

**Genetic Tests Spark New Type Of Litigation**  
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Connecticut woman files one of first claims under new anti-discrimination law

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Law Tribune File Photo

**Stamford attorney Gary Phelan hopes his client's actions will send a message to employers that it's illegal to fire workers just because genetic testing reveals they're at risk for certain diseases.**

More people may turn to genetic testing in the future to detect the possibility of contracting certain diseases. When that information is shared with employers and allegedly used against an employee, there's a new type of litigation that could spring up called genetic discrimination.

And Connecticut is becoming the focal point of such a battle.

Last week, Fairfield resident Pamela Fink, who eventually had a voluntary double mastectomy after genetic testing, alleged that her employer eliminated her job after learning she carried a gene that indicated she's at risk for breast cancer.

Fink, 39, said in her claims that her bosses at Stamford-based natural gas and electric supplier MXenergy gave her glowing evaluations for years, but targeted, demoted and eventually dismissed her when she told them of the genetic test results.

Her complaints, filed with the U.S. Equal Opportunity Commission and Connecticut Commission on Human Rights and Opportunities, are among the first known to be filed nationwide based on the federal Genetic Information Nondiscrimination Act (GINA).

The law, which went into effect in November, prohibits discrimination by employers and health insurers based on a person's genetic information.

Fink said in her case, that information included results showing she carried the hereditary BRCA2 gene linked to many breast cancers. "What MXenergy did by firing her because of a positive genetic test is wrong and it's illegal," said her attorney, Gary Phelan, a partner in the Stamford office of Outten & Golden.

"Part of what she is hoping by going public is that employers will get the message that you can't do this – that you can't use someone's genetic history against them and that individuals won't, out of fear, avoid the advantages of genetic testing," Phelan said.

Company spokesman Todd Miller said MXenergy "emphatically and categorically" denies the allegations, but has a policy not to discuss personnel matters and will not comment further.

Whether this is the beginning of a trend in employment litigation is unclear, attorneys say.

George O'Brien, a management-side attorney with Littler Mendelson in New Haven, said the purpose of GINA is to offer protections from companies "trying to purge their workforce of people who drive up health insurance costs," or those who could drive up costs based on test results that show they're susceptible to certain diseases.

"I'm not sure this is what I expect to be spending a lot of time on in the next five to 10 years," O'Brien said. "It's conceivable, but I haven't seen employers try to manipulate the hiring or retention process based on genetic testing results."

Joseph J. Lazzarotti, a partner at Jackson Lewis, said this type of litigation may not dominate attorneys' time, but companies should educate themselves about the type of genetic information they collect from employees and how it's used.

"I can see [litigation] happening with more and more people as genetic testing becomes less costly and more available," said Lazzarotti, a White Plains, N.Y.-based partner who is working with a Stamford partner to alert clients about GINA through the firm's blog. "I expect those [discrimination] claims are going to start coming and a lot employers aren't even aware of the law."

GINA bars discrimination against employees not only based on the employee's genetic information, but also on the employee's family health history, which is considered genetic information, Lazzarotti said.

If an employee offers up that type of information to a company and later is fired or receives some perceived adverse treatment, there could be an opportunity for litigation.

"Employees have to be careful about what they do with this information," Lazzarotti said.

He noted that a Boston-based partner of Jackson Lewis currently is talking to a potential client who may have a case involving a GINA violation based on not getting hired by a company.

### **'Honest With Them'**

Fink, who filed the Connecticut discrimination complaints, was the public relations director for MXenergy from 2006 until her dismissal in March.

She said that genetic tests that she and her two sisters had done in 2004 at Yale Cancer Center showed all three carried the specific gene predisposing them to breast cancer.

Both sisters developed breast cancer, but survived with treatment. After several biopsies and frightening false alarms, Fink opted for a preventative double mastectomy last year.

Feeling comfortable in what she described as a supportive work environment, she told her bosses at MXenergy about her genetic tests and the surgery, she said.

"I'd had great reviews, I had merit increases, I had bonuses. I really felt it was a place where I could be comfortable and confident and be honest with them, and that was a mistake," she told the Associated Press last week.

She said in her complaint that MXenergy hired a consultant for her work while she was recovering from her first surgery, but that person became her boss when she returned and the company quickly took away her office and most her duties. She said her job was eliminated and she was escorted out in March, about six weeks after she returned from her second surgery.

Phelan said last week he hopes Fink's complaint is resolved in her favor by the state and national anti-discrimination agencies, but that they will go to federal court, if necessary.

Catherine Barbieri, a Philadelphia attorney specializing in anti-discrimination employment law, said although she could not rule out the possibility of similar complaints elsewhere, the Connecticut case is the first she's heard about nationwide that cites the genetic tests law.

Barbieri, who is also chairwoman of the board of the national Women's Law Project, advises employers to keep medical and personnel records separate to avoid the potential for such conflicts, and tells them not to request in-depth explanations when an employee seeks a medical leave.

For workers, she said, a little discretion may also go a long way toward avoiding misunderstandings and potential discrimination claims or lawsuits.

“Unfortunately, I think in today’s day and age people have started sharing a lot more personal information about themselves, whether it’s in social media or in the workplace, but I think it may behoove people to keep some of that information closer to the vest,” she said.

“I’m not suggesting employers are necessarily going to act on that, but really there may be no need for them to know.” •

*This article contains information from the Associated Press.*

**(There was a “teaser” for this story, with photo, on Page 1.)**