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GENETIC TESTING AND EMPLOYMENT LITIGATION

HARRY ZANVILLE¹

I have only a couple of comments to make that relate to litigation hurdles and how to achieve this balance, and the first thing I want to talk about, following the wonderful presentation is, in fact, we probably don't in some ways even need a new cause of action.

This is going to sound so garden variety and hum-drum. Well, one of the claims we had in the Burlington Northern Santa Fe Railroad² was fraud. Imagine that, the common variety of fraud. What was it? The Burlington Northern has strategic (inaudible) goals to avoid paying occupational illness or injury claims of its employees.

It has a goal to avoid reporting occupational illnesses or injuries as required by the Federal Railway Administration. It has the goal of being exempted or excused from governmental ergonomic rules or the expense of or dislocation associated with compliance with such rules.

And to accomplish these goals, the Burlington Northern has and is using means which are unlawful separately and in combination by engaging a set of, and a concerted set of actions against the employees which constitute common-law fraud.

They knowingly made false and misleading statements, including but not limited to material omissions. If they don't tell you they're doing genetic testing, they've made a material omission, which is actionable as if you had said something directly false to the employees in connection with their participation in medical testing programs.

They knowingly induced physicians to make material omissions in medical diagnoses, in treatment plans, and in statements. The employees, of course, were, have been and continue to be directly and indirectly damaged by these fraudulent actions. Common variety of fraud, and I think it's perfectly legitimate, and I think we would have prevailed on that claim if we had needed to.

So I agree with you, common law is a great way to go. One of the problems with trusting judges is you have to trust judges. That's not always a good thing to do.

I personally would prefer to trust a jury every time. But having said that, for those of you who are not lawyers, you should be aware that the U.S. Supreme Court some years ago in a case called *Daubert*³ made an effort to preclude the use of what it called "junk science" from being used in the court, because every time there was a case, here came some expert, an expert on dog saliva on window sills. There

¹Represented the Brotherhood of Maintenance of Way Employees and the Brotherhood of Locomotive Engineers in *EEOC v. Burlington Northern Santa Fe Railroad Company*, which successfully challenged genetic testing of its employees. Until 1995, his law practice focused on complex legal problems in commercial, labor and employment law. In 1995, he began a sabbatical and takes only isolated cases that have potentially important principles at issue. J.D., Case Western Reserve University.

²*Sheet Metal Workers Int'l Union v. Burlington Northern*, 736 F.2d 1250 (8th Cir. 1984).

³*Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

was an expert for that. I mean, you can get an expert on astrological meaning. You can have an expert on anything.

The court is saying, "Look, we got to cut down on his stuff, and so they set some requirements for actual science and medicine as being used as evidence in court." Well that's great. How do dogs relate to the use of genetics in the court?

For example, in the carpal-tunnel case, here's Athena's test, and the Burlington Northern wants to use that presumably in their successful case. Ah-ha, they got the guy to take the test, whether secretly or through coercion. Now we can prove our 20 years of operating a grinder or a hydraulic injection didn't cause the carpal-tunnel, it was the genetics.

How are they to get that into the evidence considering *Daubert*, and the answer is, it's going to be pretty tough, if not impossible. It's not peer-reviewed, it's not generally accepted in the medical community, it's not subject to publication.

How are they going to get it in, and what becomes the legal standard, is it a subjective or objective view of good-faith beliefs, and if it is, is it for asymptomatic illnesses, as if there's going to be meaningful prediction? How are they going to get that past *Daubert* standards? Well, the science is not yet perfected and is changing as we speak. Or if it's not asymptomatic, is it, in fact, existing? What's the causal relationship? How is that going to be science or medicine that's going to be admissible in a court?

So the whole theory of why employers are starting to use this when challenged by employees is really going to be problematic, and it seems to me as we talk about legislation and litigation and balances and obstacles, surely *Daubert* comes into play in a number of ways.

Another thing we should be aware of as non-lawyers is that the U.S. Supreme Court's current makeup more and more is denying access to courts and more and more requiring referral to arbitration, and it beats the heck out of me how an arbitrator in the traditional labor field is going to start making genetic decisions.

I mean, it's hard enough for us who kind of know a little something to keep up with you all who are doctors and geneticists. But an arbitrator, there is no hope, and, of course, there is basically no appeal from an arbitrator's decision.

So the Supreme Court's decision is that, what's the term, "yellow dog contracts," are valid, everything is sent to arbitration. That's a dead end, and it's not going to serve anybody's interest in the long run to go there, but that is an obstacle and it's something that has to be dealt with.

There's another thing to please be aware of. You know, I hope you as non-lawyers don't think that we as practicing lawyers are overly cynical. You know, the truth is, there's some bad people out there, and it didn't take September 11th to tell us this. There are outlaws and there are corporate outlaws, and I'm not saying BNSF is one of them.

Take another example: There's a case called *Adler v. Soo Line*,⁴ which I was happy to be involved in. In *Adler v. Soo Line*, the Soo Line was abandoning a large section of track, and they very cleverly worked it out with a new company, a class two railroad called the I & M Rail Link, which was going to be a non-union operation. They said to the service transportation board, to get approval of this

⁴*Adler v. I & M Rail Link, L.L.C.*, 13 F. Supp. 2d 912 (N.D. Iowa, 1998).

transaction, “We’re going to hire everybody. We need more workers than currently work there now.” Great. Except when it came time to do it, you know who they didn’t hire? They didn’t hire people with prior injuries. They didn’t hire people that had prior injury claims, and they didn’t hire people who were union activists. They hired everybody else. They preferred to hire people off the streets who had been let out of jail literally, rather than guys with 20 years of experience. Why? Because they had the misfortune of being injured.

Well, 75 percent of all rail workers who work on the maintenance way are injured seriously at one point or another in their working career. That’s reality, and if they filed a claim, they had the courage to do that, they weren’t going to be hired.

I’m happy to tell you that we were able to achieve a successful result for those people. But the point is, there are outlaws and these people running these organizations, they may be bean counters, but what they try to do is find a way to limit their costs, and they’ll use any means, whether it be genetic testing or any corporate structure or time and opportunity, and the reason we have to have laws is to deal with those outlaws, those people who just don’t want to obey laws and do the right things.

There’s a reason for our concern as lawyers to deal with this, and you will understand that if any of your family or friends get caught up in one of these situations. Then you’ll understand why there was this need.

I fully agree that the states are more amenable, more flexible. We were able to work successfully in Minnesota with the Minnesota Medical Association and the Bioethics Institute of Minneapolis, which is associated with the University of Minnesota to get a law passed in Minneapolis, in the legislature. Very fast. We didn’t have one vote in opposition. It went through slick as a whistle. It’s a pretty good law, it’s not perfect, but it’s pretty good, and better by far than anything that’s in Section 318.

So having said that, that’s the end of my comments, except for that if anybody wants copies of our complaint and our lawsuit or the brief, they’re available electronically by letting the conference organizers know they want it and we’ll make sure you get it, and also reference to a website that’s run by the National Conference of State Legislatures on Privacy Issues on Genetic Technology. They do absolutely great stuff. I strongly recommend you read it. They also have catalogs of all the state legislation and regulation, and it’s done beautifully. So for what it’s worth, that’s an important thing to go look at.

AUDIENCE: What is the site?

MR. ZANVILLE: Ah, it is: <http://www.ncsl.org/programs/health/genetics>, and then there’s a whole bunch of stuff under that.

MR. FORD: Last question.

AUDIENCE: I have a question for Professor Hoke. I agree with an awful lot of what you said, but my one concern is when you refer to states and their common-law legislature, you get a patchwork quilt, and then it becomes very difficult, even for a person who wants to comply, to know what the law is in the state. So I guess that’s kind of a two-part question. That’s an observation.

But the real question is, how do we know when we’ve got enough experience and scientific knowledge so that the feds can step in, come in with some meaningful uniform national act that would solve at least the problems that we conceive for now?

PROFESSOR HOKE: I think you're absolutely right that we have a patchwork, and I think at some level we ought to start learning to be comfortable with the uncertainty that we have when we have this patchwork because we're going to be able to learn from it.

I think the bigger risk is to have a federal law that will basically fix a situation and then we find it impossible to move. There is no set time when we will know enough. When particularly a community like this feels that you've learned enough and you're ready to move forward and you've assessed the political risk, I think, great.

But from what I've learned from this conference and the reading in advance, I don't think we're at that point yet on a national level as far as everything that needs to go into that particular law, and maybe I feel more that way because I'm more worried about what's going to happen in Washington at this point in time.

On the state level, I think it would be wonderful, even if we ended up with a genetic discrimination piece of legislation that was highly flawed like our state (inaudible) statute is in the hands of our current Supreme Court, meaning our Ohio Supreme Court, they would pluck that policy out and they would enforce it through the common law and in a powerful way bereft of all the stupid compromises, and I think that's exciting.

So I think that, on the other hand, should encourage us to move forward at the state level and then start evaluating what we're learning from the other states, you know, to try to do the best we can. But we've got some powerful medical institutions in the state that could lead the way -- many of you are from them -- working with the lawyers to fashion appropriate legislation, and then it wouldn't come across as employee rights' legislation to which our legislature has some great hostility.

So I guess it's a long-winded way of saying that I think it's actually to our benefit at this point to have the patchwork, to learn from it and to be able to point out the pros and cons of the other states' laws so that then we might be able to be the model that would become the national model. I think that would be great.