UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. HONEYWELL INTERNATIONAL INC., Defendant.	Misc. Action No. _____ **Memorandum In Support of EEOC's Application For Temporary Restraining Order and an Expedited Preliminary Injunction.**

I. Introduction

The United States Equal Employment Opportunity Commission ("EEOC") is investigating two charges of discrimination alleging that Honeywell International Inc. ("Honeywell") requires that its employees submit to involuntary medical examinations or face substantial monetary penalties. The EEOC requests that the Court issue a temporary restraining order and a preliminary injunction to stop defendant Honeywell from compelling these examinations in potential violation of the Americans With Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"). Under governing statutory authority, the injunction will last only until the final disposition of the charges of discrimination before the EEOC.

II. Summary of the Argument and Relief Requested

The EEOC seeks preliminary relief pursuant to Section 706(f)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f)(2), which is incorporated into both Section 107 of the ADA, 42 U.S.C. § 12117, and Section 207(a)(1) of GINA, 42 U.S.C. §2000ff-6(a)(1). This provision gives the EEOC statutory authority to seek preliminary relief when it concludes that such relief is necessary to carry out the purpose of the Acts. The injunctive relief lasts only until final disposition of the charges filed with the EEOC. 42 U.S.C. §2000e-5(f)(2).

Based upon the EEOC's preliminary review, Honeywell's medical examinations are unlawful. The ADA prohibits employers from conducting medical examinations that are not job-related and consistent with business necessity. While an employer can ask the employees to undergo voluntary health exams, an examination is not voluntary when the employer imposes a penalty on the employee if he or she declines to participate.

The EEOC's preliminary investigation also indicates that the ongoing medical testing violates GINA. Honeywell requires that the employees' spouses be tested or the employees will be penalized. GINA prohibits employers from offering inducements (or alternatively imposing penalties) to employees to obtain medical information about an employee's family members.

Honeywell's program, if not enjoined, will irreparably harm the EEOC and Honeywell's employees. The EEOC's mission will be thwarted. It will be forced to sit by and watch Honeywell violate the ADA and GINA, thereby irreparably damaging the EEOC's role as the agency charged with enforcing those statutes and preventing discrimination under them. Honeywell employees will be forced to take the biometric tests, both because of the magnitude of the penalties if they do not take the so-called voluntary exam and because Honeywell has informed them that its penalties are lawful. Employees who do not want to take the medical exam will because they see no reasonable alternative. The unwanted medical exams invade their privacy rights and there is no adequate remedy at law for unwanted and unlawful medical examinations.

No harm will come to Honeywell through a TRO and a preliminary injunction. Honeywell will remain free to conduct voluntary medical examinations. Its health benefit plan will not be undone; it will not be forced to undo its programs. Honeywell will only be prohibited from imposing its recently adopted unlawful penalties for those who decline participation.

Finally, the public interest strongly supports issuance of the preliminary injunction. A person's bodily integrity and private medical information are of paramount importance, and are protected by the ADA and GINA. These

interests should not be invaded lightly or without a thorough consideration of all of the legal, equitable, and practical consequences.

The facts and law all support issuance of an injunction. Therefore, the Court should enter a TRO and, after an opportunity to be heard, a preliminary injunction that:

(1) Requires Honeywell to contact all employees to advise them that Honeywell will not seek to impose any penalty or cost upon them if they decline to go through Honeywell's biometric testing;

(2) Enjoins Honeywell from imposing any penalty or cost upon any employee who declines to participate in Honeywell's biometric testing;

(3) Enjoins Honeywell from reducing any contribution to a health savings account or imposing any surcharge on an employee because the employee declined to undergo biometric testing; and

(4) Enjoins Honeywell from imposing any penalty or cost upon an employee because the employee's spouse has not participated in biometric testing, or providing any inducement to an employee's spouse to participate in the testing.

III. Factual Background

Honeywell is a Fortune 100 company that "invents and manufactures technologies to address some of the world's toughest challenges initiated by revolutionary macrotrends in science, technology and society." http://honeywell.com/About/Pages/our-company.aspx (accessed on 10/23/2014). It has approximately 131,000 employees worldwide with about 51,000 of them located in the United States. *Honeywell International Inc., 10-K Annual*

Report 13 (2/14/2014), available at http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjI0MzIwfENoaWxkSUQ9LTF8VHlwZT0z&t=1 (accessed on 10/23/2014). This motion concerns only those employees who are working in the U.S.

Honeywell provides health benefits coverage for its employees. (Declaration of Keenan Hall ("Hall Decl.) ¶2; Declaration of SueAnn Schwartz ("Schwartz Decl.") ¶2). Employees who enroll are assessed payroll deductions for the coverage. (Hall Decl., ¶3; Schwartz Decl., ¶3). In connection with the upcoming 2015 plan year, Honeywell recently informed the employees that they (and their spouses if there is family coverage) would be required to undergo biometric testing or incur large financial penalties. (Hall Decl., ¶5; Schwartz Decl., ¶5). Biometric tests are medical examinations designed to identify and measure health status factors like blood pressure, cholesterol, and glucose levels. (*See* Declaration of Laurie Vasichek ("Vasichek Decl.) Ex. B; Hall Decl., Ex. D at Q. 12). Honeywell states that its biometric screening is part of a wellness check to help identify various health risks. (Hall Decl., Ex. D, at Q. 12).

Honeywell tests for blood pressure (systolic and diastolic), HDL and total cholesterol, non-fasting glucose, and height, weight, and waist circumference (BMI). (Vasichek Decl., Ex. B (Honeywell Operating System,

2015 US Benefits Change)); Hall Decl, Ex. D, at Q. 6, 7). The biometric test requires a full venipuncture collection where two vials of blood are drawn. (Hall Decl., Ex. D at Q. 14). The blood of the employees and spouses will also be tested for cotinine to determine whether the employees or spouses smoke tobacco. (*Id*., Ex. D at Q. 16, 33).

All told, Honeywell intends to impose up to $2500 in direct surcharges that will be paid by the employee, as well as withhold up to $1,500 in contributions to the each individual employee's health savings account ("HSA"), if the employee and his or her spouse do not go through the biometric testing. First, the employee will be assessed a $500 "surcharge" if the employee does not go through the biometric testing. (*Id*., Ex. C, D at Q. 7). Second, the employee will be penalized with a $1,000 surcharge for supposed tobacco use if he or she foregoes the testing, even if the employee is a non-smoker and declines for other reasons. (*Id*., Ex. C, D at Q 9, 26). Third, the employee will be penalized an additional $1000 "tobacco surcharge" if his or her spouse does not go through the testing, again even if the spouse is a non-smoker and simply objects to the involuntary medical examination. (*Id*.). Honeywell has informed its employees that they and their spouses cannot avoid the $2,000 surcharge by submitting a physician's form attesting that they are nicotine-free. (Hall Decl., Ex. D., Q. 27, 29). The employees will be

charged the surcharges unless all of the biometric information on the physician's form is provided as well. (*Id.*). Fourth, only those employees who go through the biometric testing will receive a contribution to their health savings account ("HSA"), which can be up to $1,500. (Hall Decl., Ex C. at 1, Ex. D at Q. 6).

Honeywell contends that it will not see the results of this biometric information, but it reserves the rights to use it in the future. Honeywell earlier announced that it would be using information from the medical testing to establish goals for its employees, requiring employees considered "at risk" to reduce their blood pressure, cholesterol, or Body Mass Index to qualify for any 2015 HSA contribution. (*Id.*, Ex. B at Planning for 2015). In a more recent communication to employees, Honeywell announced that it has delayed this requirement, but said that it "has not made any final decisions regarding offering [such] incentives in 2016." (*Id.*, Ex. C at Planning for 2016; *see id.*, Ex. D at Q. 39). Honeywell is telling its employees that it is considering using the following health risk criteria in determining eligibility for incentives in 2016: (1) blood pressure greater or equal to 140/90; (2) total cholesterol greater than or equal to 240 or HDL (good cholesterol) less than 35; and (3) a body mass index (BMI) of 35 or more. (*Id.*, Ex. D, Q. 39). It does not say what these incentives (or penalties) might be.

Honeywell has started its testing and it is ongoing. Two employees filed charges with the EEOC regarding Honeywell's testing: Keenan Hall on October 16 and SueAnn Schwartz on October 21, 2014. (Hall Decl., Ex. A; Schwartz Decl., Ex. A). Both allege that Honeywell is violating the ADA and GINA by imposing penalties on its employees if they and their spouses do not go through the medical testing. (Id.). Both object to the testing. (Hall Decl. ¶¶ 6, 8, 9; Schwartz Decl. ¶¶ 6, 10).

In 2014, Hall carried insurance for himself and his wife through Honeywell. He currently pays about $4,718 annually for his health coverage. (*See* Hall Decl., ¶ 3) (pays $187 per two-week pay period). Both Hall and his wife object to the biometric testing. If they did not go through it, though, Hall would have had to pay additional health contributions of a $500 individual surcharge, a $1,000 "tobacco surcharge" for himself and another $1,000 for his wife. (Hall Decl. ¶7). He also would lose a $500 HSA contribution.

Hall cannot afford the penalties of not going through the biometric testing. (*Id*., ¶ 8). He believes he is being forced involuntarily to take the medical exam. (*Id*. at 9). He is scheduled for testing on October 28. Hall's wife will not go through the testing, and Hall will no longer be carrying her on his policy. (*Id*., ¶ 7(d)).

Schwartz went through the biometric testing with her doctor. (Schwartz Decl., ¶ 7). Schwartz pays $2,244 annually for her health benefit coverage with Honeywell. (*Id*., ¶3) (pays $178 per month). If Schwartz had not gone through the testing, Schwartz would have lost $2250 -- $1,500 from her own pocket in increased health benefit costs, and the $750 HSA contribution available only to persons taking the tests. (*Id*., ¶8). Schwartz went through the biometric testing because she felt forced by Honeywell's penalties. (*Id*., ¶10)

Other employees also object, and both Hall and Schwartz included class allegations in their charges. (Hall Decl. ¶10 and Ex. A; Schwartz Decl., Ex. A). The EEOC's investigation of these charges of discrimination will focus not only on the rights of Hall and Schwartz, therefore, but also on the rights of Honeywell's other U.S. employees.

The EEOC served Hall's charge and Schwartz's unperfected charge on Honeywell on October 16. (Vasichek Decl., Ex. A). EEOC District Director John P. Rowe notified Honeywell at that time that it appeared as though Honeywell's biometric testing program violated the ADA and GINA, and asked Honeywell to respond to the charges by October 22. (*Id*.) The EEOC also requested that Honeywell stop imposing penalties in connection with its biometric testing. (*Id*.) If Honeywell did not, the EEOC reserved the right to

proceed to Court to obtain preliminary relief to carry out the purposes of the Acts. (*Id.*) Honeywell responded by October 22, but was not willing to stop imposing penalties for individuals who did not want to participate in its biometric testing. (*Id.*, ¶3). The EEOC and Honeywell counsel conferred but were unable to resolve the matter. (*Id.*, ¶4)

IV. Argument

A. Jurisdictional prerequisites and standard of review

The EEOC has satisfied the jurisdictional requirements for seeking relief from this Court. The ADA and GINA incorporate Section 706(f)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f)(2), which authorizes the EEOC to seek preliminary relief if: a charge of discrimination has been filed; the EEOC has concluded following a preliminary investigation that prompt judicial action is necessary; and the defendant has been given notice of these proceedings as required by Fed. R. Civ. P. 65.[1] 42 U.S.C.

[1] Section 706(f)(2) provides:

> Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission . . . may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

§12117; 42 U.S.C. §2000ff-6(a)(1). All prerequisites have been satisfied. (Vasichek Decl., ¶¶2-4, Ex. A).

Where the EEOC has satisfied the prerequisites under Section 706(f)(2), courts are split as to the additional proof that the EEOC must show to obtain preliminary relief. Many courts, relying on the language of Section 706(f)(2) and the legislative history of that section, hold that the EEOC must establish only a *prima facie* case that defendant has committed or is likely to commit serious violations of the Act that will, if not enjoined, frustrate its purposes. These courts reason that where a statute embodies its own scheme for seeking preliminary relief, the traditional irreparable harm requirements are replaced with a "statutory presumption."[2]

Other courts, however, have concluded that the EEOC must satisfy the more traditional criteria for preliminary relief, including showing a likelihood of success on the merits or at least serious questions going to the merits, and a likelihood of irreparable injury either to the charging party or to the EEOC.[3]

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42 U.S.C § 2000e-5(f)(2).

[2] *See Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 (11th Cir. 1988); *EEOC v. Pac. Press Publ'g Ass'n,* 535 F.2d 1182, 1187 (9th Cir. 1976); *accord EEOC v. Cosmair, Inc. L'Oreal Hair Care Div.*, 821 F.2d 1085, 1090-91 (5th Cir. 1987) (extending the statutory presumption standard to retaliation cases under the ADEA).

[3] *See EEOC v. Anchor Hocking Corp.*, 666 F.2d 1037, 1043 (6th Cir. 1981);

Under the traditional burdens of proof, a claimant in the Eighth Circuit seeking a preliminary relief must satisfy the criteria set forth in *Dataphase Sys., Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). Under *Dataphase*, the relevant facts are: "(1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the issuance of an injunction is in the public interest." *Sanborn Mfg. Co. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 485-86 (8th Cir. 1993) (citing *Dataphase*, 640 F.2d at 114). These factors are consistent with the test for a preliminary injunction set forth in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *See Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 989 (8th Cir. 2011).

The EEOC satisfies both the statutory presumption test and the traditional *Dataphase* test for preliminary relief. The EEOC will discuss here only how it is entitled to relief under the *Dataphase* factors, however, because those factors are broader and essentially subsume those of the statutory presumption test. Regardless of which test applies, the EEOC is entitled to obtain preliminary relief.

EEOC v. Chateau Normandy, Inc., 658 F.Supp. 598, 601 (S.D. Ind. 1987); *EEOC v. Howard Univ.*, No. 83-879, 1983 WL 519 at *4 (D. D.C. June 14, 1983); *EEOC v. Lockheed Elec. Co.*, 461 F.Supp. 242, 243 (S.D. Tex. 1987).

B. The EEOC has satisfied the *Dataphase* factors.

1. *Dataphase* factor one: Based upon the EEOC's preliminary investigation, there is a substantial probability of success on the merits.

The EEOC's preliminary investigation indicates that Honeywell is violating the ADA and GINA by seeking unlawful medical examinations of employees and their spouses. Honeywell violates the ADA when it penalizes employees to induce them to go through medical examinations that are not job-related or consistent with business necessity. Honeywell violates GINA because it imposes penalties on its employees conditioned on obtaining medical information from the employees' spouses.

a. Honeywell is violating the ADA.

Under the ADA, an employer is prohibited from requiring medical examinations or making disability-related inquiries of current employees unless they are job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(A). *See EEOC v. Murray, Inc.*, 175 F.Supp. 2d 1053, 1065-66 (M.D. Tenn. 2001); *Scott v. Napolitano*, 717 F.Supp. 2d 1071, 1083 (S.D. Cal. 2010) (whether the exam is a periodic exam or a fitness-for-duty exam, the employer must show that it is job-related and consistent with business necessity). All employees – disabled and nondisabled – are protected from unauthorized examinations. *See Cossette v. Minn. Power & Light*, 188 F.3d

964, 969-70 (8th Cir. 1999). A "medical examination" under the ADA is a procedure or test that seeks information about an individual's physical or mental impairments or health. *Kroll v. White Lake Ambulance Auth.,* 691 F.3d 809, 815-16, 818 (6th Cir. 2012). An examination is job-related and consistent with business necessity when it is used to determine whether the employee can perform the essential functions of the job or can do so without posing a direct threat due to a medical condition. *Bates v. Dura Auto. Syst., Inc.,* 2014 WL 4192784 at *13 (6th Cir. 2014); *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA* Q & A 5 ("*Enforcement Guidance*") (available at http://www.eeoc.gov/policy/docs/guidance-inquiries.html) (accessed on October 23, 2014). The ADA makes an exception from this restriction for voluntary medical examinations that are part of an employee health program available to employees at that work site. Section 102(d)(4)(B), 42 U.S.C. §12112(d)(4)(B).

Here, Honeywell's biometric testing is a medical examination within the meaning of the ADA. *Enforcement Guidance* at Q & A 2 (tests for blood pressure and cholesterol are medical examinations); *Indergard v. Georgia-Pac. Corp.*, 582 F.3d 1049, 1056, 1060 (9th Cir. 2009) (a medical test is one capable of revealing an impairment). Because Honeywell's examinations are not an

effort to determine whether its employees are currently able to perform their jobs or pose a direct threat, Honeywell can only seek such examinations if the employees voluntarily participate. *See id*. Such testing is voluntary only "as long as an employer neither requires participation nor penalizes employees who do not participate." *Enforcement Guidance* at Q. 22.

Based on the EEOC's preliminary investigation, Honeywell's examinations are not voluntary. On the contrary, Honeywell seeks to compel employees to have medical examinations by imposing large financial penalties. The cost of the employee or his/her spouse of not going through the medical examinations is so substantial that cost cannot be said to be a mere nominal incentive. Indeed, Honeywell itself characterizes most of its financial penalties as "surcharges." (*See, e.g.,* Hall Decl., Ex. C, D). Honeywell is, therefore, requiring employee participation or penalizing those who do not participate in violation of the ADA.

Honeywell contends that its biometric testing complies with the terms of the Health Insurance Portability and Accountability Act ("HIPAA"), 29 U.S.C. § 1182, and the Affordable Care Act ("ACA"), 42 U.S.C. § 300gg-4 (2010). However, compliance with HIPAA and the ACA are not defenses to the ADA.[4] The preamble to the 2006 interim regulations on HIPAA stated that

[4] HIPAA and the ACA do not *require* employers to impose financial penalties in connection with wellness programs, and thus could not form the basis for a conflict of laws defense under the ADA.

compliance with HIPAA's provisions is not determinative of compliance with the ADA. 71 Fed. Reg. 75014-15 (Dec. 13, 2006). This qualification is repeated under the ACA. The 2013 final rulemaking on wellness programs under the ACA by the Department of Labor, IRS, and HHS explicitly provides that many other laws may affect wellness programs, including the ADA, and the ACA regulations are not determinative of compliance under the ADA. 78 Fed. Reg. 33157, 33168 (06/03/2013). The regulations promulgated by the various enforcement agencies for the ACA confirm that its provisions do not limit those of the ADA. *See* 26 C.F.R. § 54.9802-1(h) (IRS regulations) ("Compliance with this section is not determinative of compliance with . . . any other State or Federal law, such as the Americans with Disabilities Act."); 45 C.F.R. § 146.121(h) (HHS regulations) (same); 29 C.F.R. § 2590.702(h) (Labor regulations) (same).

Honeywell also argues that its testing is exempt from the ADA under the safe harbor in Section 501(c)(2), 42 U.S.C. § 12201(c)(2), relying on *Seff v. Broward County*, 691 F.3d 1221 (11th Cir. 2012). Section 501(c)(2) provides that the ADA does not restrict organizations from "establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are not based on or not inconsistent with State law." In *Seff*, the Court of Appeals

held that the employer's wellness program was a "term" of the employer's plan because it was available only to the plan enrollees and it was presented as part of the employer's group plan. The Court held that the wellness plan therefore fell within the safe harbor provision.

Seff's analysis is inconsistent with the language, the legislative history and the purpose of the safe harbor provision. Under its plain meaning, the safe harbor provision allows insurers and self-insured employers to establish benefit plans that are based on sound underwriting and classifying risks. *Barnes v. Benham Grp.,* 22 F. Supp. 2d 1013, 1020 (D. Minn. 1998) (employer did not violate ADA where insurance company required physicals to set initial premiums for group health policy). The legislative history makes it clear that this was the intended purpose of the safe harbor: according to the House Judiciary Committee, "The Committee added this provision because it does not intend for the ADA to affect legitimate classification of risks in insurance plans, in accordance with state laws and regulations under which such plans are regulated." H.R. Rep. 101-485(III), 101st Cong. 2nd Sess.1990, *reprinted in* 1990 U.S.C.C.A.N. 445, 493-94. The Senate Report similarly states that Congress included the provision "to make it clear that [the ADA] will not disrupt the current nature of insurance underwriting or the current regulatory structure for self-insured employers or of the insurance industry in sales,

underwriting, [and] pricing. S. Rep. No. 101-116, 77 (1989). *See Barnes v. Benham Grp., Inc.*, 22 F. Supp. 2d at 1020 (holding that the purpose of the ADA's safe harbor provision was to permit development and administration of benefit plans in accordance with accepted principles of risk assessment).

Honeywell is not protected by the narrow provisions of the ADA's safe harbor. Honeywell is not engaged in underwriting or any actuarial studies or any legitimate classification of risk through its biometric testing. The health benefits provided to the Honeywell employees remain the same if the employee is or is not biometrically tested. The only difference is that employees who are not tested are financially penalized. Although Honeywell may argue that it is seeking control future health benefit expenses, that intent is not the equivalent of performing an actuarial study to make legitimate classifications of risk. An employer could cast virtually any health-based inquiry as a cost-saving measure and seek immunity from the ADA's provisions, which is certainly not the intent of the ADA or its limited safe harbor provision. *See also EEOC, Interim Enforcement Guidance on the application of the Americans with Disabilities Act of 1990 to disability-based distinctions in employer provided health insurance*, Number 915.002 (6/8/93), available at http://eeoc.gov/policy/docs/health.html (accessed on October 27, 2014) (discussing 501(c) in the context of disability-based distinctions in

health benefit plans, and providing that employers can justify the distinctions if the treatment is based on legitimate risk classification and underwriting procedures).

Further, under *Seff*, an employer would always be able to justify a forced medical examination as long it included the examination as a provision in the health plan documents. It would render irrelevant the provisions of Section 102(d)(4)(B), 42 U.S.C. § 12112(d)(4)(B) – the provision that provides that an employer can conduct only *voluntary* medical examinations that are part of an employee health program. *See Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 575 (7th Cir. 2001) (rejecting employer's argument when it would render a term in the ADA to be mere surplusage).

Based on the EEOC's preliminary investigation, therefore, Honeywell is violating the ADA. None of the defenses that Honeywell could assert are meritorious. Because there is a strong likelihood of success on the merits of such a claim, the EEOC has satisfied the first *Dataphase* factor.

b. Honeywell is violating GINA.

GINA prohibits employers from acquiring genetic information of an employee. Section 202(b), 42 U.S.C. § 2000ff-1(b). Under the Act, an employee's genetic information includes information relating to the manifestation of a disease or disorder in family members. Section

201(4)(A)(iii), 42 U.S.C. § 2000ff-(4)(A)(iii). Family members under GINA include persons who are or become related to an individual through marriage, birth, adoption, or placement for adoption. 29 CFR § 1635.3(a)(1); *see* Section 201(3)(A), 42 U.S.C. §2000ff-(3)(A) (defining family member to mean a dependent as the term is used in Section 701(f)(2) of ERISA). It also includes up to fourth-degree relatives. *Id.*, § 1635.3(a)(2). In other words, spouses – who are related to the employee through marriage – are considered family members for purposes of GINA's protections.

Under GINA, employers are prohibited from offering incentives to an employee in order to obtain family medical history in connection with a wellness program. *Id.*, §1635.8(b)(2)(ii). In this case, Honeywell will contribute to the employees' HSA if the employee's spouse goes through the biometric testing, but impose a $1000 surcharge if the spouse does not. The contributions to the employees' HSAs and the imposition of the tobacco surcharge are incentives within the meaning of GINA. Because Honeywell's medical testing is designed to reveal, among other things, information relating to the manifestation of diseases such as hypertension and diabetes, Honeywell is seeking family medical history (or genetic information) within the meaning of GINA. Therefore, Honeywell violates GINA by imposing penalties (or

withholding inducements if that is the language preferred by Honeywell) unless the spouse undergoes the biometric testing.

Honeywell contends, however, the intent of GINA was to bar discrimination against employees based upon their genetic predisposition, and because spouses are not related by blood, GINA does not apply to their medical histories. *Cf. Poore v. Peterbilt of Bristol*, 852 F. Supp. 2d 727 (W.D. Va. 2012) (holding that GINA did not apply to plaintiff's claim that employer fired him because his wife had multiple sclerosis; wife's medical condition had no predictive value regarding plaintiff's genetic propensity to develop MS). Honeywell's argument is contradicted by the language of the statute itself. By defining "family member" to mean dependent under Section 701(f)(2) of ERISA, Congress explicitly expanded the definition of family members to include those related by marriage and adoption. Arguments similar to those by Honeywell were raised about including adopted family members during the rulemaking on GINA. The EEOC has rulemaking authority under GINA, Section 211, 42 U.S.C. § 2000ff-10, and as it explained then:

> However, GINA's express reference to section 701(f)(2) of ERISA and section 701(f)(2)'s explicit reference to dependents by adoption or placement for adoption makes it absolutely clear that Congress intended to include such persons in GINA's definition of "family member." Moreover, the acquisition of information about the occurrence of a disease or disorder in an applicant's or employee's adopted child could certainly result in the type of discrimination GINA was intended to prohibit. For example, an employer might use information it obtains

> about the current health status of an adopted child to discriminate against an employee because of concerns over potential health care costs, including increased health insurance rates, associated with the family member's medical condition. See S. Rep. No. 110-48 at 28 (indicating that spouses and adopted children were included in the definition of family member for this exact reason).

75 Fed. Reg. 68912, 68915 (Nov. 9, 2010).

Finally, Honeywell argues that its wellness program is part of a bona fide group health plan governed by Title I of GINA, and the EEOC (which enforces Title II) has no jurisdiction to question its terms. Honeywell is incorrect. Honeywell is acting as an employer and seeking to obtain genetic information from its employees. Title II by its very terms governs that relationship. Indeed, Title II of GINA explicitly discusses an employer's restrictions on requesting genetic information in connection with a wellness program. *See* Section 202(b)(2), 42 U.S.C. § 2000ff-1(b)(2).

Based upon the EEOC's preliminary investigation, therefore, there is a substantial likelihood that Honeywell is violating the ADA and GINA by imposing penalties upon employees who do not elect to undergo biometric training, and by imposing penalties to obtain medical information from the employee's spouses.

2. *Dataphase* factor two: There is no adequate remedy at law and irreparable harm will occur if Honeywell is not enjoined.

If preliminary relief is not granted, both the EEOC and Honeywell's employees will suffer irreparable harm. Serious violations of the ADA and GINA will likely occur, thereby interfering irrevocably with the EEOC's ability to enforce the statute and prevent violations. Employees will lose the fundamental privilege under the ADA and GINA to keep private information private.

EEOC is the federal agency charged with enforcing the ADA and GINA. *See, e.g.*, *Gen. Tel. Co. of the N.W. v. EEOC*, 446 U.S. 318, 326 (1980) (EEOC "is guided by the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement"). The statutes confer upon the EEOC the authority to investigate charges of discrimination, issue determinations on whether there is reason to believe the statutes have been violated, and if so, attempt to resolve the matter through informal methods of conciliation. Section 706 of Title VII, 42 U.S.C. § 2000e-5.

If Honeywell is allowed to continue in its medical testing program, the EEOC will not be able to carry out the purposes of the statutes as intended by Congress. *See id.*, Section 706(f)(2) of Title VII, 42 U.S.C. § 2000e-5(f)(2) (EEOC authorized to seek injunction when it concludes one is necessary to carry out the purposes behind the statutes). It will be forced to watch while Honeywell violates the statutes that the EEOC enforces, even though charges

were filed challenging Honeywell's program. The EEOC's ability to enforce the Acts, including by preventing discrimination from occurring, will be irreparably harmed.

Moreover, Honeywell's employees will lose the right to decide without coercion whether to participate in Honeywell's biometric testing. The employees face substantial penalties if they do not undergo the testing, and Honeywell is affirmatively telling them that these penalties are legal. (Hall Decl, Ex. D, at Q. 36 (Q: Is it legal for Honeywell to impose a penalty if I do not complete a biometric screening? A: Honeywell's biometric screening requirements and wellness program have been carefully designed to be compliant with applicable law.") The employees are in an untenable position. It is not sufficient to say that those who forego testing can recover Honeywell's imposed penalties in a later legal action; in the face of such threatened financial penalties and Honeywell's assertions of legality, reasonable employees will almost certainly feel forced to take the tests, and they subsequently can never be placed back into the position of being allowed to choose voluntarily whether to go through the test.

The tests themselves are intrusive – requiring two vials of blood which will be analyzed by Honeywell's medical vendor. Even if Honeywell never sees the results or acts on its threat to use the results this next policy year to judge

risk factors, its employees should not be compelled to forego their rights to say "no" to these exams. "One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic makeup." *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) (holding that a state agency and laboratory violated the constitutional right to privacy by conducting unauthorized medical and genetic testing of applicants);[5] *cf. Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 612-17 (1989) (recognizing both that "chemical analysis of [an individual's blood] sample to obtain physiological data is a further invasion of the tested employee's privacy interest" and that "chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested . . . itself implicates privacy interests"); *Anderson v. City of Taylor*, Civ. No. 04-74345, 2005 WL 1984438 at *6 (E.D. Mich. August 11, 2005) (holding that employer's wellness program, which included a mandatory blood draw, was unconstitutional; "The Court finds that the mandatory blood draws instituted by Defendants, despite the fact that they were intended to benefit Plaintiffs, violates their personal

[5] The court in *Norman-Bloodsaw* dismissed the plaintiffs' ADA claims on the grounds that the employer's testing was being conducted at the post-offer, pre-employment stage, where the ADA does not restrict the medical exams to being job-related and consistent with business necessity. 135 F.3d at 1273. Here, the EEOC is challenging the medical testing of current employees, which the ADA permits only where job-related and consistent with business necessity.

privacy rights protected by the Fourth Amendment."). Once this right to medical privacy is given up involuntarily, that right to be left alone can never be regained and cannot be fully remedied by money.

Honeywell will argue that no irreparable harm exists because one of the persons filing a charge with the EEOC has submitted to the biometric testing and the other is scheduled to go through the exam in the near future. This argument ignores the rights of all the other Honeywell employees who are being subjected to the same compulsion as the charging parties here, neither of whom wanted to go through the testing but both of whom felt that they had no real choice. It is bad enough that the EEOC could not prevent the harm to these employees who lost their rights to choose voluntarily; it would irreparably harm the EEOC and the remaining employees who still are in a position to choose if Honeywell's involuntary medical testing is not stopped pending the disposition of the charges before the EEOC.

3. *Dataphase* factor three: Honeywell will face no hardship by issuance of the preliminary relief.

In considering the "balance of harms" factor of *Dataphase*, the Court must examine "the balance between the harm [to the movant] and the injury that the injunction would inflict on other interested parties, and the public interest." *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926, 928-29 (8th Cir. 1994). Here, no party, and particularly not Honeywell, will be

harmed by the issuance of a preliminary injunction. The EEOC is not seeking to stop Honeywell's testing. Honeywell can continue to request its employees to take the examination, and those who want to participate can do so. Only the penalties for not taking the exam will be suspended.

All the EEOC seeks as relief is to "freeze" Honeywell's imposition of surcharges and withholding of its HSA contribution for the spouse's refusal to go through the medical testing until a decision can be reached on the merits. *See Branstad v. Glickman*, 118 F. Supp. 2d 925, 943 (N.D. Iowa 2000) ("It is also true that the preliminary injunction would only maintain the status quo as it existed during the administrative appeals and the Branstads should not be effectively denied their right to judicial review."). Honeywell's individual and tobacco surcharges on employees who do not take the biometric testing are new to this upcoming policy year. The EEOC is not seeking to prevent Honeywell from offering to conduct biometric testing on its employees and their spouses as long as that offer is free from financial penalties, and accords with the other requirements of the ADA and GINA.

Honeywell contends, however, that any preliminary injunction would disrupt its open enrollment process, and require it to both unwind the administration and rewrite the terms of its health benefit plan. This is hyperbole. Honeywell's open enrollment season can continue. Its testing can

continue. Its health plan can continue. It just cannot do what the law says it cannot do – fine its employees who do not want to voluntarily submit to its medical testing.

4. *Dataphase* factor four: The interests of the public support granting preliminary relief.

Viewing the public's interest in the context of the purposes and interests that the ADA and GINA were intended to serve, *Branstad*, 118 F.Supp. 2d at 943, the public has an enormous interest in the proper application of these statutes. Both Acts signaled a revolutionary change in the manner and extent to which employers could obtain information about applicants', employees' and family members' medical conditions. With the ADA, Congress concluded that persons with disabilities were being excluded from employment based upon myths, fears and stereotypes. 29 C.F.R. pt. 1630, Appendix 1630.2(l). Congress determined that one mechanism to combat the exclusion of persons with disabilities from the world of employment was to restrict the employers' ability to obtain and misuse information relating to the employee's medical condition. Chai F. Feldblum, *Medical Examinations & Inquiries Under the Americans With Disabilities Act: A View from the Inside*, 64 Temple L.Rev. 521, 531-41 (1991). Under GINA, Congress believed that the possibility of discrimination based on genetic information, including family medical history, was so pernicious that it barred employers entirely from seeking to obtain it.

Payne, *Genetic Information Nondiscrimination Act of 2008: The Federal Answer for Genetic Discrimination,* 5 J. Health & Biomedical L. 33 (2009); Schlein, *New Frontiers for Genetic Privacy Law: The Genetic Information Nondiscrimination Act* of 2008, 19 Geo. Mason U. Civ. Rts. L.J. 311 (Spring 2009).

The public interest, codified in ADA and GINA, supports issuance of the preliminary relief. It is essential that the public be confident that the terms of the ADA cannot be flouted, and that their interests in the privacy of their medical information will be protected. Moreover, the filing of this action by the EEOC reflects the belief of the chief federal enforcement agency that preliminary relief is necessary to effectuate the privacy interests reflected in the ADA and GINA. *See EEOC v. Waffle House,* 534 U.S. 279, 291-92 (2002) (EEOC represents the public interests in enforcing the ADA); *Gen. Tel. Co. of the N.W.*, 446 U.S. at 326 (EEOC represents public interest under Title VII).

Honeywell argues that there is great public interest supporting wellness programs as evidenced by the ACA, and that granting a preliminary injunction would undermine the goals of the ACA. As noted earlier, however, the ACA's provisions are not determinative of rights under the ADA and GINA. Moreover, the public interest in lawful wellness plans supports issuance of preliminary relief here. A preliminary injunction would allow the

EEOC – the enforcement agency of the ADA and GINA – to investigate and enforce the provisions of those statutes without the ongoing irreparable harm to its processes or Honeywell's employees.

V. Conclusion

Honeywell's imposition of financial penalties upon employees who do not go through its medical examinations must be suspended immediately pending final disposition of the charges of discrimination filed with the EEOC. Based upon the EEOC's preliminary investigation, Honeywell's proposed medical testing is not voluntary and seeks family medical history, thus violating both the ADA and GINA. The *Dataphase* factors support issuance of a TRO and a preliminary injunction, because there is a substantial likelihood of success on the merits, irreparable harm will occur if preliminary relief is not granted, Honeywell will suffer little damage through the issuance of the injunctive relief, and the public interest supports issuance of the injunctive relief.

Therefore, because the facts and law all support issuance of an injunction, the Court should enter a TRO and a preliminary injunction that:

(1) Requires Honeywell to contact all employees to advise them that Honeywell will not seek to impose any penalty or cost upon them if they decline to go through Honeywell's biometric testing;

(2) Enjoins Honeywell from imposing any penalty or cost upon any employee who declines to participate in Honeywell's biometric testing;

(3) Enjoins Honeywell from reducing any contribution to a health savings account or imposing any surcharge on an employee because the employee declined to undergo biometric testing; and

(4) Enjoins Honeywell from imposing any penalty or cost upon an employee because the employee's spouse has not participated in biometric testing.

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