

April 30, 2010

Ex-Worker Says Her Firing Was Based on Genetic Test

By STEVEN GREENHOUSE



Douglas Healey/Associated Press

Pamela Fink of Fairfield, Conn., says MXenergy illegally fired her based on a test showing a predisposition for breast cancer.

After one of her two sisters was found to have breast cancer, Pamela Fink rushed to have a genetic test to see whether she had a predisposition for such cancer, and the answer came back yes.

Soon her other sister also contracted breast cancer and had chemotherapy and a mastectomy. Alarmed by these developments, Ms. Fink, a 39-year-old mother of two who lives in Fairfield, Conn., decided to have a preventive double mastectomy, fearing that she would also contract breast cancer and might die from it.

When she returned from surgery, she said, her company started giving her fewer responsibilities, then demoted her and ultimately fired her.

This week she filed one of the first complaints claiming illegal dismissal under a new federal law that prohibits employers from considering someone's genetic background in firing, hiring or promotions.

“Getting laid off really added insult to injury,” said Ms. Fink, who was director of public relations for [MXenergy](#), a natural gas and electricity supplier based in Stamford. “I know that having that surgery was life-saving for me and important for my children and also important for my employer because it meant I was not going to get sick.”

The complaint that Ms. Fink filed this week with the [Equal Employment Opportunity Commission](#) raises new questions about when and whether employers can fire or demote employees when they learn the **employees' genetic information**. The [Genetic Information Nondiscrimination Act of 2008](#) prohibits companies and health insurers from requiring genetic testing, asking for genetic information or using it against employees.

Peggy R. Mastroianni, the commission's associate legal counsel, said most of the 80 complaints filed since the genetic law took effect five months ago seemed to involve cases in which employers had improperly acquired or disclosed genetic information. But Ms. Fink's case alleges a more serious offense: an improper firing because of it.

Her lawyers say that if she loses her case, it could discourage other workers from going for genetic testing about particular illnesses and from having surgery in response to such testing — steps that are good for their health.

Derede McAlpin, a spokeswoman for MXenergy, said, “As a matter of policy, we do not comment on personnel matters.” But she added, “We are confident that when the facts are revealed, the company's actions will be seen in a different light and will be seen as being warranted.”

Ms. Fink worked for MXenergy for more than four years. Confident that she had a good relationship with her supervisors, she informed them that she had a genetic marker for breast cancer and that she felt she needed surgery.

“She disclosed this to her employer, she had preventative surgery, and that was the primary catalyst for her being fired,” said her lawyer, Gary Phelan. “Not only is that genetic information, but it's action taken based on that information.”

Ms. Fink said that she had excellent performance reviews — **“has done an exemplary job working to keep C.E.O. exposed in a positive light,” one review said** — and that her supervisor told her that if she had to lay off everyone in the marketing department, Ms. Fink would be the only person she kept.

“It's a very intense company that requires 24/7 accessibility,” Ms. Fink said. “I always felt I had gone above and beyond and been available, but maybe this thing with the gene testing made them think I wasn't going to be accessible to them.”

Sharon F. Terry, chairwoman of the Coalition for Genetic Fairness, a group that pushed to enact the genetic information law, said Ms. **Fink's case was the first brought under the law to become public.**