“KNICKEL” AND DIME ISSUES: AN UNEXPLORED LOOPHOLE IN NEW YORK’S GENETIC DISCRIMINATION STATUTE AND THE VIABILITY OF GENETIC TESTING IN THE SPORTS EMPLOYMENT CONTEXT

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It is better to know some of the questions than all of the answers.
- James Thurber (1894–1961)

I. INTRODUCTION

It is often stated that “[s]port is a microcosm of society.”1 In some respects, this statement rings true. Athletes involved in competition, like individuals functioning in society, must make immediate decisions, must trust in others, and must follow the rules. Because of such similarities, the law often draws little distinction between what is appropriate in the realm of sports and what is appropriate for the remainder of society. However, as new complexities emerge in the modern sports era, particularly with respect to genetic testing in professional sports, it has become increasingly clear that a law designed for individuals functioning in society may be insufficient for regulation in the sports world.

The issues of genetic discrimination and sports collided in October 2005 when the Chicago Bulls, a member of the National Basketball

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1 JOHN BARTLETT, FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE 690 (Justin Kaplan ed., 16th ed. 1992). Genetic discrimination in employment, the main issue addressed herein, is best described as a current event. As such, this Comment is generally prospective in nature. Legal questions involving genetic discrimination in employment are proposed. However, because the law has yet to thoroughly evolve in this area, there is often little on-point primary legal authority from which to derive an answer. This Comment, thus, explores different legal avenues, pursues hypothetical situations, and presupposes what could happen in a given context.

2 Suzanne Sangree, Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute, 32 CONN. L. REV. 381, 436 (2000).
Association (NBA), asked one of its team members, Eddy Curry, to undergo genetic testing to diagnose a suspected heart arrhythmia.\(^3\) Curry refused, citing American constitutional privacy rights.\(^4\) Instead of challenging Curry’s position under Illinois law or the United States Constitution, the Bulls opted to trade Curry to the New York Knicks.\(^5\) In so doing, the arena for Curry’s legal battle shifted to New York, placing the State’s genetic discrimination statute under possible judicial scrutiny. However, as the Bulls had done in Illinois, the Knicks also opted to avoid challenging Curry’s position under existing state law.\(^6\) Instead, Curry agreed to multiple physical evaluations that proclaimed his good health,\(^7\) enabling the Knicks to insure his multimillion dollar contract.\(^8\) As a result, New York’s genetic discrimination statute remains untested in the sports employment context.

Suppose the Knicks had challenged Curry’s right to refuse genetic testing under section 296 of New York’s Executive Law, the State’s genetic discrimination statute. Would the Knicks have prevailed? An exploration of the scenario purposefully avoided by the Knicks reveals that the Knicks may have prevailed under the “increased risk” exception contained in section 296(19)(b),\(^9\) thus circumventing the policy goals of New York’s genetic discrimination law and forcing Curry to be genetically tested. Although successful use of this exception may have far reaching consequences in both the sports employment context and the ordinary employment context,\(^10\)

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\(^3\) Curry was believed to have the same genetic heart condition, Hypertrophic Cardiomyopathy (HCM), which caused the untimely deaths of other professional basketball players. See Ian Thomsen, Troubling History: Bulls’ Concern for Curry Based on Multiple Incidents, SI.COM, Oct. 13, 2005, http://sportsillustrated.cnn.com/2005/writers/ian_thomsen/10/13/curry/index.html (last visited Oct. 8, 2006) (describing the Bulls’ concern with Curry’s suspected predisposition to HCM as the reason for his trade from Chicago to New York); see also infra notes 100–02 and accompanying text.

\(^4\) See Thomsen, supra note 3; see also Liz Robbins, The Knicks Have a Test Case in Medical Ethics, N.Y. TIMES, Oct. 15, 2005, at D4 (reporting that the National Basketball Players Association supported Curry’s privacy rights).

\(^5\) Thomsen, supra note 3.

\(^6\) See id.


\(^8\) The NBA’s insurance carrier was unwilling to indemnify Curry’s contract because of his previous heart problems. See Beck, supra note 7, at D1. The Knicks were forced to find an outside insurance carrier that would, after multiple medical evaluations as assurance, insure Curry’s contract. In place of insurance, the Knicks have made Curry’s contract partially dependant on his health. Id. If Curry was unable to play due to heart problems, the Knicks would not be liable for the entire contract. Id.

\(^9\) N.Y. EXEC. LAW § 296(19)(b) (McKinney 2005).

\(^10\) The term “ordinary” in this Comment refers to employment contexts other than the sports employment context.
this Comment will argue that use of the section 296(19)(b) loophole should be limited to the sports employment context.

This Comment further contends that marked differences between employment in the sports context and employment in ordinary contexts require that the statute be amended to follow two emerging international legal trends: one recognizing the need for laws uniquely tailored to the sports employment context\(^{11}\) and a second allowing for limited genetic testing.\(^{12}\) Acknowledging the extreme financial and organizational dependencies of sports employers on the health of athlete-employees, New York sports employers must be afforded the right to test athletes for physically-limiting genetic conditions. New York, therefore, must not only amend section 296 of its Executive Law to eliminate the use of the increased risk exception in ordinary employment contexts, but also amend section 296 to permit qualified\(^{13}\) genetic testing in the sports employment context.

Support for this possibly controversial proposal is presented in the six sections of this Comment. Section I introduces genetic testing in the sports employment context. Section II then discusses the historical backdrop of the global interest in genetics and briefly revisits the currently limited federal and state protections against genetic discrimination. Section III shifts the focus to specifically address the history of genetic discrimination legislation in New York that lead to the 1996 revision of section 296. Section III also analyzes the increased risk exception found in section 296(19)(b). Next, Section IV explores the likelihood and the possible fallout of the Knicks’ success if Curry’s decision was challenged under current New York law. Section V then discusses two emerging international legal trends and suggests that the extreme level of sports employer dependence on the health of athlete-employees necessitates that New York incorporate aspects of both trends in an amended section 296 that would favor qualified genetic testing in the sports employment context. Finally, Section VI concludes this Comment by addressing recent modifications in employer genetic discrimination policies.

\(^{11}\) See infra Section V.B.1.

\(^{12}\) See infra Section V.B.2.

\(^{13}\) Qualified in the sense that it must take place in the sports employment context and must relate to a clear health requirement of the sport. See infra notes 130–38 and accompanying text.
II. BACKGROUND: A GROWING INTEREST IN GENETICS RECEIVES LIMITED FEDERAL AND STATE RESPONSES

A. Global Interest: The Human Genome Project

In October 1990, an international effort known as the Human Genome Project (HGP) was undertaken to distinguish each of the approximately 35,000 human genes with the goal of understanding the role of genes in health and disease. With this knowledge, the HGP aimed to identify and treat the underlying causes of disease, as opposed to merely suppressing symptoms through medication. The United States, along with such nations as Australia, Brazil, Canada, China, Denmark, France, Germany, Israel, Italy, Japan, Korea, Mexico, the Netherlands, Russia, Sweden, and the United Kingdom, participated in the HGP by establishing human genome research programs. The United States’ HGP consisted of the Department of Energy’s Human Genome Program and the National Institutes of Health’s National Human Genome Research Institute.

The HGP was scheduled to conclude in 2003 and was considered ahead of schedule when, in June 2000, an initial draft of the human genome was finalized. However, the unanticipated early success of the HGP created unforeseen obstacles. New questions were posed as to the legal, moral, and ethical implications of openly discernable genetic information. Such questions were of unique concern in the employment arena where employers might use genetic information as a basis for employment decision-making. Like other countries, the role of genetic information in employment decision-making, as is evidenced by the Curry saga, remains an unsettled issue in the United States.

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15 See id. at 54.
16 Id. at 53.
17 Id.
18 Id.
20 See Williams, *supra* note 19, at 208.
21 See infra notes 130–38 and accompanying text.
B. Limited Federal Responses: The Occupational Safety and Health Act, Title VII, the Americans with Disabilities Act, and the United States Constitution

Existing federal legislation has been slow to respond to the threats of genetic discrimination in employment. The primary federal protections for workers were constructed before the inception of the HGP; therefore, they were not tailored to provide significant protection against employer genetic discrimination. With current federal legislation failing to directly address genetic discrimination, employers are left to interpret which tests are acceptable and which tests constitute unlawful genetic discrimination. Furthermore, Congress has done little to curtail the growing threats posed by genetic testing. Existing federal legislation has not been amended to directly address genetic discrimination, and new legislation has been enacted at a slow pace. Because an in-depth analysis of current federal protections against genetic discrimination is beyond the scope of this Comment, the following subdivisions only briefly explore current federal law so as to provide sufficient background for a contextual understanding of New York’s genetic discrimination statute.

1. The Occupational Safety and Health Act

The Occupational Safety and Health Act (OSHA), passed in 1970, was designed to protect workers from dangerous work environments and thus offers little protection in the realm of genetic discrimination. Under OSHA, employers are obligated to create “safe and healthful” work environments for employees. To comply with this requirement, an employee may be required to submit to medical testing and evaluations to determine if any

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22 See infra Part II.B.1–4.
23 See infra Part II.B.1–4.
25 See Taylor, supra note 14, at 57–58.
workplace hazards exist that pose a unique threat to the safety and health of the employee. In addition, OSHA requirements also create a statutory duty owed by employers to employees.

Consequently, an employer’s failure to test an employee not only subjects the employer to liability under OSHA but also subjects the employer to liability under negligence tort theories. Therefore, far from protecting employees from genetic discrimination, OSHA is in actuality a tool by which employers can insist on genetic testing under the cover of liability protection. Although OSHA has clarified that it does not require genetic testing and that its standards should not be interpreted to limit employee opportunities, OSHA has offered little direction as to the legal status of genetic testing within its guidelines.

2. Title VII

Facially, Title VII of the Civil Rights Act (Title VII) protects against discrimination solely on the grounds of “race, color, religion, sex, or national origin.” Title VII, however, does provide some inherent limited protection against genetic discrimination based on the disparate impact theory. This protection, however, is restricted to groups that would otherwise be protected under the Act. More specifically, Title VII is applicable when genetic testing eliminates a job candidate based on the presence of a genetic trait that is unique to the applicant’s protected class. For example, testing for genetic traits related to sickle cell anemia or breast cancer falls under Title VII protection because protected classes,

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28 See Judith Richter, Taking the Worker as You Find Him: The Quandary of Protecting the Rights as Well as the Health of the Worker with a Genetic Susceptibility to Occupational Disease, 8 Md. J. Contemp. Legal Issues 189, 208 (1997) (stating that OSHA creates a “standard of care” under which employer defendants can be held liable on negligence tort grounds).
30 Richter, supra note 28, at 208.
31 See 29 U.S.C. § 651(b)(6)–(7) (authorizing employers to protect employees by “exploring ways to discover latent diseases” and by “providing medical criteria”).
34 See Taylor, supra note 14, at 59–60.
35 See id. at 60.
37 Id. at 329 n.61; Taylor, supra note 14, at 60–61.
38 See Taylor, supra note 14, at 60–61.
African-Americans and women respectively, are implicated by the unique nature of such traits. Therefore, because Title VII was not originally constructed to protect against genetic discrimination, the incidental protections that Title VII offers protected classes fail to provide a comprehensive regulatory framework with respect to genetic testing and discrimination.

3. Americans with Disabilities Act

Like Title VII, the Americans with Disabilities Act (ADA) was also not constructed as a safeguard against genetic discrimination, and, thus, the ADA also provides limited protection. The ADA states that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” Thus, to pursue a genetic discrimination claim under the ADA, genetic traits must fall within the ADA’s definition of disability. To be considered a disability under the ADA, a genetic trait must be “a physical or mental impairment that substantially limits one or more of the major life activities[,] . . . a record of such an impairment; or . . . being regarded as having such an impairment.” Since genetic traits tend to cause impairment in the future, the United States Supreme Court has suggested that genetic traits do not sufficiently meet the interpreted requirement that a disability be currently present. Consequently, genetic traits likely fall outside of the ADA’s definition of disability.

Furthermore, like OSHA, not only does the ADA not clearly prohibit genetic discrimination, but the Act also provides defense grounds that may support genetic testing by employers. For example, ADA regulations permit employers to protect workers

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40 See Richter, supra note 28, at 225; see also 42 U.S.C. § 12102(2) (defining disability in terms of past and present impairments without reference to future impairments linked to genetic conditions).
42 See Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (noting that the ADA defines disability in the “present indicative verb form” and, thus, disability was not intended to cover future impairments).
43 See id.
44 See 42 U.S.C. § 12113(b) (“An individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”).
from “direct threat[s]” created by the occupational workplace. In addition, under the ADA, employers need not endure “undue hardship[s]” when accommodating a disabled employee. Again, employers may argue that accommodating an employee with a suspected genetic trait, should the genetic trait become an active disability, places an undue hardship on the employer.

4. United States Constitution

The United States Constitution may protect against genetic discrimination under its Equal Protection Clause and under the judicially established fundamental right to privacy. However, the lack of constitutional challenges to genetic discrimination under these provisions has left a gap of uncertainty as to the level of protection these constitutional rights actually provide. Given the Supreme Court’s stated criteria for determining whether a genetic trait is properly categorized as coinciding with a suspect classification, it is plausible that possession of a certain genetic trait could place an individual in a suspect class and qualify the individual for protection under the Equal Protection Clause.

In addition, in <i>Griswold v. Connecticut</i>, the Supreme Court recognized a fundamental right to privacy and subsequently extended it to such areas as a woman’s right to terminate a pregnancy. The right to privacy, however, has not yet been directly addressed by the Court with respect to the non-disclosure of

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45 Id.; see also 29 C.F.R. § 1630.2(r) (2006) (defining direct threat as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation” (emphasis added)).

46 The legitimacy of an employer’s argument is to be determined by “[t]he duration of the risk; . . . [t]he nature and severity of the potential harm; . . . [t]he likelihood that the potential harm will occur; and . . . [t]he imminence of the potential harm.” 29 C.F.R. § 1630.2(r)(1)–(4).


48 See Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973) (describing factors to consider such as whether the trait was determined by birth and whether the trait has any relation to the individual’s ability to function in society).

49 381 U.S. 479, 484 (1965) (finding, with respect to a Connecticut statute prohibiting the use of contraception, that a fundamental right to privacy was implicit in the Third Amendment’s prohibition against the quartering of soldiers, the Fourth Amendment’s right of people to be secure in their persons, the Fifth Amendment’s right against self-incrimination, and the Ninth Amendment’s right to retain rights not enumerated in the Constitution).

50 Id. at 485.

personal medical data or, more specifically, to the collection of genetic information. Though the Court, in dicta, later recognized the importance of protecting personal data and personal autonomy, the Court did not go so far as to extend the right to privacy to the collection of genetic information.

C. Varying States’ Responses: A Broad Spectrum of Protection Against Genetic Discrimination

The inadequacy of federal protections against genetic discrimination is mirrored at the state level. Despite insufficient federal protections, many states have not passed genetic discrimination legislation. Furthermore, the legislation passed by those states with genetic discrimination laws varies in application and in effect. For instance, Florida and North Carolina occupy one end of the spectrum by enacting legislation that prohibits discrimination based on traits appearing primarily in minority groups. This legislation typically targets discrimination based on traits associated with racially isolated diseases such as sickle cell anemia and Tay-Sachs disease. At the opposite end of the spectrum are those states with more comprehensive genetic discrimination laws. Oregon and New Hampshire, for example, offer comprehensive legislation that prohibits genetic discrimination

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52 Whalen v. Roe, 429 U.S. 589, 598–600 (1977) (recognizing that an individual’s personal matters are within the zone of privacy).

53 Nicole Silvestri, Comment, Echazabal and the Threat to Self-Defense: The Most Recent Call for a Consistent, Interstate Genetic Nondiscrimination Policy, 7 U. PA. J. LAB. & EMP. L. 409, 420 (2005) (“As of 2001, twenty-one states have passed laws which place special restrictions on employers wishing to acquire genetic information. Out of these states, employers are prohibited from requesting information in seventeen states, from performing genetic tests in thirteen states, and from obtaining genetic information from any source in nine states.” (footnote omitted)).

54 FLA. STAT. ANN. §§ 448.075–.076 (West 2002) (prohibiting discrimination based on the presence of the sickle-cell trait and prohibiting testing for the sickle-cell trait, respectively).


56 See generally Paul Steven Miller, Genetic Discrimination in the Workplace, 26 J.L & ETHICS 189, 193 (1998) (discussing state statutory protections that are aimed at specific traits found primarily in minority groups).

57 See id.

58 See id. (addressing the nature of more comprehensive state protections against genetic discrimination).

59 OR. REV. STAT. § 659A.303(1) (2005) (prohibiting the use of genetic information “to distinguish between or discriminate against or restrict any right or benefit otherwise due or available to an employee or a prospective employee”).

in employment irrespective of whether or not the genetic trait in question disproportionately affects a minority group.

In general, the states with more comprehensive legislation prohibit most genetic testing as a condition of employment. Though some states allow for consensual genetic testing, the exception is limited in that the consent must be generally “informed” and must relate to a “bona fide occupational qualification.” One of the most comprehensive state statutes prohibiting genetic discrimination is section 296 of New York’s Executive Law. Similar to Oregon’s and New Hampshire’s statutes, New York prohibits most genetic testing as a condition of employment and prohibits direct or indirect solicitation of genetic information for consideration in employment decisions.

III. GENETIC DISCRIMINATION LEGISLATION IN NEW YORK

A. Background: The Road to Section 296(19) of New York’s Executive Law

Prior to adopting the revised version of section 296 in 1996, which comprehensively addresses genetic discrimination, New York enacted its first genetic discrimination legislation in response to the growing influence of genetics in American culture. Beginning in the 1970s, the federal government initiated the first of several programs aimed at testing for the sickle cell trait. With these programs gaining notoriety and with the international community undertaking the HGP in 1990, some states, including New York, recognized the growing threat of discrimination based on the presence of certain genetic traits. Most notably was the threat of

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61 See supra notes 58–60 and accompanying text.
62 See, e.g., IOWA CODE ANN. § 729.6(7) (West 2003) (“This section does not prohibit the genetic testing of an employee who requests a genetic test and who provides written and informed consent to taking a genetic test . . . .”); N.H. REV. STAT. ANN. § 141-H:3(IV) (“This section does not prohibit the genetic testing of an employee who requests to undergo genetic testing . . . .”).
63 E.g., IOWA CODE ANN. § 729.6(7).
64 E.g., OR. REV. STAT. § 659A.300(5).
65 N.Y. EXEC. LAW § 296 (McKinney 2005).
66 § 296(1)(a).
67 § 296(19)(a)(1).
68 See supra notes 14–20 and accompanying text.
70 Id.
discrimination based on minority linked traits. In response, New York’s legislature passed section 48-a of the Civil Rights Law in 1990 that prohibited employment discrimination based on the presence of “unique genetic disorder[s].” The legislation limited its coverage to “sickle cell trait, carriers of Tay-sachs disease or carriers of Cooley’s anemia.” Therefore, section 48-a, like the current statutes of Florida and North Carolina, was limited in scope as its protection applied only to traits appearing primarily in minority groups. The narrow scope of section 48-a, combined with the inadequacy of federal protections, prompted New York to revisit its stance on genetic discrimination in 1996.

B. New York Prohibits Genetic Based Discrimination: Unveiling Section 296(19) of New York’s Executive Law

Beginning in 1996, New York’s legislature amended multiple sections of its Executive Law to reflect the State’s growing concern with genetic discrimination. The changes occurred primarily in three areas. First, “genetic predisposition and carrier status” was included in the list of protected criteria existing under section 296(1)(a). The State’s legislature subsequently changed the terminology to “predisposing genetic characteristics” in 2005. Secondly, with regard to the statute’s definitional section, the phrase “genetic or neurological condition[]” was added to the definition of disability, while terms such as “genetic test” were separately defined. Finally, subdivision 19 was added to section 296 to prohibit genetic testing as a condition of employment.

Subdivision 19(a) states in relevant part:

[I]t shall be an unlawful discriminatory practice of any employer, labor organization, employment agency, licensing agency, or its employees, agents, or members . . . to directly
or indirectly solicit, require, or administer a genetic test to a person, or solicit or require information from which a predisposing genetic characteristic can be inferred as a condition of employment, preemployment application, labor organization membership, or licensure . . . .

Like similar statutes in states such as New Hampshire and Wisconsin, section 296(19) explicitly prohibits any direct or indirect use of genetic information for discriminatory purposes. In this respect, section 296(19) and similarly prohibitive statutes are the most comprehensive state protections against genetic discrimination. Despite its stringent standards, however, New York’s increased risk exception provides room for maneuvering around the statute’s protections.

C. The Exceptions of Section 296(19): An Unexplored Loophole

The 1996 revisions to section 296 did not prohibit all genetic testing. Section 296 authorizes genetic testing in two scenarios. First, genetic testing is permitted if consent is given. Second, genetic testing is permitted if an employee is deemed to be susceptible to an increased risk of disease from working in a particular occupational environment.

1. The Consent Exception

With regard to the first previously stated exception, genetic testing is permitted pursuant to written and informed consent in three limited circumstances. Consent is valid if given pursuant to a worker’s compensation claim, civil litigation, or for purposes of determining an employee’s susceptibility to certain toxins found in an occupational environment. Because the revisions to section 296 are recent, no judicial challenges to the boundaries of the consent exception are reported. This may be because the statute’s specific criterion for application of the consent exception leaves little room

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83 WIS. STAT. ANN. § 111.372(1) (West 2002).
84 See § 296(19)(c)–(d) (McKinney 2005).
85 Id. § 296(19)(b).
86 See id. § 296(19)(c).
87 Id. § 296(19)(c)(1).
88 Id. § 296(19)(c)(2).
89 Id. § 296(19)(c)(3).
for ambiguity or interpretation. The same cannot be said of the statute’s increased risk exception.

2. The Increased Risk Exception

The increased risk exception, unlike the consent exception, is a likely loophole to the protections of section 296. Section 296(19)(b) states in relevant part:

An employer may require a specified genetic test as a condition of employment where such a test is shown to be directly related to the occupational environment, such that the employee or applicant with a particular genetic anomaly might be at an increased risk of disease as a result of working in said environment.91

Under the increased risk exception, an employer is permitted to subject an employee to genetic testing where it can be demonstrated that such testing is directly related to the occupational environment.92 Consequently, as it relates to employers in New York, section 296(19)(b) is an unexplored loophole that allows for the submission of employees to genetic testing provided that a link is demonstrated between an employee’s suspected genetic anomaly and the dangers of a particular occupation environment. Because of its infancy, New York’s section 296(19)(b) exception has yet to be judicially scrutinized. The plain language of the statute, however, leaves much room for its interpretation. Specifically, a viable argument exists for permitting genetic testing when the statute’s text is applied to the situation faced by the Knicks in its acquisition of Curry.

IV. CHALLENGING CURRY UNDER SECTION 296(19)(B): THE KNICKS’ POTENTIAL ARGUMENT AND THE POSSIBLE FALLOUT OF SUCCESS

A. The Knicks’ Potential Arguments: A Plain Interpretation of the Statutory Language and the Viability of Genetic Testing in Professional Sports

The success of the Knicks’ argument under section 296(19)(b) hinges on a plain interpretation of the statutory language and on the viability of genetic testing in professional sports.

91 § 296(19)(b).
92 See id.
1. A Plain Interpretation of the Statutory Language

The United States Supreme Court has stated that the first and often only canon of statutory construction is “that a legislature says in a statute what it means and means in a statute what it says there.”93 The Court then stated that “[w]hen the words of a statute are unambiguous, then, this first canon is also the last.”94 The statutory language of section 296(19)(b) is seemingly unambiguous.95 Thus, the plain meaning of the stated language should be the first and last step of interpretation. However, should ambiguity be found to exist, reliance on the legislature’s intent in drafting the subdivision (19)(b) exception96 is of little assistance.97 The legislature provided little insight as to its intended purpose in including the subdivision (19)(b) exception.98

An application of the plain statutory language to the facts surrounding Curry’s employment with the Knicks supports the contention that Curry is subject to genetic testing as a condition of employment. Genetic testing for HCM is related to a professional basketball occupational environment in that HCM, if undiagnosed, places Curry at an increased risk of disease from employment as a professional basketball player. History supports this contention.99 Undiagnosed genetic heart conditions resulted in the widely publicized deaths of such basketball players as Hank Gathers in 1990,100 Reggie Lewis in 1993,101 and Jason Collier in 2005.102

94 Id. at 254.
95 See § 296(19)(b).
97 See Germain, 503 U.S. at 253–54 (referencing legislative intent as the next step in statutory interpretation if the language is ambiguous).
98 The legislature described purposes related to the general passage of section 296, but did not address the specific purpose(s) behind individual subdivisions. Act of June 25, 1996, ch. 204, sec. 1, 1996 N.Y. Laws 2229, 2229. For example, the legislature stated that section 296 was a response to the growing influence of genetics in society, as well as to related threats associated with employment based genetic discrimination. Id. The legislature, however, did not address the need for, or the purpose of, the increased risk exception contained in subdivision (19)(b). See id.
99 See Ian Thomsen, Change of Heart; Pro Leagues Should Make a Common Cardiac Test Mandatory, SPORTS ILLUSTRATED, Oct. 31, 2005, at 26 (using the historical deaths of various professional athletes from undiagnosed heart conditions to contend that the NBA should require echocardiogram screening of players).
100 Timothy G. Church & James R. Neumeister, University Control of Student-Athletes with Disabilities Under the Americans with Disabilities Act and the Rehabilitation Act, 25 J.C. & U.L. 105, 105 (1998) (“On March 4, 1990, Hank Gathers, a basketball player for Loyola Marymount University who was leading the nation in scoring and rebounding, collapsed while playing in an intercollegiate game. Two hours later he died from cardiomyopathy, a
Historical precedent, therefore, shows a professional basketball player with an undiagnosed heart condition is not only at an increased risk of disease but, more importantly, is at an increased risk of death. As required by the statutory language, a clear link exists between Curry’s genetic anomaly and his occupational environment. Therefore, a plain interpretation of the statutory language supports the Knicks’ potential argument that Curry is subject to genetic testing under section 296(19)(b).

2. The Viability of Genetic Testing in Professional Sports: Tort Claims and Cost Increases

a. Tort Claims

Genetic testing is a viable option for the Knicks because failing to test Curry for a heart arrhythmia may subject the team to tort claims. Prior to his trade from Chicago to New York, Curry had experienced several instances of unexplained illness. His symptoms of lightheadedness and chest pain were indicative of a heart condition. Because the Knicks were aware of Curry’s prior incidents, the team likely had a duty to determine the source of the problem. Failure to identify the problem’s source could conceivably subject the team to tort liability should the dormant condition become active and threaten Curry’s life. The tort claim may be based on a failure to comply with OSHA standards that

heart ailment.”).

101 Id. ("On April 29, 1993 . . . Reggie Lewis collapsed in an NBA playoff game, but he recovered enough to reenter the game. . . . [E]ventually, a doctor informed Lewis that he suffered only a fainting spell. On July 27, 1993, however, Lewis collapsed again while shooting baskets in the Celtics training center. This time he died." (footnotes omitted)).

102 Howard Beck, Autopsy Does Not Worry Curry, N.Y. TIMES, Nov. 3, 2005, at D5 (“Jason Collier, the Atlanta Hawks center . . . died on Oct. 15. . . . Collier, who was 28, died of a sudden heart-rhythm disturbance caused by an abnormally enlarged heart.”).

103 See N.Y. EXEC. LAW § 296(19)(b) (McKinney 2005).


105 See Thomsen, supra note 3.


107 See Beck, supra note 102, at D4.

require the Knicks to protect Curry from a potentially dangerous occupational environment. 109 The tort claim may also be based on fraudulent concealment by the employer of a previously detected condition. 110 Although any potential tort claim against the Knicks would certainly encounter causation barriers, 111 the threat of onerous litigation, especially given the Knicks’ knowledge of Curry’s medical past, was real.

b. Cost Increases

Curry’s potentially undiagnosed HCM may also result in various cost increases for the Knicks. First, Curry’s absence from the team due to death or illness would likely result in a multimillion dollar contractual loss for the Knicks. For example, Curry’s base salary would almost certainly continue to be paid following his death or illness. 112 Consequently, Curry’s contract essentially becomes a sunk cost since the Knicks would receive minimal return on their investment. Furthermore, because of the increased likelihood that Curry would suffer a career ending injury, an insurance company would likely require an increased premium to protect itself from incurring a loss. 113

In *McDermott v. Xerox Corp.*, a case involving a corporate employer’s refusal to hire an individual after a pre-employment medical examination revealed obesity, 114 the New York Court of Appeals explicitly rejected an employer’s insurance cost defense

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109 See *supra* notes 28–30 and accompanying text.
110 *Richter, supra* note 28, at 200.
111 See generally *id.* at 195–96 (indicating problems with negligence torts, genetic conditions, and causation). Causation issues are particularly problematic in the realm of genetic conditions and sports employment because of the inherent difficulty in proving that but for the employment—professional basketball here—the employee-athlete would not have been afflicted with the impairment. A genetic condition by its nature is dormant and, thus, can become active without notice and without certainty of cause.
113 See generally Robyn B. Nicoll, Comment, *Long-Term Care Insurance and Genetic Discrimination—Get It While You’re Young and Ignorant: An Examination of Current Discriminatory Problems in Long-Term Care Insurance Through the Use of Genetic Information*, 13 ALB. L.J. SCI. & TECH. 751, 753, 763–66 (2003) (analyzing the potential threats of genetic information in the hands of insurers, including dropped policy holders and increased premium costs).
with respect to denying employment based on a disability. However, it is unclear whether the Court of Appeals would rule out the Knicks’ cost defense given that Curry’s case is distinguishable in two key respects. First, Curry’s employment contract with the Knicks is vastly different, with respect to his multimillion dollar salary and physical job requirements, than the corporate employment contract at issue in *McDermott*. Second, a medical examination, relied upon by the employer in *McDermott*, is quite distinguishable from genetic testing in that a satisfactory medical examination, unlike genetic testing, is often a prerequisite to employment.

**B. The Possible Fallout of Success**

The Knicks’ potentially successful use of the increased risk exception would have far-reaching consequences not only in New York’s sports employment context but also in New York’s ordinary employment contexts. For instance, with respect to the sports employment context, athletes may be subjected to extensive medical evaluations by their teams and by insurance companies to determine the likelihood of a predisposed illness. Any hint of predisposition may consequently subject the athlete to genetic testing under a plain interpretation of section 296(19)(b). Furthermore, the results of genetic testing may lead to trade limitations and to testing for desirable athletic genes. Similarly, athletes may be tested for the absence of genes linked to an increased susceptibility for specific injuries such as sprains and soft tissue damage.

Ordinary employers, following a successful strict application challenge under section 296(19)(b) in the sports employment

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115 *Id.* at 697 (“[I]f a person suffers an impairment, employment may not be denied because of any actual or perceived undesirable effect the person’s employment may have on disability or life insurance programs.”).

116 *Cf. id.* at 695 (noting that respondent, a former computer programmer, was offered a position with appellant corporation as a systems consultant).

117 See Sellenger, *supra* note 19, at 214–16 (exploring various threats of genetic testing in sports, including insurance problems and gene doping).

118 See discussion *supra* Section IV.A.1.

119 Sellenger, *supra* note 19, at 214–15. An athletic employer may be unable to trade an athlete-employee with a diagnosed genetic condition as acquiring teams may be fearful that the dormant genetic condition will become active.

120 *See id.* at 209, 212–13 (surmising the possibility of sports teams testing for the presence of the ACE I allele, believed by some to be present in superior athletes).

121 *Id.* at 224 (referring to “Anti-Performance Gene[s]”).
context, may also attempt to subject employees to genetic testing. For example, a coal miner with a known family history of lung disease may be subjected to genetic testing as a condition of employment given that a link exists between the predisposition and the increased risk of disease from the occupational environment. This possibility is not limited to physically intensive work environments. For example, a court stenographer with a suspected predisposition for carpal tunnel syndrome may also be subjected to genetic testing.122

Though these hypotheticals may appear unrealistic to some, it was also likely inconceivable to many that a professional basketball player could be ousted from a team because he refused to undergo genetic testing for a predisposed heart condition. While it is apparent that genetics will impact the law, the complete fallout of lawful genetic testing is not entirely clear. What remains clear is that lawful genetic discrimination under section 296 will have unintended consequences in many employment contexts.123 Therefore, section 296 should be amended to eliminate the possibility of lawful, but undesirable, genetic discrimination in the ordinary employment context through successful exploitations of the section 296(19)(b) loophole. However, because there are extreme contrasts between sports and ordinary employment contexts, section 296 should also be amended so as to allow for qualified genetic testing in the sports employment context.

V. CONVERGING INTERNATIONAL LEGAL TRENDS: QUALIFIED GENETIC TESTING IN THE SPORTS EMPLOYMENT CONTEXT AS AN EXEMPTION TO SECTION 296

A. The Unique Experience of a Sports Employer

An athlete-employee’s failure to perform, whether due to illness, injury, or death, has far-reaching organizational and financial consequences for sports employers that are not shared by ordinary employers. The influence of athlete-employees differs from the influence of ordinary employees in two key interrelated respects—heightened organizational and financial dependence of the sports employer on the athlete-employee.

122 See infra notes 139–40 and accompanying text.
123 See supra notes 117–21 and accompanying text.

1. Heightened Organizational Dependence

First, with respect to organizational dependence, sports employers generally have fewer contributing employees than do most ordinary employers. Therefore, a sports employer’s reliance on each employee’s contribution is much more critical as compared to an ordinary employer’s reliance. Unlike most ordinary employers, a sports employer’s potential for success, in terms of wins and losses, is significantly harmed by the absence of a single athlete-employee. Although ordinary employers also regularly rely on key employee(s) whose absence may be crucial to the employer’s success, replacing a missing athlete-employee is a vastly different challenge than is replacing an employee in ordinary employment contexts.

2. Heightened Financial Dependence

Second, sports employers depend almost exclusively on an athlete’s physical wellness for financial success. Athlete-employees often retain a significant percentage of their salary merely by entering an employment contract, regardless of subsequent injury, illness, or death. Furthermore, various sources of revenue,
including ticket sales and team memorabilia sales, are critically linked to an athlete-employee’s ability to perform physically. A sports employer, therefore, has much to lose financially should an athlete-employee’s health falter while under contract. These organizational and financial dependencies are unique to sports employers. As a result, it logically follows that New York’s universal genetic discrimination law insufficiently addresses the inequities existing for employers in the sports employment context. While genetic discrimination is generally inappropriate in ordinary employment contexts, the extreme link between an athlete’s health and a sports employer’s organizational and financial success suggests that genetic testing is often appropriate in the sports employment context.

B. Sports Exemptions to Employment Discrimination Laws: Emerging International Legal Trends Beckon New York to Follow

Section 296 of New York’s Executive Law should be amended to conform with two emerging international legal trends.

1. Laws Uniquely Tailored to the Sports Employment Context

One trend recognizes genetic discrimination laws uniquely tailored to the sports employment context. For example, Australia’s genetic discrimination laws are uniquely tailored to protect sports employers from situations involving an athlete’s inability “to perform the actions reasonably required in relation to the sporting activity” and situations involving an athlete’s inability to “effectively compete.” Similarly, Italy bans athletes from competition that have been predetermined, though not through genetic testing, to have heart conditions related to sudden death. As improvements are made in genetic diagnosis accuracy and in

128 See, e.g., Nancy Gay, *Washington Hits the Rookie Wall*, SAN FRANCISCO CHRON., Dec. 28, 2005, at D7 (suggesting that a professional football team must consider “a television blackout” to increase ticket sales if too many players were injured).

129 See Sellenger, supra note 19, at 229–30 (summarizing sporting exemptions to Australia’s genetic discrimination laws).

130 Id. at 228–29.

131 Although Italy’s ban is currently limited to heart conditions determined by electrocardiogram and echocardiogram, as opposed to heart conditions determined by genetic testing, this may soon change as the limitations of genetic testing are eliminated. See Laura Spinney, *Heart-Stopping Action*, NATURE, Aug. 4, 2004, http://www.nature.com/news/2004/040802/pf/430606a_pf.html (observing that the major genetic testing limitations in Italy are testing inaccuracy and testing cost).
New York’s Genetic Discrimination Loophole

testing costs, Italy, like Australia, is increasingly likely to approve the use of genetic testing in sports so as to avoid the harsh consequences to sports employers of an athlete’s untimely death during competition.

2. Laws Permitting Limited Genetic Testing

A second trend recognizes limited genetic testing in universal employment contexts where clear health specifications are required for effective contribution in a particular occupational environment. For example, the Netherlands, Spain, and Denmark limit genetic testing in the employment context where an “unambiguous health requirement for the job” or where a necessity to protect a particular employee in a given occupational environment exists. Although the laws of these nations, like section 296(19)(b), recognize the need for limited genetic testing, the risks associated with the universal application of such laws are too great. Further qualifications, such as restricting limited testing to the sports employment context, are needed to avoid the unforeseen consequences of universal genetic testing in employment.

3. Converging the International Trends

New York, therefore, should amend section 296 to converge the two emerging international legal trends. First, like Australia and Italy, New York should recognize the unique implications for sports employers of undiagnosed genetic anomalies in athletes. Like Australia, New York should create a statutory exemption for genetic testing in the sports employment context. As currently written, section 296(19)(b) potentially allows the Knicks to submit Curry to genetic testing. Section 296 should be amended to explicitly allow for genetic testing as it relates to the sports employment context. Second, like the Netherlands, Spain, and Denmark, the exemption should be limited to a clear health requirement of the sport or otherwise relate to protecting the athlete-employee in the sports employment context.
occupational environment. With such qualified genetic testing, New York will not only help protect sports employers who have unique dependencies on athlete-employees but will also avoid universal employment exploitations of the increased risk exception to section 296(19).

VI. CONCLUSION

Recent events have alerted society to the dangers of unrestricted access to genetic information and the need for increased protections against genetic discrimination. For example, in the widely publicized genetic discrimination case Equal Employment Opportunity Commission v. Burlington Northern and Santa Fe Railway Co., Burlington subjected unsuspecting employees to genetic testing for a predisposition to carpal tunnel syndrome. The Equal Employment Opportunity Commission (EEOC) challenged the testing under provisions of the ADA and reached a settlement of up to $3.08 million dollars with Burlington in 2002. Although the case did not reach a decision on the merits, Burlington warns of the potential for employer misuse of genetic information.

In response to the growing threat of genetic discrimination in employment, as evidenced by Burlington’s actions, a number of employers implemented job specific genetic discrimination policies. For example, in October 2005, IBM, recognizing the shortcomings of both state and federal protections, announced a company wide policy of not using genetic information in hiring decisions or in eligibility for health insurance decisions. Similarly, in February 2000, Executive Order 13,145 was passed prohibiting discrimination in federal employment based on genetic information. New York must follow the examples of Executive Order 13,145 and IBM’s revised hiring policy and amend section 296 to eliminate the

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137 No. 02-C-0456, 2002 WL 32153386, at *1 (E.D. Wis. May 8, 2002).
138 Id.
139 Id. at *1–*2.
possibility of lawful genetic discrimination through exploitations of the subdivision (19)(b) exception in the ordinary employment context.

While increased employee protections are necessary in the ordinary employment context, in the sports employment context the need for increased protections rests most noticeably with employers. Thus, the extreme influence of an athlete-employee over the organizational and financial success of the sports employer is a unique role reversal that also requires the state legislature’s attention. In the sports context, it is often the employee’s performance ability, not the employer’s decision-making, that ultimately controls the employer’s organizational and financial success. Without increased protections under section 296, sports employers will continue to be susceptible to substantial organizational and financial losses associated with undiagnosed genetic conditions of employee-athletes. Though there are risks associated with genetic testing in the sports employment context,¹⁴² such risks are outweighed by the inequities associated with applying section 296 to uniquely situated sports employers. As such, section 296 should be amended to permit some level of qualified genetic testing for the protection of sports employers from substantial organizational and financial losses caused by the genetic anomalies of athlete-employees.

¹⁴² See supra notes 117–21 and accompanying text. These risks must be addressed individually through appropriate legislation should qualified genetic testing be permitted in the sports employment context.