IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BROWGLEY RUSSELL and JAMES BURRIS,	)	
	)	Case No. 1:20-cv-00420
Plaintiffs,	)	
	)	Judge LaShonda A. Hunt
v.	)	
	)	Magistrate Judge Heather K. McShain
CITY OF CHICAGO,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant City of Chicago (hereinafter the "City"), through the undersigned attorneys, respectfully submits its Motion for Summary Judgment, pursuant to FRCP 56, and this Court's Local Rule 56.1, as follows:

I. INTRODUCTION

1. The City is entitled to summary judgment on Plaintiffs' claim under the Genetic Information Nondiscrimination Act of 2008, et seq., ("GINA"), because the undisputed facts establish that the City did not require the submission of Plaintiffs' genetic information as defined by GINA. The sole basis for Browgley Russell's (B. Russell) and James Burris' (J. Burris) (collectively, "Plaintiffs"), GINA claim is the allegation that the City required Plaintiffs' spouses to provide their medical histories in conjunction with participating in the City's Chicago Lives Healthy Wellness Program ("Wellness Program"), without first obtaining their "prior, knowing, voluntary, and written authorization." (Plaintiffs' Second Amended Complaint ("SAC") at ¶¶ 24-25; 42 U.S.C. § 2000ff-1(b)(2)(B)). Plaintiffs assert that their spouses' medical histories are defined under GINA as Plaintiffs' "genetic information."

2. Contrary to Plaintiffs' allegations, J. Burris' spouse did not participate in the Wellness Program during the relevant time period; thus, she could not have disclosed J. Burris' alleged genetic information. In addition, B. Russell's GINA claim fails because B. Russell failed to establish what information, if any, his spouse disclosed while participating in the Wellness Program in 2019. Moreover, to the extent B. Russell's spouse disclosed alleged genetic information, she did so as part of the City's voluntary Wellness Program, which is exempted from GINA.

3. Finally, that non-participants in the Wellness Program incur a $50 per non-participant increase to their monthly contributions does not render the Wellness Program involuntary or unlawful under GINA. Therefore, the City is entitled to summary judgment on Plaintiffs' GINA claim.

II. LEGAL ARGUMENT

A. Plaintiffs' GINA claims are limited to alleged discriminatory acts occurring between July 17, 2018 and December 31, 2020.

4. Plaintiffs' GINA claims are limited to alleged discriminatory acts occurring on or after July 27, 2018, based on this Court's prior ruling. Dkt. No. 192. This Court held Plaintiffs' GINA claims "relating to [alleged] discriminatory acts that occurred within 300 days prior to [G.] Williams' EEOC charge" were not time-barred." *Id*. G. Williams filed his charge on May 23, 2019, so Plaintiffs' claims are limited to alleged discriminatory acts occurring on or after July 27, 2018. (SOF ¶ 8; 29 C.F.R. § 1601.13(a)(4)(ii)(A)).

5. Plaintiffs' GINA claims are further limited to alleged discriminatory acts occurring on or before December 31, 2020. Plaintiffs' GINA claim is solely based on their allegation that the City's Wellness Program was not voluntary because of the $50 non-participation increase in monthly premiums. (Dkt. No. 208, SAC, ¶ 10). However, the City discontinued the collection of

the additional $50 per non-participant increase in employees' monthly contributions for non-participation in the Wellness Program on December 31, 2020. (SOF ¶¶ 26-27). Thus, Plaintiffs' GINA claims are limited to alleged discriminatory acts occurring between July 27, 2018 and December 31, 2020 (the "Relevant Time Period").

B. GINA exempts Wellness Programs from its requirements.

6. Plaintiffs' claim is based on GINA's prohibition on the acquisition of genetic information from an employee or an employee's family member. 42 U.S.C. §2000ff-1(b). The crux of Plaintiffs' GINA claim is that the City, through participation in its Wellness Program, allegedly requires the disclosure of Plaintiffs' spouse's medical history, which is defined as genetic information of Plaintiffs under GINA. 42 U.S.C. §2000f(4)(a)(iii). The form of the alleged disclosure, according to Plaintiffs, is the risk assessment questionnaire component of the Wellness Program, which may be completed by the employee's spouse, if the employee has a spouse on the City's healthcare coverage. Dkt. No. 208, ¶ 24 (SOF, ¶¶ 44-45).

7. However, obtaining information in response to a risk assessment questionnaire from a participating spouse of an employee is not considered genetic information of the employee if the Wellness Program is exempt from GINA, which is the case here. 42 U.S.C. §2000ff-1(b)(2)(A-D); 29 CFR §1635.8(c)(2).

C. J. Burris cannot establish the City violated GINA because his spouse did not participate in the City's Wellness Program during the Relevant Time Period.

8. The City is entitled to summary judgment on J. Burris' GINA claim because his spouse, Sharon Burris ("S. Burris"), did not participate in the City's Wellness Program during the Relevant Time Period. J. Burris admitted that S. Burris could not participate in the Wellness Program because J. Burris chose not to participate and, therefore, neither J. Burris nor S. Burris provided any information, let alone genetic information, to the City through its Wellness Program.

(SOF ¶¶ 52-55). Accordingly, the City could not have violated GINA with respect to J. Burris, and the City is entitled to summary judgment on J. Burris' GINA claim.

D. B. Russell cannot establish the City violated GINA because his spouse did not provide B. Russell's "genetic information," let alone without the requisite authorization.

9. The City is entitled to summary judgment on B. Russell's GINA claim because B. Russell failed to establish his spouse, Michelle Russell ("M. Russell"), provided his "genetic information" as that term is defined in GINA, via her participation in the Wellness Program. Under GINA, it is generally unlawful for an employer to "request, require, or purchase genetic information with respect to an employee or a family member of the employee." 42 U.S.C. § 2000ff-1(b). An individual's "genetic information" includes, as relevant here, information about "the genetic tests of family members of such individual" and "the manifestation of a disease or disorder in family members of such individual." *Id.* at § 2000ff(4). In turn, "genetic test" is defined as "an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes." *Id.* at § 2000ff(7). Within the Relevant Time Period, M. Russell participated in the Wellness Program in two instances: she completed a biometric screening on February 8, 2019, and she completed a Questionnaire on March 28, 2019. (SOF ¶¶ 61-62). In neither instance did M. Russell provide B. Russell's "genetic information." (SOF, ¶¶ 63-66).

10. First, biometric screenings under the Wellness Program are not genetic tests. (SOF ¶ 41). The biometric screenings fall squarely outside of GINA's definition of "genetic test" because they do not analyze DNA, RNA, chromosomes, proteins, or metabolites to detect genotypes, mutations, or chromosomal changes. *See* 42 U.S.C. § 2000ff(7); 29 C.F.R. § 1635.3(f)(3) ("The following are examples of tests or procedures that are *not* genetic tests: . . . [c]omplete blood counts, cholesterol tests, and liver-function tests.") (emphasis added). As such, M. Russell did not

provide B. Russell's "genetic information" by completing a biometric screening on February 8, 2019.

11. Second, B. Russell has not presented any evidence that M. Russell provided his "genetic information" when M. Russell completed and submitted her Questionnaire on March 28, 2019. (SOF ¶ 44). M. Russell was not required to answer any number of the questions in the Questionnaire and could have left every question potentially related to "the manifestation of a disease or disorder" blank. (SOF ¶ 45). In addition, M. Russell testified that she does not know whether she has ever been asked for or ever provided "genetic information" as part of her participation in the Wellness Program. (SOF ¶ 63-66).

12. In fact, B. Russell testified that neither he nor M. Russell provided any genetic information to the City in connection with their completion of the RealAge Assessment or Questionnaire. (SOF ¶¶63-66).

13. Without testimony from M. Russell regarding the information she provided, if any, when she completed the Questionnaire on March 28, 2019, or a copy of M. Russell's completed Questionnaire, B. Russell cannot establish M. Russell provided any information that qualifies as B. Russell's "genetic information." Thus, B. Russell's GINA claim fails, and the City is entitled to summary judgment.

14. Further, even if M. Russell did provide B. Russell's "genetic information" in completing the Questionnaire on March 28, 2019, B. Russell and M. Russell provided their prior authorization to such disclosure. As relevant here, an employer does not violate GINA where an employee's "genetic information" is provided as part of a wellness program with "prior, knowing, voluntary, and written authorization." 42 U.S.C. § 2000ff-1(b)(2). Before B. Russell and M. Russell completed their biometric screenings on January 18, 2019, and February 8, 2019,

respectively, they each would have had to complete a separate "Physician Screening Form." (SOF ¶¶34-37). The "Physician Screening Form" includes a line for the participant's signature and notes "[p]articipant signature REQUIRED in order to process." (*Id.*). By signing the "Physician Screening Form," the participant acknowledges that they "have read, understand and agree to the terms on the Wellness Notice and Consent attached to this form." (*Id.*). In turn, the "Wellness Notice and Consent" attached to the "Physician Screening Form" notes:

> I understand that completion of this biometric screening is voluntary. If I choose not to participate or do not give my permission by signing this authorization form and completing this screening, I understand that I may not be able to receive Program incentives (if offered). . . . By signing this form, I voluntarily and knowingly authorize the collection of this genetic information and understand that it will be used for purposes of the Program. If I am participating as the spouse or child of an employee, I also understand that by undergoing the biometric screening I may disclose genetic information. The kind of genetic information I may disclose is information about my diseases and disorders.

(SOF, ¶ 37).

15. By signing their respective "Physician Screening Forms," accepting the terms of the Consent Form, B. Russell and M. Russell both provided their prior, knowing, voluntary, and written authorization to the possible collection of B. Russell's "genetic information" as part of their participation in the Wellness Program. B. Russell's "genetic information" includes "the manifestation of a disease or disorder" in M. Russell. 42 U.S.C. § 2000ff(4). To the extent M. Russell disclosed B. Russell's "genetic information" by participating in the Wellness Program, B. Russell and M. Russell did so with "prior, knowing, voluntary, and written authorization. 42 U.S.C. §2000ff-1(b)(2)(B). Thus, the City is entitled to summary judgment on B. Russell's GINA claim.

E. Plaintiffs' GINA claims fail because the City's Wellness Program is voluntary and, therefore, lawful.

16. Plaintiffs' GINA claims also fail because wellness programs with moderate financial incentives, like the additional contributions for non-participation in the City's Wellness Program, are lawful. GINA has always permitted "voluntary" wellness programs, though the statute does not explicitly address the use of incentives. GINA is aimed at prohibiting discrimination based on genetic information known about an employee. 42 U.S.C. § 2000ff-1(a). As noted above, although GINA makes it unlawful "for an employer to request, require, or purchase genetic information with respect to an employee and a family member of the employee," it specifically exempts the acquisition of such information as part of a wellness program if the provision of such information is voluntary. *Id.* at § 2000ff-1(b)(2). Of note, GINA does not define "voluntary" or address financial incentives.

17. Similarly, the 2019 Patient Protection and Affordable Care Act (the "ACA") explicitly endorsed employee wellness programs and provided guidance on the use of financial incentives, setting no limits on incentives for participatory programs, while raising the permissible level of incentives based on "satisfying a standard that is related to a health status factor" from 20 percent to "30 percent of the cost of coverage" for both the employee and employer contributions. *See* 42 U.S.C. § 300gg-4(j)(3). HIPAA similarly provides for incentives. 78 Fed. Reg. 33,158, 33,159 (June 3, 2013).

18. With the City's Wellness Program, the prior $50 increase in monthly premiums for a non-participating employee is far less than the ACA and HIPAA's permissible incentive levels of 20% to 30% of total cost of coverage.[1] (SOF, ¶¶ 23-25)

[1] The total cost of coverage for a single employee in the City's LLMC PPO health plan ranged from $680.88 to $753.66 per month, from 2018 to 2020. (SOF, ¶¶ 23-25).

19. Plaintiffs do not dispute the fact that employees and spouses have a choice each year whether to participate in the City's health plan and, separately, its Wellness Program. (SAC ¶¶ 15-16 (alleging that certain Plaintiffs "*elected* not to participate in the Program") (emphasis added)). Plaintiffs also cannot dispute that their own union representatives negotiated and agreed to the City's health plan, including its Wellness Program. (SOF ¶ 9). Still, Plaintiffs challenge the voluntariness of the participation in the Wellness Program because, if the employee chose not to participate, their monthly health care contribution was increased by $50 per non-participant prior to January 1, 2021. (SAC ¶¶ 10, 14).

20. However, Plaintiffs do not, and cannot, point to any provision in GINA or its regulations stating that requiring such a contribution makes participation involuntary. As discussed above, GINA does not prohibit such incentives. Further, both the ADA and HIPAA permit financial incentives for participants in wellness programs, and it would make no sense to read GINA's allowance of "voluntary" wellness programs to prohibit the very incentives permitted by the ACA and HIPAA. *See* 42 U.S.C. § 300gg-4(j)(3); *see also* fn. 4, *supra*. Congress should not be presumed to have created an elaborate nullity. *See U.S. v. Harris*, 838 F.3d 98, 106 (2d Cir. 2016).

21. Plaintiffs do not, and cannot, offer any evidence that disputes the fact that the City's Wellness Program is voluntary. As such, the City is entitled to summary judgment on Plaintiffs' GINA claims.

WHEREFORE, for the foregoing reasons and the reasons set forth in Defendant City of Chicago's Memorandum of Law in Support of its Motion for Summary Judgment and Statement

of Undisputed Material Facts, Defendant City of Chicago respectfully requests this Court grant summary judgment in its favor and against Plaintiffs Browgley Russell and James Burris.

Dated: October 4, 2024

Respectfully submitted,

Office of the Corporation Counsel

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CERTIFICATE OF SERVICE

I, Jennifer A. Naber, an attorney, certify that I caused the foregoing **Defendant's Motion for Summary Judgment** to be served on all parties of record via the Court's ECF filing system on this 4th day of October, 2024.

/s/ Jennifer A. Naber