevented oxygen from reaching internal organs and required the removal of his spleen and gallbladder.<sup>108</sup> When the Steelers returned to Mile High Stadium in 2009, they did so without Clark, although doctors had cleared him to play.<sup>109</sup> Clark's incident, among many others, led NCAA Football<sup>110</sup> to recommend that teams test for sickle-cell traits.<sup>111</sup>

Over the past twenty years, professional sports organizations have transformed.<sup>112</sup> That is, the so-called "old school" teams that played for the love of the game have been replaced by powerful brands, cash cows playing for the love of money.<sup>113</sup> In each of America's "big four" professional sports—football, baseball, basketball, and hockey—the average team value has skyrocketed over the past decade.<sup>114</sup> For example, the average MLB team was worth \$134 million in 1997.<sup>115</sup> That number soared to an all-time high of \$491

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105. Press Release, Harris Poll, Professional Football Continues Dominance over Baseball as America's Favorite Sport College football comes in third (Jan. 27, 2009) available at <http://www.b2i.us/profiles/investor/NewsPDF.asp?b=1963&ID=34215&m=rl>.

106. Bill Williamson, *Steelers Won't Play Clark*, ESPN.COM (Nov. 8, 2009, 4:44 PM), <http://sports.espn.go.com/nfl/news/story?id=4635544>.

107. *Id.*

108. Scott Brown, *Clark Unlikely to Play Monday Night*, PITTSBURGH TRIBUNE-REVIEW, Nov. 6, 2009, [http://pittsburghlive.com/x/pittsburghtrib/sports/steelers/s\\_651784.html](http://pittsburghlive.com/x/pittsburghtrib/sports/steelers/s_651784.html).

109. *Id.*; see also Dennis Dodd, *NCAA to Recommend Schools Test for Sickle Cell Trait*, CBSSPORTS.COM (June 29, 2009), <http://www.cbssports.com/collegefootball/story/11903550>.

110. NCAA Football was created in 1997 as a 501(c) 4, not-for-profit corporation to serve as the collective voice to promote college football. It represents a coalition of the American Football Coaches Association (AFCA), the Collegiate Commissioners Association (CCA), the Football Bowl Association (FBA), the National Association of Collegiate Directors of Athletics (NACDA), the National Collegiate Athletic Association (NCAA) and the National Football Foundation (NFF), which are the stakeholders for college football. *NCAA Football Fact Sheet*, NCAAFOOTBALL.COM, <http://www.ncaafootball.com/About.aspx#facts> (last visited Mar. 17, 2011).

111. *Id.*

112. See generally NAT'L SPORTS LAW INST. OF MARQUETTE UNIV. LAW SCHOOL, SPORT FACILITY REPORTS: A COMPARISON OF TEAM VALUES IN PROFESSIONAL TEAM SPORTS – 2 YEAR UPDATE (2007), available at <http://law.marquette.edu/s3/site/docs/value-report-8.pdf> [hereinafter SPORTS FACILITY REPORT].

113. See generally Chris Brown, *What is the Proper Goal for a Professional Sports Team, Profits or Championships?*, SMART FOOTBALL (Feb. 24, 2010), <http://smartfootball.com/business/what-is-the-proper-goal-for-a-professional-sports-team-profits-or-championships>.

114. See SPORTS FACILITY REPORT, *supra* note 112.

115. *Id.*



million in 2010,<sup>116</sup> an increase of 266%. This trend is even more pronounced in the NFL, where the average team value rose approximately 407%, from \$205 million in 1997 to \$1.02 billion in 2010.<sup>117</sup> Even the less popular leagues like the NBA and the National Hockey League (NHL) witnessed dramatic growth during this period, with the average team value increasing 148%<sup>118</sup> and 147%,<sup>119</sup> respectively. To put it bluntly: Professional sports is not just business. It is big business. And business is booming.

The business model of professional athletics underscores the enormous potential for genetic information in the industry. Professional sports organizations are quintessentially asset-driven entities.<sup>120</sup> Teams invest in human capital (players) with an unknown though relatively predictable usable life (career) and attempt to maximize the return on these assets when used collectively (revenue). Thus the quality of each team—a collection of individual athletes acting in concert—remains a key driver of ultimate success. Teams dole out massive amounts of money each year on prospects, hoping previous performance will serve as an indicator of future success.<sup>121</sup> For example, the top ten draft picks in the 2007 NFL draft signed contracts that guaranteed them an average of \$18.7 million.<sup>122</sup> Similarly, a player's genetic information portends future success or failure, because it can reveal susceptibility to certain medical

116. Kurt Badenhausen et. al., *Baseball's Most Valuable Teams*, FORBES.COM (Apr. 7, 2010, 6:00 PM), <http://www.forbes.com/2010/04/06/most-valuable-baseball-teams-business-sportsmoney-baseball-valuations-10-values.html>.

117. See SPORTS FACILITY REPORT, *supra* note 112; Kurt Badenhausen et. al, *The Business of Football, 2010*, FORBES.COM (Aug. 25, 2010, 6:00 PM) [http://www.forbes.com/2010/08/25/most-valuable-nfl-teams-business-sports-football-valuations-10\\_land.html](http://www.forbes.com/2010/08/25/most-valuable-nfl-teams-business-sports-football-valuations-10_land.html) (stating that the Dallas Cowboys are the most valuable team, worth approximately \$1.8 billion; the Jacksonville Jaguars are the least valuable, worth just over \$780 million).

118. See SPORTS FACILITY REPORT, *supra* note 112; Kurt Badenhausen et. al, *The Business of Basketball*, FORBES.COM (Dec. 9, 2009, 6:00 PM), <http://www.forbes.com/2009/12/09/nba-basketball-valuations-business-sports-basketball-values-09-intro.html>.

119. See SPORTS FACILITY REPORT, *supra* note 112; Kurt Badenhausen, *The Business of Hockey*, FORBES.COM (Nov. 11, 2009, 6:00 PM), <http://www.forbes.com/2009/11/11/nhl-team-values-business-sports-hockey-values-09-intro.html>.

120. That is, the particular assets they invest in—real estate, stadiums, humans—serve as the ultimate value-drivers for their profitability. For example, the Dallas Cowboys opened the 2010 season in a new \$1.25 billion stadium and spent over \$143 million on player expenses. *NFL Team Valuations, # 1 Dallas Cowboys*, FORBES (Aug. 25, 2010 6:00 PM), [http://www.forbes.com/lists/2010/30/football-valuations-10\\_Dallas-Cowboys\\_300988.html](http://www.forbes.com/lists/2010/30/football-valuations-10_Dallas-Cowboys_300988.html) (noting that the stadium revenues alone contributed \$423 million in value to the organization in 2010).

121. See Jarrett Bell, *Guaranteed Money a Windfall for Draft Picks*, USA TODAY (April 28, 2008, 5:22 PM), [http://www.usatoday.com/sports/football/nfl/2008-04-23-first-round-money\\_N.htm](http://www.usatoday.com/sports/football/nfl/2008-04-23-first-round-money_N.htm).

122. *Id.*

conditions or weaknesses.<sup>123</sup> Accordingly, genetic information holds enormous potential value in professional sports.

Thanks to the scientific breakthroughs of the past half-century, individuals have capitalized on this opportunity, creating a new market for genetic testing. For example, 23andMe, Inc., which describes itself as “an industry leader in personal genetics,” recently conducted genetic analyses of both former and current NFL players to investigate how genes impact athletic performance.<sup>124</sup> The company described the study’s methodology in a press release:

23andMe initially looked for variants associated with athletic prowess using the players’ raw genetic data obtained from 23andMe testing . . . The researchers then investigated a specific list of genes in the players associated with athletic ability. . . For example, mutations in [a certain gene] . . . have been associated with a reduced risk of ACL tears in limited previous research. Knowledge about [this gene] could in the future allow athletes to better understand their risk of knee injury.<sup>125</sup>

This study emphasizes the ever-growing potential for genetic information in professional sports. As science continues to advance, more about the link between genes and athletic performance will be revealed.<sup>126</sup> Further, with the rapid growth in the value of professional sports and the millions of dollars teams invest in players, more money than ever is at stake in each employment decision.<sup>127</sup> Of course, the operative phrase is “employment decision.”<sup>128</sup> Because of GINA’s prohibitions, professional teams must be aware of potential conflicts between the new law and their practices in making these decisions.<sup>129</sup>

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123. See *The Genetic Information Nondiscrimination Act: Congressional Record—Extension of Remarks*, 110th Congress E120 (2007), available at [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2007\\_record&page=E120&position=all](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2007_record&page=E120&position=all) (speech of Rep. Louise Slaughter) (noting that there are 15,500 recognized genetic disorders affecting 13 million Americans).

124. Press Release, 23andMe, Inc., 23andMe Tests NFL Players’ DNA for Athletic Genetic Factors (Oct. 13, 2009), available at <https://www.23andme.com/about/press/20091013>.

125. *Id.*

126. See DEPT OF HEALTH AND HUMAN SERVS., NIH FISCAL YEAR 2011 BUDGET REQUEST (2010) (statement of Eric D. Green, M.D., Ph.D., Director, National Human Genome Research Institute) (estimating growth in the field), available at <http://www.genome.gov/27539063> (last visited Nov. 12, 2010).

127. See *supra* note 112.

128. By “employment decision,” I refer to the unlawful employer practices enumerated under Title II. See 42 U.S.C. § 2000ff–1 (2006).

129. See *supra* note 89 and accompanying text.

## II. A BIG BITE OF NOTHING: GINA'S TOOTHLESS CLAMP ON PROFESSIONAL SPORTS

While GINA could technically protect professional athletes from discrimination based on genetic information, multiple obstacles stand in the way of its effective implementation.<sup>130</sup> These obstacles include the statute's limited scope, players' ability to consent to genetic testing, and the economic realities of most player-team negotiations.

### A. Statutory Limitations

The first major issue comes from the statute itself. GINA only limits employer practices regarding an employee's "genetic information."<sup>131</sup> The statute explicitly states that an employer does not violate Title II if it makes an employment decision based on medical information other than "genetic information."<sup>132</sup> With respect to any individual, GINA defines "genetic information" as "(i) such individual's genetic tests,<sup>133</sup> (ii) the genetic tests of family members of such individual,<sup>134</sup> and (iii) the manifestation of a disease or disorder in family members of such individual."<sup>135</sup> The term also means "any request for, or receipt of, genetic services,<sup>136</sup> or participation in clinical research which includes genetic services, by such individual or any family member of such individual."<sup>137</sup> Taken together, this language attempts to accomplish two of GINA's goals: providing heightened protection from discrimination in the employer-employee context and encouraging employees to seek beneficial genetic testing.<sup>138</sup>

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130. See *infra* parts II.A—II.C.

131. 42 U.S.C. § 2000ff-1 (2006).

132. *Id.* § 2000ff-9 ("An employer . . . shall not be considered to be in violation of this chapter based on the use, acquisition, or disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition of an employee or member, including a manifested disease, disorder, or pathological condition that has or may have a genetic basis.").

133. *Id.* § 2000ff(7) (A)—(B) ("The term 'genetic test' means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes, . . . . [It] does not mean an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes.").

134. *Id.* § 2000ff(3) ("The term 'family member' means, with respect to any individual, (A) a dependent (as such term is used for purposes of section 1181(f)(2) of Title 29 of such individual, and (B) any other individual who is a first-degree, second-degree, third-degree, or fourth-degree relative of such individual or of an individual described in subparagraph (A).").

135. *Id.* § 2000ff(4)(A).

136. *Id.* § 2000ff(6) ("(A) a genetic test; (B) genetic counseling (including obtaining, interpreting, or assessing genetic information); or (C) genetic education").

137. *Id.* § 2000ff(4)(B).

138. See GINA Congressional Findings, *supra* note 33.

However, certain statutory exclusions could soften GINA's blow in the professional sports context. For instance, the term "genetic information" does not include "information about the sex or age of any individual."<sup>139</sup> As noted above, determining the actual age of Latin American prospects has been the primary purpose of MLB's genetic testing.<sup>140</sup> Thus, an employer-team would be in the clear as long as it required the genetic test solely as means to determine an individual's age. This means that an MLB club could continue to test players like Miguel Sano on this pretext.<sup>141</sup> The team could not, however, test these players' family members.<sup>142</sup>

Age is relevant for all sports, but perhaps most important for professional baseball.<sup>143</sup> Both the NFL and the NBA have minimum age requirements for prospective players.<sup>144</sup> While MLB imposes age requirements for domestic players participating in its annual draft,<sup>145</sup> this rule does not apply to a sizeable constituency of MLB: foreign players.<sup>146</sup> Instead, foreign prospects are given contracts to play on an MLB team's developmental squad.<sup>147</sup> But MLB rules restrict the number of roster spots in U.S.-based rookie leagues for players over

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139. 42 U.S.C. § 2000ff(4)(C).

140. See Schmidt & Schwarz, *supra* note 1.

141. See *id.*

142. See *id.*

143. Tom Farrey, *Boras Confirms Player Used False Identity*, ESPN.COM (May 18, 2004, 3:02 PM), <http://sports.espn.go.com/mlb/news/story?id=1803614> ("MLB rules restrict the number of roster spots in U.S.-based rookie leagues for players over the age of 20. The younger the Dominican prospects, the more time they have to improve to the point where they can win one of those spots -- as well as a U.S. visa.").

144. *Article X - 2005 Collective Bargaining Agreement*, NBA PLAYERS ASS'N (Dec. 16, 2009), <http://www.nbpa.org/sites/default/files/ARTICLE%20X.pdf> (domestic players must be nineteen years of age and one year removed from high school graduation while international players must be at least twenty-two); *NFL Collective Bargaining Agreement*, NFL PLAYERS ASS'N, art. xvi, § 2(b), <http://images.nflplayers.com/mediaResources/files/PDFs/General/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf> (requiring that a prospect be three years removed from his high school graduation to be eligible).

145. See *First-Year Player Draft: Official Rules*, MLB.COM, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Nov. 2, 2010).

146. See Press Release, MLB.com, *Opening Day Rosters Feature 229 Players Born Outside the U.S.* (April 6, 2009), available at [http://mlb.mlb.com/news/press\\_releases/press\\_release.jsp?ymd=20090406&content\\_id=4139614&vkey=pr\\_mlb](http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20090406&content_id=4139614&vkey=pr_mlb) (describing 28% of MLB players on Opening Day as foreign born).

147. Many Latin players, especially the youngest prospects, are signed during the "international signing period" as free agents, but are assigned to minor league affiliates because players signed during the international signing period are not eligible to play an MLB game that same year. See Ben Badler, *Reds Spend Big for 16-Year-Old Dominican*, BASEBALL AMERICA (Mar. 4, 2008), <http://www.baseballamerica.com/today/prospects/international-affairs/2008/265719.html>; Dennis Nosco, *International Flavor - 2009 Style*, INDIANS PROSPECT INSIDER (July 1, 2009, 1:18AM), <http://www.indiansprospectinsider.com/2009/07/international-flavoer-2009-style.html>.

the age of 20.<sup>148</sup> Appearing as young as possible thus behooves a foreign prospect, as doing so will not only provide more time to improve on the field and earn a spot on a major league roster, but will also provide more time to obtain a U.S. visa.<sup>149</sup> Thus, as the issue of age falsification primarily affects baseball, this statutory language matters most for MLB.<sup>150</sup>

From one vantage point, this exclusion—which effectively allows teams to freely test players in order to determine their ages—makes sense because no one would argue that an individual should benefit from misrepresenting himself in contract negotiations. GINA should protect players from discrimination based on genetic information, but not from the ramifications of their disingenuous actions.

However, this provision creates an obvious potential for abuse.<sup>151</sup> Just ask Jeremy Gruber, president of Council for Responsible Genetics, a non-profit, non-governmental policy organization that focuses on social, ethical, and environmental implications of genetic technologies.<sup>152</sup> In a recent *New York Times* article, Mr. Gruber cited the *Burlington Northern* case<sup>153</sup> as an example of the potential bait-and-switch opportunity such a provision creates.<sup>154</sup> Gruber noted “many instances where employers have acquired information for one reason and used it for another,” and added, “Dominicans who want to come to the United States and play baseball are particularly . . . susceptible to the privacy and discrimination issues as a means to escape being poor.”<sup>155</sup>

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148. Farrey, *supra* note 143.

149. *Id.*

150. This is not to say that MLB is the only entity in the world to have an issue with falsification, but only that, when compared to other American professional sports, this phenomenon remains unique to MLB. One could imagine it occurring in the NBA or NFL in the reverse situation, i.e., a player faking his age to appear *older*. Further, if a professional gymnastics league ever came to prominence in America, this could be a concern. See Nick Mulvenney & Liu Zhen, *Thousands of Chinese Athletes Faking Ages in Guangdong*, REUTERS (Mar. 11, 2009, 12:16 AM), <http://www.reuters.com/article/idUSSP7288120090311> (estimating one in five Chinese athletes, especially gymnasts, fake their age).

151. See GINA Congressional Findings, *supra* note 33.

152. *About CRG*, COUNCIL FOR RESPONSIBLE GENETICS, <http://www.councilforresponsiblegenetics.org/Help/About.aspx> (last visited Nov. 2, 2010).

153. See Greenhouse, *supra* note 78 (describing how Burlington Northern Santa Fe Railway used blood samples derived from worker's compensation exams to genetically test for predisposition to carpal tunnel syndrome).

154. Alan Schwarz, *Dominican Youth's Future in Baseball Hinges on a DNA Test*, N.Y. TIMES, July 22, 2009, <http://www.nytimes.com/2009/07/23/sports/baseball/23dna.html>.

155. *Id.* (Gruber also criticized MLB: “Genetic information has incredible potential to reveal medical information that can be used for a whole spectrum of purposes that can be discriminatory against the individual. For M.L.B. to be doing this with little to no understanding of ramifications is incredibly short-sighted and against basic employment principles.”).

Thus, despite GINA's generally sweeping prohibition of using genetic information in employment decisions,<sup>156</sup> certain statutory exclusions will likely prevent its application in much of the genetic testing in professional baseball, if not all professional sports. Further, policy arguments concerning the potential loopholes these provisions create in the professional sports context are unlikely to outweigh clear statutory language.<sup>157</sup>

### *B. GINA's Extraterritorial Reach (or Lack Thereof)*

The extent of GINA's extraterritorial reach places another potential limitation on the statute's effective implementation. In addition to being incorporated domestically, the majority of MLB teams, as well as the league itself, are also incorporated entities in the Dominican Republic, where the genetic testing of prospective players often occurs.<sup>158</sup> Thus, while GINA would bar a team from subjecting its players to genetic testing on American soil, the prohibition might not apply if the team is incorporated in the Dominican Republic and conducts testing abroad.<sup>159</sup> However, at least one commentator has suggested that the courts could resolve the uncertainty surrounding GINA's extraterritorial reach.<sup>160</sup> Nathaniel Grow—assistant professor of legal studies at the University of Georgia and a columnist for Sports Law Blog—recently commented on the interplay between GINA and the Civil Rights Act and the possible judicial interpretation of the issue:

The use of separate Dominican entities may in fact insulate MLB from liability under the Genetic Information Nondiscrimination Act. . . . [T]he Civil Rights Act of 1964, which is cross-referenced in GINA . . . expressly states that it applies to activity abroad by a foreign corporation controlled by a U.S. entity. Because GINA does not include a similar express statement, courts may be hesitant to apply the Act to activity occurring

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156. See 42 U.S.C. § 200ff-1 (2006).

157. See *infra* part II.B; see also *Lamie v. United States Tr.*, 540 U.S. 536, 538, 124 S. Ct. 1023, 1032 (2004) (“[A] court’s unwillingness to soften the import of Congress’s chosen words, even if the court believes the words lead to a harsh outcome, is longstanding. It results from deference to the supremacy of the legislature, as well as recognition that Congressmen typically vote on the language of a bill.”); *Price v. Del. State Police Fed. Credit Union (In re Price)*, 370 F.3d 362, 378 (3d Cir. 2004) (“[A court’s] task of statutory construction does not depend on evaluating whether one side or another is unfairly affected by the plain language of the section.”).

158. Jorge Arangure, Jr., *The Great DNA Debate*, ESPN.COM (July 24, 2009, 11:27 AM), <http://insider.espn.go.com/espn/blog/index?entryID=4353295>.

159. See *id.* (noting “similarly, while MLB in the U.S. may be restricted by American law, the Office of the Commissioner of Major League Baseball in the Dominican Republic may be able to continue to use DNA in its age investigations”).

160. Nathaniel Grow, *Update on MLB's Use of Genetic Testing*, SPORTS LAW BLOG (July 24, 2009, 4:30 PM), <http://sports-law.blogspot.com/2009/07/update-on-mlbs-use-of-genetic-testing.html>.

outside of the U.S. On the other hand, if a court finds that MLB effectively controls the Dominican entities, then it may be willing to hold the America-based MLB entities liable for violations resulting from the Dominican entities' activities. It is also possible that Congress could amend GINA to expressly give it extraterritorial reach, similar to that of the Civil Rights Act.<sup>161</sup>

Whether or not courts will apply the Civil Rights Act remains to be seen. As a general rule, when faced with an ambiguity, there is a strong presumption against applying a domestic statute extraterritorially.<sup>162</sup> To overcome this presumption, Congress must have clearly stated an intent to apply a domestic statute abroad.<sup>163</sup> Since GINA refers to Title VII of the Civil Rights Act in defining key terms in other areas,<sup>164</sup> applying its extraterritoriality provisions could be said to respect the "spirit" of the legislation. On the other hand, Congress could have added such a provision if it thought necessary. Since it chose to exclude such a provision, courts should enforce the law as written, and not apply it extraterritorially.

Further, even if one assumes that the extraterritoriality provisions of the Civil Rights Act alluded to by Professor Grow apply to claims under GINA, they appear not to provide any relief in certain situations, as illustrated by the following hypothetical. Javier—a citizen of the Dominican Republic—tries out for the New York Yankees and undergoes genetic testing after team managers represent to him the tests were simply part of the MLB screening process. The team is incorporated in the United States and the Dominican Republic, with its principal place of business is the United States. The Yankees then administer the genetic tests in the Dominican Republic. If the Yankees sign Javier to a two-year contract and force him to undergo genetic testing while he plays in the United States, Title VII would likely apply because it generally covers aliens working inside the United States. However, were the Yankees to demand testing *before* they initially sign Javier, the protections of Title VII would not apply because Javier is not an American citizen.<sup>165</sup> This is not to say that Title VII cannot apply to actions outside the United States. Section 109 of the Civil Rights Act of 1991—which amended Title VII and the

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161. *Id.*

162. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

163. *Id.*

164. *See supra* notes 71—72, 87 and accompanying text.

165. EQUAL OPPORTUNITY EMP'T COMM'N, NO. 915.002, EEOC ENFORCEMENT GUIDANCE ON APPLICATION OF TITLE VII AND THE AMERICANS WITH DISABILITIES ACT TO CONDUCT OVERSEAS AND TO FOREIGN EMPLOYERS DISCRIMINATING IN THE UNITED STATES (1993), available at <http://www.eeoc.gov/policy/docs/extraterritorial-vii-ada.html> ("Is the charging party a U. S. citizen? If not, (s)he is not protected by Title VII or the ADA, which exclude aliens working outside the United States.") [hereinafter EEOC ENFORCEMENT GUIDANCE].

Americans with Disabilities Act<sup>166</sup>—ensures protection from discriminatory actions taken against U.S. citizens abroad by American or American-controlled employers.<sup>167</sup> However, jurisdiction over charges alleging extraterritorial discrimination depends on the “status of both the charging party and the respondent.”<sup>168</sup>

In a different scenario, though, Title VII could apply. For example, assume the Yankees do not test Javier in the Dominican Republic. Instead, they sign him to a two-year contract. Though he never becomes a citizen, Javier moves to America and plays in the Yankees’ farm system. When the time comes to negotiate a new deal, the Yankees force him to undergo genetic testing and then decline any further negotiations. These facts would most likely lead to a different result than the previous scenario, since the alleged discrimination in this instance occurred in America while Javier was domiciled and working here, and Title VII generally covers aliens working inside the United States.<sup>169</sup> Of course, teams would likely alter their methods by simply conducting all genetic testing of non-U.S. citizens abroad and therefore bypass Title VII completely.

Thus, it seems that GINA provides another possible loophole for professional sports, especially for MLB. Again, this issue matters most to MLB, though other leagues should also pay close attention as they increasingly recruit international players.<sup>170</sup>

### *C. Player Consent & Economic Reality*

Even when a team openly tests a player’s genetic information and makes employment decisions based on the results, the employer would not face liability if the player consents to the testing and does

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166. Relevant for employment discrimination are Titles I and V of the Americans with Disabilities Act of 1990. Pub. L. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. § 12101 *et. seq.* (2009)).

167. *Id.*; see also *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 512 n.8 (2006) (“With respect to employment in a foreign country, the term ‘employee’ includes an individual who is a citizen of the United States.”) (quoting *The Civil Rights Act of 1991*, § 109(a), 105 Stat. 1077 (codified at 42 U.S.C. § 2000e(f))).

168. EEOC ENFORCEMENT GUIDANCE, *supra* note 165.

169. See, e.g., *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (“Title VII of the Civil Rights Act of 1964 protects all individuals, both citizens and noncitizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin.”) (quoting 29 C.F.R. § 1606.1(c) (1972)).

170. See Press Release, NBA.com, *Season Opens with Record-tying 83 International Players* (Dec. 9, 2009), available at <http://www.nba.com/2009/news/10/27/international.players/index.html> (noting that as of the start of the 2009–2010 season, the NBA has 83 international players from 36 countries and 27 of the 30 teams have at least one international player); *NHL Frequently Asked Questions*, NHL.COM, <http://www.nhl.com/ice/page.htm?id=26372> (last visited Nov. 2, 2010) (noting that more than 33 percent of NHL players hail from outside North America).



not subsequently protest.<sup>171</sup> On the one hand, this practical loophole is defensible as a means by which teams filter out falsified information. On the other hand, more cynically, such an agreement is little more than a vehicle through which employers attempt to justify otherwise unlawful practices. This difference in interpretation stems from diametrically opposed presumptions about the relative bargaining positions of parties to a professional sports employment contract.

Players in relatively strong bargaining positions would be advised to decline such consent requests, since doing so would not damage their ability to find other employment in the field.<sup>172</sup> This is not the case, however, with young, impoverished prospects from countries like the Dominican Republic. These players seldom negotiate at arm's length, which likely explains the rampant attempts to misrepresent age—often accomplished by concealing their true identities.<sup>173</sup> Miguel Tejada, the Houston Astros shortstop who admitted to falsifying documents to appear younger, explained the situation: “I was a poor kid,” he told reporters. “I wanted to sign a professional contract, and that was the only way to do it. I didn’t want or mean to do anything wrong. At the time, I was two years older than they thought.”<sup>174</sup>

Because of the disparate bargaining positions in these negotiations, some sports agents have advised their clients to consent and take the tests.<sup>175</sup> Rob Plummer, Miguel Sano’s agent, recently described the situation and why he advises his clients to submit to the tests: “Players are being forced to do the DNA testing—what other choice do they have? . . . If they don’t do it, they’re guilty. If you’re clean, you should want to do it.”<sup>176</sup> To be sure, legitimate player consent is always a possibility. When coupled with the economic realities of the situation, however, player consent appears less than

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171. There is an exception which allows an employer to acquire genetic information from employees under 42 U.S.C. § 2000ff-1(b)(2)(B) where an employee provides the employer “prior, knowing, voluntary, and written authorization,” but this would not be relevant to making an individualized employment decision since that exception is limited to circumstances where “any individually identifiable genetic information provided under subparagraph (C) in connection with the services provided under subparagraph (A) is only available for purposes of such services and shall not be disclosed to the employer except in aggregate terms that do not disclose the identity of specific employees.” *Id.* § 2000ff-1(b)(2)(D) (2006).

172. See McCann, *supra* note 4.

173. See, e.g., *Tejada Admits to Being Two Years Older Than He Said*, ESPN.COM (Apr. 18, 2008, 1:26 AM), <http://sports.espn.go.com/mlb/news/story?id=3351418>.

174. *Id.*

175. Schwarz, *supra* note 154.

176. *Id.* (In fact, Plummer even paid the fee for Miguel’s bone scan, which cost 1,000 pesos, or about \$28).

voluntary, effectively creating an escape device by which professional teams may evade GINA's prohibitions and continue to base employment decisions on genetic information.

### III. GINA SHOULD APPLY IN THE PROFESSIONAL SPORTS CONTEXT

Through one of two statutory loopholes, or by player consent, teams can effectively evade liability under GINA. In the end, one must ask whether this is such a bad thing. Several arguments support this result: GINA should not apply to professional sports (the exemption argument); GINA should not apply extraterritorially because MLB is justified in testing international players (the foreign justification argument); testing a player's age does not violate GINA (the exclusion argument); and, teams should not be held liable when players consent to the testing (the consent argument).<sup>177</sup> While these claims have some appeal, they are outweighed by the opposing arguments to each respective issue.

#### A. *The Exemption Argument*

Relying on the assumption that professional sports are somehow distinct from other industries that traditionally fall within the employment context, the exemption argument reasons that professional sports should escape compliance with the new law.<sup>178</sup> Under this line of reasoning, Congress intended GINA to protect the paradigmatic, blue-collar railroad worker, not the millionaire athlete.<sup>179</sup> However, this argument goes too far. While Congress might have acted in response to the mistreatment of some blue-collar workers,<sup>180</sup> enforcing GINA in the case of an outside linebacker or center fielder accomplishes the same goal: protecting *employees* from

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177. See discussion *infra* Part III.A—D.

178. While this argument has not yet been put forth with regards to a claim under GINA, its presence has been acknowledged in other, related contexts. See *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 959 (2d Cir. 1987) ("The nature of professional sports as a business and professional sports teams as employers calls for contractual arrangements suited to the unusual commercial context."); see also Adam Epstein, *The ADEA and Sports Law*, 16 J. Legal Aspects Of Sport 177, 180—81 (2006) (arguing that under the federal age discrimination statute, professional athletes may have a harder time proving liability because of the inherent differences in the professional sports context vis-à-vis traditional employment contexts).

179. See, e.g., Epstein, *supra* note 190, at 194 ("Still, the ADEA remains essentially uncharted territory in sports law. Professional athletes' jobs are reviewed annually, weekly and in many cases daily. This special employment relationship which is based upon the unique talents, abilities and skills of athletes (and under public scrutiny on a daily basis) is remarkably different than the traditional employment context considered when the ADEA was enacted.")

180. See Greenhouse, *supra* note 78.

discrimination based on genetic information.<sup>181</sup> Further, if Congress had intended GINA to apply only to a certain class of employees, it could have drafted the statute to reflect this narrow scope, either by explicitly excluding professional athletes or narrowly defining the term “employee.” But it did neither. Accordingly, GINA should apply in all professional sports leagues, and no industry should receive a special exemption.

### *B. The Justification Argument*

The justification argument goes as follows: only one league, MLB, conducts genetic tests on its prospects and players; only MLB has issues with foreign players that falsify information; these players actively deceive MLB, which has a right to protect itself from such deception; therefore, it should have the right to test foreign prospects’ genetic information without potential liability under GINA.<sup>182</sup> This logic proves faulty for two reasons. First, while age falsification has, at least so far, only been an issue for MLB, it could arise in other leagues whose international base continues to grow rapidly.<sup>183</sup> Further, freedom to test genetic information is one thing, but freedom to discriminate is another. To be sure, MLB should be able to protect itself from fraudulent transactions. However, it should not be given blanket immunity from the law, as doing so would undermine GINA’s purpose. Thus, MLB should be held to the same standard regardless of where the genetic testing takes place, particularly since the employment decisions—and thus, the real basis for discrimination—will likely be made where management resides: in America.

### *C. The Exclusion Argument*

GINA explicitly excludes an employee’s age from the definition of “genetic information,”<sup>184</sup> which means the team can continue to make employment decisions based on genetic testing as long as it ostensibly uses the information only for age verification. This especially benefits MLB, whose teams would have the easiest time

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181. See NIH FACT SHEET, *supra* note 25.

182. See Michael S. Schmidt, *Less Demand for Dominicans as M.L.B. Scrutiny Increases*, N. Y. TIMES, Oct. 9, 2010, <http://www.nytimes.com/2010/10/10/sports/baseball/10dominican.html> (noting that MLB teams began testing players’ ages after “[the] teams recognized that they were overpaying for ‘mythological’ players who were not as good or as young as they appeared.”).

183. See *NHL Frequently Asked Questions*, *supra* note 170.

184. See 42 U.S.C. § 2000ff(4)(C) (2006).

passing the “straight-face”<sup>185</sup> test based on the league’s history with age fraud. In the context of MLB, this defense blends with the justification argument and makes sense insofar as teams should be able to protect themselves from fraud in contract negotiations. But, this rule poses the danger of becoming nothing more than an immunizing façade, creating the opportunity for teams to allegedly test a player’s age while actually learning much more information.<sup>186</sup> Accordingly, the regulations should implement a mechanism that ensures this bait-and-switch does not occur. The regulations could accomplish this by focusing on the labs in which the genetic tests are conducted. While MLB teams make the decision to perform genetic tests on prospects, the actual testing occurs in a lab. By restricting the results a lab can deliver to a team, the regulations could preempt a team’s surreptitious motives. For example, the regulations could limit results to data that verifies a player’s age.

#### *D. The Consent Argument*

Finally, the player consent issue warrants special attention. Employers do not face liability under GINA if the employee provides “prior, knowing, voluntary, and written authorization.”<sup>187</sup> Relying on freedom of contract, player consent arguably ends the legal analysis rather abruptly. To be sure, if a fully informed player consents to the exact tests administered, a team should be immunized from liability for using such genetic information. Generally, however, a professional team will hold virtually all the bargaining power in contract negotiations between the team and an international prospect, precluding any hopes of an arm’s length transaction. That a poor teenager from the Dominican Republic signed a consent form should not grant teams carte blanche to make employment decisions based on the player’s genetic information, especially if those terms were part of a take-it-or-leave-it contract. Courts should strike a balance between the freedom to contract and the economic realities of the situation.

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185. See, e.g., *Ae Ja Elliot-Park v. Manglona*, 592 F.3d 1003, 1008 (9th Cir. 2009) (describing the aforementioned claim as not remotely colorable: “It hardly passes the straight-face test to argue at this point in our history that police could reasonably believe they could treat individuals disparately based on their race”); see also *Succession of McCord v. Comm’r*, 461 F.3d 614, 627 (5th Cir. 2006) (noting the straight-faced test’s synonym, the “smell test,” is “commonly used to identify a decision made *not* on the basis of relevant facts and applicable law, but on the decision maker’s ‘gut’ feelings or intuition.”).

186. See *supra* note 99 and accompanying text.

187. 42 U.S.C. § 2000ff-1(b)(2)(B).

## IV. CONCLUSION

Progress in science and medical research has fueled society's knowledge about genetic information. Thanks to initiatives like the Human Genome Project, scientists have identified almost two thousand disease genes and have shed light on the power of genetic information.<sup>188</sup> However, this progress has its costs, including the potential for workplace discrimination through misusing genetic information in employment decisions.<sup>189</sup>

Realizing the need to ensure continued progress in science, while also protecting employees in the face of this potential for misuse, Congress enacted GINA, which seeks to protect employees from discrimination based on their genetic information.<sup>190</sup> While GINA's mandate is clear in the typical employment context, issues arise when applying the law to professional sports.<sup>191</sup> That genetic information has become increasingly relevant in professional sports only exacerbates the problem.<sup>192</sup>

Multiple legal and practical hurdles<sup>193</sup>—such as explicit statutory exemptions, ambiguity in potential statutory interpretation, and the economic reality of most contract negotiations—stand in the way of GINA's effective implementation in the professional sports context. Further, several policy arguments support this outcome. These claims, however, do not overcome their respective counter-arguments and ultimately remain unpersuasive. Yes, most professional athletes—at least those in MLB, the NFL, and the NBA—earn a substantial income. Yes, they receive salaries for playing a game. And, yes, professional teams have—at least as far as the public knows—only leveraged genetic testing to combat the rampant age falsification among Latin American prospects. But, at the end of the day, professional athletes are still “employees” under the statute.<sup>194</sup> They deserve its protection.

*Jesse A. Bland\**

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188. See NIH FACT SHEET, *supra* note 25.

189. See *supra* discussion Part I.

190. See *supra* notes 10–16 and accompanying text.

191. See *supra* Part II.B.2.

192. See *id.*

193. *Id.*

194. See *supra* Part II.B.1.

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