UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LISA KWESELL; CHRISTINE TURECEK; AND JASON SCHWARTZ, individually and on behalf all others similarly situated,	:	Civil action no.: 3:19-cv-01098 (KAD)
Plaintiffs,	:	
v.	:	
YALE UNIVERSITY,	:	
Defendant.	:	July 3, 2020

DEFENDANT'S REPLY MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (ECF NO. 44) AND IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND/OR TO DISMISS IN PART FOR LACK OF STANDING (ECF NO. 54)

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Plaintiffs acknowledge the "generosity," "affordability," and "high[]quality" of Yale's employee health benefits package, PB 24,[1] but argue that the HEP—which is an integral part of that package—must nevertheless be found unlawful. Under Plaintiffs' view, requiring all employees to contribute to the cost of their healthcare is fine, but offering a choice to pay a modest opt-out fee or undertake a handful of recommended health actions is not "voluntary." Plaintiffs' interpretation is inconsistent with the longstanding common-law meaning of the term "voluntary" and conflicts with other laws expressly permitting financial incentives in wellness programs. Plaintiffs' claim for a violation of Title II of GINA also fails for multiple reasons: (1) a group health plan's disclosure of data to a business associate is not an impermissible "acquisition"; (2) the HEP is operated by YGHP, which is separate and distinct from Yale, and thus governed by Title I (not Title II); and (3) Plaintiffs lack standing because they assert no injury traceable to Yale's conduct. Finally, even if Plaintiffs stated a viable GINA claim, damages would not be available. Yale is thus entitled to summary judgment.

ARGUMENT

I. Yale's Definition of Voluntary Comports with the Plain Text, the Common-Law Backdrop, and Other Laws Governing Employee Wellness Programs.

Yale's opening brief contrasted Plaintiffs' novel definition of "voluntary" ("divorced from financial considerations") with the longstanding plain meaning of that word ("done by design or intention"). OB 23-31. Plaintiffs offer no response to leading dictionary definitions of "voluntary" and reject the importance of the common-law backdrop against which Congress legislated. Nor do they contest that "no case anywhere" has held "that an employee wellness program with financial incentives constitutes employment discrimination under the ADA in

[1] This brief uses the same abbreviations as Yale's opening brief. Emphasis is added and internal quotations omitted unless otherwise noted. Plaintiffs' opening brief is referred to as "POB"; Plaintiffs' opposition/reply brief is referred to as "PB"; and Yale's opening brief is referred to as "OB."

violation of 42 U.S.C. § 12112(d).” OB 25-26.

They want *this* Court to be the first court ever to make that holding—and they recognize that a victory here would disrupt employee wellness programs nationwide. *See* PB 23. They offer scant support for their big request: assertions about what voluntary “must mean,” evasiveness or misunderstanding of what the ACA, ERISA, and HIPAA allow, and an upside-down view of regulatory deference where courts defer to ambiguous bits of informal guidance issued without notice or comment and ignore regulations issued after notice and comment.

A. The “Context of Work” Supports Yale’s Interpretation of Voluntariness. Plaintiffs contend that voluntariness must be defined in the “context of work.” PB 9. Work is a context bounded by contract law.[2] Congress legislates workplace rules against this backdrop of contract law. Absent indication to the contrary, Congress “intend[s] to retain the substance of the common law,” *Kirtsaeng v. John Wiley & Sons*, 568 U.S. 519, 538 (2013), “*particularly* when an undefined term has a settled meaning at common law,” *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 447 (2003). While Congress can deviate from the common law, Plaintiffs offer nothing in the text, structure, or history of 42 U.S.C. § 12112(d) showing intent to depart from the common-law understanding that contracts—including employment contracts—represent voluntary transactions.

Naturally, a contract does not represent a voluntary agreement if formed through duress or fraud. Those common-law touchstones define a lack of voluntariness. Congress legislated against that common-law backdrop. Employers cannot force employees to participate in medical

[2] All employment occurs by agreement, i.e., by contract (written or oral). Plaintiffs contend that workplace choices are involuntary unless “divorced from financial consideration.” PB 3. That assertion has no support. Plaintiffs acknowledge that people work for “financial consideration” but deny that their definition of voluntariness compels the conclusion that people who work for money are doing so “involuntarily.” PB 12. They offer no way to preserve their definition without reaching that conclusion.

tests or exams in employee wellness programs, or trick them into participating; the duress or fraud would negate any "voluntary" participation. But Plaintiffs do not allege duress or fraud. They allege a $25/week incentive cost for non-participation. OB 27-28.

Plaintiffs run from the common-law "context of work" toward employment statutes that they think bolster their interpretation of voluntariness. They lean most heavily on the FLSA, or more precisely a regulation interpreting the FLSA.[3] That regulation has nothing to do with employee wellness programs or even incentives. It requires employers to pay employees for attending training sessions if attendance is "not voluntary," defined under the regulation to include when employees are "led to believe that [their] present working conditions . . . would be adversely affected by nonattendance." 29 C.F.R. § 785.28. The regulation distinguishes paid work from unpaid non-work; it does not help explain whether an incentive makes a wellness program involuntary under another statute.

Plaintiffs cite another workplace statute, the Older Workers Benefit Protection Act (OWBPA), which like the FLSA is unrelated to wellness programs. Unlike the FLSA, it at least contains the word "voluntary" in the statutory text. PB 11 n.3.[4] Plaintiffs point to an OWBPA rule involving the waiver of age discrimination claims in severance agreements. They note that even if the rest of a severance agreement is enforceable, the waiver is not enforceable unless specific criteria are met—and they argue that this means that voluntariness under the ADA and GINA should not be understood to track common-law contractual notions of voluntariness. *Id.* What they fail to mention is that the OWBPA—unlike the ADA or GINA—defines "voluntary" with great specificity, augmenting the ordinary requirements of contract law with additional

[3] The regulation reflects the judgment of only the Department of Labor, which administers the FLSA. It sheds no light on Congressional intent in other statutes (ADA and GINA), or on how the EEOC interprets those other statutes. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

[4] The correct citation is 29 U.S.C. § 626(f); Plaintiffs erroneously cite (nonexistent) § 633(f).

requirements. 29 U.S.C. § 626(f).[5] Notably, the OWBPA and ADA were passed by the *same Congress* in the *same year*. Yet when legislating wellness programs in the ADA, Congress chose *not* to add requirements to the common law when using the word "voluntary." It made different choices to achieve different ends: incorporating the common-law definition of voluntariness in the ADA, and creating a souped-up standard of voluntariness in the OWBPA.

Other federal statutes addressing the "context of work," likewise understand a "voluntary" act as an act done by choice, not "divorced from financial considerations." Under the ADEA, for instance—which Plaintiffs cite for other purposes—older workers cannot make age discrimination constructive discharge claims if they accepted a "voluntary early retirement incentive plan." 29 U.S.C. § 623(f)(2)(B)(ii). As the ADEA does not provide a souped-up definition of voluntariness, the common-law definition applies, and courts gauge voluntariness against the traditional doctrines of fraud and duress. *Auerbach v. Bd. of Educ. of the Harborfields Cent. Sch. Dist.*, 136 F.3d 104, 113 (2d Cir. 1998) ("To determine whether a retirement plan is voluntary, a court must consider whether, under the circumstances, a reasonable person would have concluded that there was no choice but to accept the offer."); *see also, e.g.*, *Parker v. Chrysler Corp.*, 929 F. Supp. 162, 166-67 (S.D.N.Y. 1996) (finding plaintiff's choice to accept

[5] Even under this provision, courts look at both the "enumerated requirements" and whether common law notions of voluntariness are satisfied. *See Palmer v. Salazar*, 324 F. App'x 729, 733 (10th Cir. 2009) ("In addition to the enumerated requirements in § 626(f)(1), an ADEA waiver is not knowing and voluntary [under the OWBPA] if procured by fraud, duress, or mutual mistake."); *Griffin v. Kraft Gen. Foods, Inc.*, 62 F.3d 368, 373-74 (11th Cir. 1995) ("[N]onstatutory circumstances, such as fraud, duress, or coercion . . . may render an ADEA waiver not 'knowing and voluntary.'"). Importantly, "financial pressure to sign a waiver is insufficient to establish that it was executed involuntarily." *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281, 295 (3d Cir. 2003); *see also Cassiday v. Greenhorne & O'Mara, Inc.*, 220 F. Supp. 2d 488, 492 (D. Md. 2002) (holding that "one's personal economic burdens resulting from the loss of a job, should not constitute 'duress'" under OWBPA, and noting that plaintiff did not allege that defendant "physically threatened her or otherwise misled or duped her"), *aff'd,* 63 F. App'x 169 (4th Cir. 2003); *Foster v. Mountain Coal Co.*, 61 F. Supp. 3d 993, 1005-06 (D. Colo. 2014) (rejecting claim of duress where plaintiff alleged "he was under economic pressure" because "he feared losing health insurance benefits," because "economic pressure alone is insufficient to establish a claim of duress"). Plaintiffs' claims here are likewise of economic pressure, not duress.

early retirement "voluntary" despite assertion that he "signed it under duress or coercion," because "a contract is voidable on the ground of duress" only if a party "was forced to agree to it by means of a wrongful threat precluding his exercise of free will" and noting that "[t]he fact that the choice offered is between inherently unpleasant alternatives . . . does not by itself establish that a resignation was induced by duress or coercion").

Likewise, the Worker Adjustment and Retraining Notification (WARN) Act requires employers to provide 60 days' notice to employees of impending "employment loss" due to a workplace closing. It defines "employment loss" as a termination "other than a discharge for cause, *voluntary* departure, or retirement." 29 U.S.C. § 2101(a)(6). Under the WARN Act, as elsewhere in the "context of work," financial incentives do not make choices involuntary. In *Ellis v. DHL Express Inc.*, 633 F.3d 522 (7th Cir. 2011), for instance, the court gave deference to an agency that interpreted "*voluntary* departure" consistent with the common-law context of work. The agency "explained that 'incentive programs, including incentive retirement programs and voluntary layoffs' should typically be considered voluntary departures within the meaning of the WARN Act so long as the circumstances surrounding them comport with *traditional legal notions of voluntariness*," such as duress. *Id.* at 526. In short, "worker participation in incentive programs is generally considered voluntary unless the employer improperly induced workers to leave their jobs, either by creating a hostile or intolerable work environment or by applying other forms of undue pressure or coercion." *Id.* at 527. Offering financial incentives does not make departures involuntary. Under the WARN Act, "a difficult decision" is not involuntary. *Id.* Rather, it might be involuntary if the employer gave workers "incomplete information" (fraudulent omission) or "somehow strong-armed them into signing the release forms and accepting the severance packages against their will" (duress). *Id.*

Here, as in the above employment-law contexts, the common-law doctrines of fraud and duress protect against absurd interpretations of voluntariness. There is no risk that "the exception will swallow the rule," or that the voluntariness requirement will be "meaningless." PB 14. In short, Congress legislates in the "context of work" with the common law of contract in mind. It deviates from the common law when it chooses (as in the OWBPA), but in most federal employment statutes—including the ADEA, WARN Act, ADA and GINA—it uses voluntariness in its traditional sense, protecting choice through the doctrines of fraud and duress.

B. The Context of "Bodily Autonomy" Lends No Support to Plaintiffs. Plaintiffs also contend that voluntariness must be defined in the context of "bodily autonomy." PB 9. It is not entirely clear what they mean by that, but American law directly and frequently engages with questions of bodily autonomy in the criminal context, where constitutional and statutory boundaries define voluntary searches (including body searches, like blood tests) and plea bargains (leading to imprisonment of the body). *See* OB 28-29. Plaintiffs seek to sidestep the Supreme Court's definitions of voluntariness by noting that in the criminal context "all interactions are inherently pressure-filled" and "implicate[] one's freedom." PB 10. That is true but cuts the other way. If people facing jail—the greatest loss of "bodily autonomy" short of death—act voluntarily *despite* the much-greater pressures exerted by police and prosecutors, *see* OB 28-29, then people facing a $25 weekly incentive cost cannot be said to act *in*voluntarily.[6]

C. Plaintiffs' Interpretation of "Voluntary" Makes No Sense in the Broader Context of Federal Regulation of Wellness Programs. Plaintiffs ask this Court not just to ignore plain

[6] Plaintiffs note in passing that criminal-law voluntariness is an individualized question of fact. OB 10. Even if voluntariness under the ADA and GINA sometimes entailed questions of fact, the relevant facts here are undisputed, *see* Pls.' L.R. 56(a)(2) Statement ("LR56") ¶¶ 10-11, 18-20, 39-43, making the legal significance of those facts appropriate for resolution at summary judgment. *See U.S. v. Haak*, 884 F.3d 400, 408-09 (2d Cir. 2018).

text, common-law backdrop, and on-point case law, but also to rip the ADA and GINA from the broader regulatory context of employee wellness programs. *See* OB 4-10, 26-27, 31-37; *see also Wachovia Bank, Nat'l Ass'n v. Schmidt*, 546 U.S. 303, 316 (2006) ("[S]tatutes addressing the same subject matter generally should be read as if they were one law."). The ACA, ERISA, HIPAA, and their implementing regulations set careful rules for operating employee wellness programs. Congress unequivocally supported such programs and approved of financial incentives for participation far higher than those present in the HEP.

The ACA endorses employee wellness programs, sets an incentive limit of 30% of premium cost for outcome-contingent programs, and sets no limit at all on incentives for purely participatory programs like the one here. 42 U.S.C. § 300gg-4(j)(2),(3). HIPAA likewise endorses employee wellness programs, and it too sets no limit on incentives for participatory programs. 29 U.S.C. § 1182(b)(2)(B) (allowing lower health costs "in return for adherence to programs of health promotion and disease prevention"); 29 C.F.R. § 2590.702(f). If this Court endorsed Plaintiffs' novel definition of "voluntary" under ADA and GINA, it would erase those portions of the ACA and HIPAA. The ACA and HIPAA directly address financial incentives for wellness program. The ADA and GINA do not. It would be unreasonable to read less-specific statutes to nullify portions of more-specific statutes.

Plaintiffs cannot change that reality by arguing that "[t]he ACA and the civil rights laws regulate different entities: the ACA regulates group health plans (GHPs), while the civil rights laws regulate employers." PB 16. *All* GHPs are, by definition, sponsored by an employer (or a union). *See* 29 U.S.C. § 1191b(a)(1); 29 U.S.C. § 1002(1). And employers offer wellness programs through GHPs, as with the HEP here. *See* Ex. 1 (HHS, *HIPAA Privacy & Security & Workplace Wellness Programs*). If, as Plaintiffs contend, the ADA and GINA prohibited all

wellness program incentives in employer-sponsored GHPs, then the ACA's carefully calibrated rules permitting incentives would mean nothing. Those would not be "overlapping rules" from different jurisdictions or different agencies (PB 18). They would be nullifying rules. Plaintiffs' position requires accepting that Congress—aware of the ADA and GINA—passed an entire section of the ACA purporting to permit wellness program incentives, even though the word "voluntary" in the ADA and GINA bans such incentives in all employer-sponsored GHPs.[7]

D. Existing Guidance Supports Yale's Position. While common-law duress sets the ceiling for any financial incentives, the HEP incentives fall well below any ceiling ever set by any statute or regulation. The lowest ceiling ever set was 20% of health plan coverage costs—and that applied only to health-contingent programs, not participatory programs like the HEP. *See* OB 8, 11. Plaintiffs advocate for a new definition of "voluntary" far more severe than any definition ever adopted by Congress or an agency in the domain of wellness programs.[8]

They rest their case on a 2000 EEOC guidance document stating that wellness programs cannot "penalize" workers, but neither the document nor Plaintiffs' gloss on it represents EEOC's "longstanding position," PB 22, and it deserves no deference in interpreting the ADA or GINA. Plaintiffs note that *Skidmore* lets courts rely on agency statements that never went through formal rulemaking, PB 21, but *Skidmore* warns that such statements "lack[] power to control" and that their weight depends on their "thoroughness," "validity of . . . reasoning," and

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[7] Plaintiffs are wrong that the "ACA *only* addresses health-contingent programs." PB 16. The ACA explicitly addresses both health-contingent and participatory programs. *See* 42 U.S.C. § 300gg-4(j)(1) (distinguishing the two types of programs). While health-contingent programs cannot use incentives larger than 30% of premium cost, *id.* § 300gg-4(j)(3), the ACA places no limit on incentives in purely participatory programs, *id.* § 300gg-4(j)(2). That distinction hurts, rather than helps, Plaintiffs' argument. As Plaintiffs concede (PB 16), the HEP is a participatory program, which the ACA treats more favorably.

[8] Plaintiffs argue that the 2016 Rules had no effect in 2018 even though they were not withdrawn until late December 2018. While judicial decisions are "*presumptively* retroactive," PB 23, that presumption falls away where, as here, a court issues an explicitly non-retroactive ruling. OB 38.

"consistency with earlier and later pronouncements." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The document here offers none of those. EEOC letters and meetings show the agency lacked any position before 2016. OB 8-10.[9] At best, the document's single unexplained use of the word "penalize" reiterates that medical tests and inquiries in wellness programs must be voluntary. It does not answer the question whether an incentive to participate makes an otherwise free choice into something "involuntary," "penalized," "coerced," or another synonym—let alone provide a thorough and valid explanation of its reasoning. In any event, Congress and several agencies have already answered the question, allowing incentives. OB 5-8.

E. Union Bargains Manifest Voluntary Consent. Plaintiffs acknowledge that their Unions proposed the HEP to save members from paying health insurance premiums or deductibles and that the Unions negotiated the specifics of the Program, including the list of basic preventive care and screenings and the $25 fee for those who opt out of the care and screenings. They argue, though, that when they choose to have an exam or test instead of paying the opt-out fee, that choice is "involuntary" despite the CBA.

Plaintiffs deny that the CBA can manifest the Union members' voluntary participation, relying primarily on *Spoerle v. Kraft Foods Global, Inc.*, 626 F. Supp. 2d 913 (W.D. Wis. 2009). *Spoerle* has nothing to do with the ADA, GINA, employee wellness programs, incentives, or voluntariness.[10] It noted that the FLSA does not require employees to be paid for time spent donning and doffing "clothes" if a CBA says that the time is not compensable. There, a CBA defined "clothes" to include certain protective gear. *Spoerle* observed that the question was what

[9] The 2000 guidance "coexisted peacefully with the pre-ACA twenty percent regulatory incentive limit," as Plaintiffs put it, PB 21, precisely because incentives had long been a part of employer-sponsored wellness programs and were, until AARP advanced its radical reinterpretation of the 2000 guidance, widely understood as consistent with the 2000 guidance. *See* OB 4-5.

[10] Plaintiffs also cite two cases that predate *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). PB 5. Each case's holding was rejected in *Pyett*.

Congress meant by "clothes," not how the parties defined it in their CBA. *Id.* at 915-17.

Spoerle does not help Plaintiffs. First, its observation was dicta: the portions Plaintiffs cite involved the court's analysis of the definition of "clothes" under the FLSA, but it ultimately did not decide the issue, ruling instead on the basis of state law. *Id.* at 918.[11] Second, its observation is not germane. *Spoerle* explored whether parties could use a CBA to redefine what Congress meant by "clothes." It did not ask whether the bargained-for choices made in a CBA are "voluntary." The difference is meaningful. Parties cannot redefine a statutory term like "clothes" by defining it in their contract. The question here, though, is whether, when parties enter into a CBA, they agree to something "voluntary." The question is whether the contract *manifests* the voluntariness, not whether it *defines* the statutory term. A CBA *is* the manifestation of the parties' voluntary agreement, absent duress or fraud.

Plaintiffs cannot escape the fact that unions can give their members' consent to searches and examinations. OB 20-21. They seek to minimize that power by limiting it to drug tests, asserting that "employees have no expectation of privacy when using illegal drugs." PB 7. They cite nothing for that assertion; the Supreme Court has long recognized that urine and blood tests "can reveal a host of private medical facts about an employee," "intrude[] upon expectations of privacy," and are subject to Fourth Amendment scrutiny. *Skinner v. Railway Lab. Execs. Ass'n*, 489 U.S. 602, 616-17 (1989). Yet unions can provide their members' consent to searches and examinations in a CBA.[12]

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[11] On appeal, the Seventh Circuit rejected the definition of clothes pressed by the plaintiffs. *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427, 428 (7th Cir. 2010) (characterizing the argument as a "loser").

[12] Plaintiffs misleadingly imply (PB 7 n.1) that the doctrine recognizing unions' power to provide their members' consent to searches and examinations was overruled by *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). *Janus* involved compelled speech under the First Amendment, not the Fourth Amendment reasonableness of searches authorized by a bargaining agent. Plaintiffs cite nothing questioning the Second and Third Circuit cases cited at OB 20-21. They also note that ADA permits involuntary drug testing (PB 7-8) but do not explain how that limits union power to provide member consent to searches.

The Unions' power to offer their members' consent to HEP does not dissipate merely because unions, like employers, cannot force workers to have medical exams or disclose medical information. That restriction stops unions from discriminating against members on the basis of medical or genetic information, e.g., by denying them membership because it will cost too much to give them health care. It does not preclude a union from serving its traditional role of bargaining with employers *on behalf of* its members. The Unions did that here, proposing and agreeing to HEP as a way to provide members zero-premium/zero-deductible health care.

II. Plaintiffs' GINA Claims Fail for Multiple Reasons.

Plaintiffs do not assert any GINA claim relating to their own medical data or participation in HEP. Their GINA claims arise solely from married union employees who enrolled spouses in YGHP. Those employees claim that the medical history of their spouses is reflected in claims data that YGHP records and shares with its business associate HealthMine to administer the Program; and might be discussed by spouses with a nurse during coaching. Their GINA claims turn on this question: does coaching these spouses or monitoring their claims data constitute an "acquisition" of Plaintiffs' *own* "genetic information" in a way that concretely harms Plaintiffs and violates Title II of GINA, entitling Plaintiffs to damages and other remedies? The answer is no. First, no "acquisition" of information occurs when a GHP plan like YGHP merely shares its own claims data with a business associate (HealthMine) to administer aspects of the plan under a HIPAA-compliant agreement. Second, even if spousal medical history were "acquired" in connection with the Program, it is not acquired by Yale, as would be required for Plaintiffs to state a claim under Title II of GINA. At most, the information is "acquired" by YGHP, which is separate from Yale and governed by Title I. Third, Plaintiffs do not allege any non-conjectural injury to themselves traceable to the claims data monitoring or health coaching and capable of establishing Article III standing. Finally, even if all those deficiencies could be overcome,

Plaintiffs would not be entitled to damages.

A. HealthMine's Access to YGHP Claims Data Is Not an "Acquisition." There is no dispute that claims data originates with YGHP. Like countless GHPs, YGHP retains business associates to perform tasks involved in plan administration. ERISA and HIPAA expressly permit GHPs to share information with business associates to perform a variety of functions, including claims payment, data analysis, care coordination, and cost-lowering programs. *See* OB 44-45; 42 U.S.C. §§ 1320d-1 to 1320d-9; 45 C.F.R. §§ 164.502(e), 164.504(e)-(f); 164.506. Agreed-upon written protocols protect privacy, and information is not shared outside the business associate relationship. All of this is true whether or not a GHP also administers a wellness program.

GINA explicitly avoids interfering with this longstanding, carefully drawn HIPAA framework for a GHP's use of health information. 42 U.S.C. § 2000ff-5 ("[T]his title does not prohibit a covered entity [such as a GHP] under [HIPAA] regulations from any use or disclosure of health information that is authorized for the covered entity under such regulations."). And for good reason. If Plaintiffs' theory were adopted, every time a GHP shared health information with a business associate, it would be a GINA-prohibited "acquisition" (at least if a spouse was involved), effectively making HIPAA business associate relationships unlawful.

Plaintiffs contend that Yale "conflat[es] involuntary *acquisition* of genetic information and unlawful *disclosure* of genetic information," that those two things are "entirely independent," and that their motion pertains only to acquisition. PB 28. It is Plaintiffs who confuse the issues. There is no dispute that the data at issue is YGHP's data, and GINA expressly permits GHPs to make HIPAA-compliant uses of information and to share information with business associates. Plaintiffs apparently think that an "acquisition" occurs when HealthMine receives the information from YGHP. But it would be nonsensical to interpret GINA to prohibit

the business associate from "acquiring" the very information that HIPAA allows GHPs to share.

Further, the ACA relies upon GHPs' ability under HIPAA to collect information about plan enrollees. The ACA authorizes GHPs to create wellness programs "based on an individual satisfying a standard that is related to a health status factor," where "health status factor" encompasses claims data, medical history, and other information. 42 U.S.C. § 300gg-4(a), (j)(3). How could GHPs implement such programs without "collecting" that claims data and medical information? And why would Congress in the ACA authorize incentives contingent on employees' achieving health targets if, as Plaintiffs claim, GINA required employees' individual consent for GHPs to access any health data *and* required employers to pay the same incentives to all employees whether or not they consent? The "incentive" would be no incentive at all.

B. Plaintiffs' Argument Ignores the Separateness of Yale and YGHP. No spousal medical history is "acquired" in connection with the Program, but even if it were, it would not be acquired *by Yale*, as would be required to implicate Title II of GINA. Plaintiffs acknowledge that a GHP is "a separate legal entity" from the employer sponsor. PB 30. Yet they conclusorily assert, with no evidentiary support, that Yale "runs" the HEP as an "employment function." PB 18, 27. The undisputed evidence contradicts that assertion, showing that YGHP administers the Program with HealthMine's assistance, while Yale remains walled off. Plaintiffs agree that:

> (1) "[p]ursuant to a [business associate agreement] . . . HealthMine performs several plan administration functions *for YGHP*";
>
> (2) "YGHP is walled off from the rest of the University [and] operates separately from any of Yale's employment offices, and health information in its possession is not accessible to other departments of the University"; and
>
> (3) "HealthMine reports to Yale's payroll processing system each quarter as to which employees will have a $25 deduction for the quarter, *with no further explanation or elaboration*."

LR56 ¶¶ 24-25, 31; *see also* Penney Dep. (Pls.' Ex. C), ECF No. 44-6, at 14-17; Penney Decl.,

ECF No. 54-3, ¶¶ 28-32. Nothing in the record contradicts that evidence.

Yale's separateness from YGHP reflects the fundamental structure of employee benefits under ERISA, HIPAA, and the many other statutes and regulations based on the ERISA framework. ERISA places certain sensitive, benefits-related functions in the hands of an employer-sponsored "plan" that serves a trustee-like role, carrying out those functions with a measure of independence and insulation from the employer's other decision-makers. *See* 29 U.S.C. §§ 1102-1104. HIPAA builds on ERISA by erecting a privacy "wall" to limit the flow of medical information between an employer and the benefits plan, while allowing the plan to share information with business associates involved in administering the plan. *See* 42 U.S.C. §§ 1320d-1 to 1320d-9; 45 C.F.R. §§ 164.502(e), 164.504(e)-(f); 164.506.

Within that structure, employers design and fund employee benefits systems, including wellness programs.[13] That does not mean they "run" the benefits. Rather, designated personnel acting as fiduciaries of the GHP "run" the benefits. A number of possible administrative structures are permissible,[14] but the bottom line remains the same: the employer and GHP functions are treated as separate entities, and personnel involved in plan administration are bound by ERISA's fiduciary obligations and, per HIPAA, cannot share information with personnel

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[13] *See* Ex. 1 (wellness programs in GHP are subject to HIPAA/ERISA). When employers establish benefits programs, they "are analogous to the settlors of a trust." *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *see Beck v. PACE Int'l Union*, 551 U.S. 96, 101 (2007) ("the common law of trusts . . . serves as ERISA's backdrop").

[14] Plans can administer benefits in house or can retain business associates to handle administration. They can contract with an insurance company to underwrite financial risk, administer claims, or both. *See generally* 65 Fed. Reg. 82462 (explaining 2000 HIPAA regulations); 67 Fed. Reg. 53182 (explaining 2002 amendments to HIPAA regulations); *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 601-02 (6th Cir. 2007). A "self-insured" plan is still separate from the employer, *contra* PB 18, 29 (citing no authority). 65 Fed. Reg. at 82645; *see also, e.g., Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 658-59 (9th Cir. 2019) (discussing self-funded contributions as "plan assets" "held in trust"). An employer with a self-insured plan has simply assumed the financial risk, rather than shifting it to an insurance company. *See id.*; *Gobeille v. Liberty Mut. Ins.*, 136 S. Ct. 936, 941 (2016).

involved in employment functions "such as discipline, hiring and firing, placement and promotions." 65 Fed. Reg. 82462, at 82508 (2000). There is no dispute that Yale follows those protocols, including in its sponsorship of the Program.

Plaintiffs try to obscure this distinction by referring to "Yale" instead of YGHP in many parts of their brief. *See* PB 27 (HealthMine "request[s] this information on [Yale's] behalf"); PB 28 ("Yale unlawfully collects Plaintiffs' genetic information by directing its vendor [HealthMine] to gather that data from Yale Group Health Plan."). Plaintiffs offer no evidence supporting their assertion that HealthMine acts as Yale's agent, rather than YGHP's business associate. In short, they offer no evidence that Yale, as an employer, ever "collects" or "acquires" individual health information in any way.[15]

Likewise, there is no evidence to support Plaintiffs' claim that "genetic information" potentially discussed during coaching sessions with nurses is disclosed to Yale. PB 32. YGHP works with another business associate (TrestleTree) to provide coaching, but Yale remains uninvolved. If a TrestleTree nurse health coach learns of medical history from a Yale employee spouse, that information is shared (if at all) only with YGHP and its business associates (HealthMine and TrestleTree), not with Yale. Even if that could be characterized as an "acquisition" of genetic information, it would be an acquisition *by YGHP*.

At bottom, then, Plaintiffs take issue with the fact that, if they choose to enroll spouses in YGHP health coverage, YGHP might learn about their spouses' medical histories (as it would any time a spouse joins a health plan and has treatment) and let business associates access it for

[15] Plaintiffs pursued such evidence. They received documents concerning YGHP's arrangement with HealthMine and deposed Yale's Rule 30(b)(6) witness on their allegation that Yale gains access to private health information held by HealthMine or YGHP. Plaintiffs asked questions at the deposition on that topic and received answers that are consistent with Yale's positions. *See* Penney Dep. (Pls.' Ex. C), ECF No. 44-6, at 36-48.

certain HIPAA-permitted purposes. In other words, they take issue with the entire system of employee benefits erected by ERISA and HIPAA. To the extent Plaintiffs contend YGHP's administration of the Program somehow violates GINA despite following ERISA and HIPAA (though it does not), their contention does not concern *employer* conduct regulated by the portion of GINA (Title II) that creates the private cause of action under which they seek relief. GINA is divided into two titles with deliberately different enforcement schemes: Title I regulates GHPs and insurers, and Title II regulates employers and labor organizations. *See* Pub. L. 110-233, 122 Stat. 881 (2008). Like HIPAA, Title I of GINA is enforced by agencies and creates no private right of action against GHPs. *See id.* §§ 101(e), 102(a)(5), 103(e), 105(a). And under GINA's "firewall" provisions, plaintiffs cannot sue employers for alleged violations of Title I by the GHPs that employers sponsor. *See* 42 U.S.C. § 2000ff-8(a)(2)(B),(c); 29 C.F.R. § 1635.11(b)(2).

Plaintiffs propose to obliterate that distinction. They contend that if an employer sponsors a GHP, then Title II applies to any action taken, whether by the employer or by the GHP. PB 30-31. But *all* GHPs, by definition, are sponsored by an employer or labor organization. *See* 29 U.S.C. § 1191b(a)(1); 29 U.S.C. § 1002(1). If Plaintiffs were correct, Title II would always provide a private cause of action for alleged GINA violations by GHPs, even though GHPs are not governed by Title II and even though Title I expressly governs GHPs and creates no private cause of action. That is not the law.

The distinction between an employer and its GHP does not read GINA out of existence, as Plaintiffs claim. PB 31 & n.11. Title I is not a nullity merely because regulators, rather than private litigants, enforce it.[16] And Title II reaches a wide range of employer conduct that has

[16] Congress often creates rules without private enforcement. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (finding no private right of action for violation of certain disparate impact discrimination claims and holding that absent evidence of statutory intent to create a cause of action, "courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute").

nothing to do with GHPs: an employer, for example, would violate Title II by requesting genetic information in the hiring process. To be sure, the mere involvement of health benefits does not necessarily remove a claim from Title II. Regulations give the example of "an employer that fires an employee because of anticipated high health claims based on genetic information." 29 C.F.R. § 1635.11(b)(2). But the same regulations are clear that "health plan or issuer provisions or actions related to . . . a health plan's or issuer's collection of genetic information remain subject to enforcement under Title I exclusively." *Id.*[17]

C. Plaintiffs Lack Standing, as They Suffered No Injury. Plaintiffs claim three sources of purported injury: (1) the $25/week opt-out fee; (2) invasion of their privacy when their spouses' medical information is accessed; and (3) risk that access to their spouses' medical information will let Yale discriminate against Plaintiffs. None establishes standing.

The $25 deductions are not traceable to either of the two alleged GINA violations: access to spouses' claims data and health coaching of spouses. No Plaintiff claims to have opted out of the Program, and thus incurred the $25 deductions, to prevent sharing a spouse's medical history or to avoid a spouse's receiving coaching.[18] The only two Plaintiffs bringing GINA claims expressly allege *other* reasons—unrelated to a spouse's medical history—for opting out of the Program. *See* OB 41. Plaintiffs cannot maintain a GINA action based on their generalized dislike

[17] Plaintiffs cite these regulations misleadingly to offer an example of an employer that "contracts with a health insurance *issuer* to request genetic information." PB 31. YGHP is not an "issuer," a defined term that refers to insurance companies. 45 C.F.R. § 160.103. Moreover, "contract[ing] with a health insurance issuer to request genetic information" is not the same as "designing and sponsoring a health plan that will inevitably come into possession of genetic information in its administration of the plan." Otherwise almost every time an employer sponsors a GHP it would violate GINA. There is a far more reasonable interpretation of the example regarding an employer that "contracts with a health insurance issuer to request genetic information": an employer cannot avoid Title II by deputizing an insurance company to collect genetic information and convey it back to the employer in violation of HIPAA.

[18] Kwesell's newfound "belie[f]" that her husband "is likely to be selected for health coaching" is conjectural. Pls.' Ex. K. And she doesn't say her belief motivated her decision to opt out of HEP. Rather, she specifically pleads she opted out to avoid colorectal screening. FAC ¶ 11; Pls.' Ex. G.

of the Program, including the many aspects that do not involve "genetic information" at all.

Plaintiffs' invocation of invasion of privacy does not help them. They skirt the key issue, which is that they allege violations of *their spouses'* privacy rights, not their own. The privacy torts they cite, PB 36-37, are individual in nature. "[T]he action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded . . . and it cannot be maintained by other persons such as members of the individual's family, unless their own privacy is invaded along with his." Restatement (Second) of Torts § 652I cmt. a. That GINA statutorily defines a spouse's medical history as the individual's own "genetic information" does not mean that anyone whose spouse's medical privacy is allegedly violated can claim a personal injury-in-fact. *See Thole v. U.S. Bank*, 140 S. Ct. 1615, 1620 (2020) (rejecting "the argument that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.").

Plaintiffs get no further by invoking the risk of possible future use of their spouses' medical history to discriminate against Plaintiffs. Yale never argued that employees must "wait until discrimination occurs to bring suit." PB 36. But if Plaintiffs' theory of injury is that employer access to genetic information risks employment discrimination, then that risk must be "imminent," not "abstract," "conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016); *cf. Allen v. Verizon Wireless*, No. 3:12-CV-482 JCH, 2013 WL 2467923, at *24 (D. Conn. June 6, 2013) (genetic discrimination could not be inferred from mere fact that employer knew of mother's health condition).[19] Here, it is purely hypothetical: it is undisputed that those at Yale who could access Plaintiffs' "genetic information" (YGHP administrators) are

[19] The fact that the only "genetic information" at issue is spousal medical history makes Plaintiffs' vague "fear [of] discrimination," PB 36, even more conjectural, as the medical history of an employee's spouse sheds no light on the employee's genetics. *See* OB 49, 40 n.21; *Poore v. Peterbilt of Bristol*, 852 F. Supp. 2d 727, 731 (W.D. Va. 2012) (cited with approval in *Allen*, 2013 WL 2467923, at *23).

"walled off" from anyone who could take discriminatory employment actions. LR56 ¶ 24. Under these circumstances, Plaintiffs allege no injury in fact that is not speculative and conjectural.

D. Plaintiffs Cannot Receive Damages under GINA. Even if Plaintiffs had standing and could prove a GINA violation, they would not be entitled to damages. Yale does not dispute that an improper "request" for or "acquisition" of genetic information would be an "unlawful employment practice" under GINA. *Contra* PB 39. And it agrees with the obvious (and meaningless) fact that the design of HEP was "intentional in a broad sense of the word," not "inadvertent." PB 42. But the HEP does not involve intentional discrimination, which is the predicate for a damages remedy under GINA.[20] Plaintiffs offer no evidence that Yale intended to discriminate against anyone on the basis of genetic information.

Plaintiffs do not dispute that GINA permits damages only to the extent available under 42 U.S.C. § 1981a. *See id.* § 2000ff-6(a)(3); 29 C.F.R. § 1635.10(b)(1). They do not dispute that § 1981a(a)(1) provides damages only for "unlawful *intentional* discrimination." Instead, they note that § 1981a(a)(1) parenthetically distinguishes "intentional discrimination" from "disparate impact." But that does not mean that *any* civil rights claim avoiding a disparate impact theory constitutes "intentional discrimination." Indeed, in a later subsection addressing the ADA, § 1981a itself distinguishes "intentional discrimination" not only from "disparate impact" but also from violations of the ADA "reasonable accommodation" requirements. § 1981a(a)(2). The parenthetical Plaintiffs cite merely reflects that § 1981a principally served to amend Title VII, under which "intentional discrimination" is synonymous with a traditional "disparate treatment" claim. *See Ricci v. DeStefano*, 557 U.S. 557, 577 (2009). Plaintiffs' theory is not disparate

[20] Congress routinely enacts statutory prohibitions enforceable only by regulators or by non-damages private remedies; that does not make those prohibitions "merely instrumental." PB 38.

treatment, as they do not allege Yale has "treated a particular person less favorably than others because of a protected trait," *id.*, so the familiar treatment/impact dichotomy does not help them.

To be sure, GINA's remedy provisions are not a model of clarity. But Plaintiffs cite no authority for the remarkable proposition that "intentional discrimination" encompasses the mere design of a wellness program that allegedly "requests" or "acquires" spousal medical history information without proper protocols. GINA itself uses the word "discrimination" to describe claims under § 2000ff-1(a) for unlawful discharges, refusals to hire, and the like, *see id.* § 2000ff-1(a) ("Discrimination based on genetic information"), while *separately* describing "requests" and "acquisitions" without any reference to "discrimination," *see id.* § 2000ff-1(b). *See also Allen*, 2013 WL 2467923, at *23 ("genetic discrimination" requires allegation of "discharge[] or depriv[ation] of employment opportunities" "because of" genetic information). Moreover, if disparate impact theories were the only possible claims not constituting "intentional discrimination," then § 2000ff-7(a) (which bars disparate impact claims under GINA) would render the limitation on damages referenced in § 2000ff-6(a)(3) completely redundant.

Plaintiffs cite two cases, but neither addresses the limitations on GINA damages set by 42 U.S.C. § 1981a. *See EEOC v. Grisham Farm Products, Inc.*, 191 F. Supp. 3d 994 (W.D. Mo. 2016); *Jackson v. Regal Beloit America, Inc.*, No. 16-134, 2018 WL 3078760 (E.D. Ky. 2018). Both involved ADA *and* GINA claims; neither differentiated between ADA and GINA remedies. In *Grisham*, the parties had stipulated to damages covering the combined GINA and ADA claims. *See* 191 F. Supp. 3d at 995, 998. In *Jackson*—where the plaintiff also brought retaliation claims requiring proof of specific intent—the court merely noted that the question of damages, whether under GINA, ADA, or retaliation, would be left to jurors. 2018 WL 3078760, at *10-11.

CONCLUSION

For the reasons above, this Court should grant Yale's motion in full.

Respectfully submitted,

July 3, 2020

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Exhibit 1

HIPAA Privacy and Security and Workplace Wellness Programs

The Health Insurance Portability and Accountability Act (HIPAA) Privacy, Security, and Breach Notification Rules (the HIPAA Rules) protect individuals' identifiable health information held by covered entities and their business associates (called "protected health information" or "PHI"). Covered entities under HIPAA are health care clearinghouses, health plans, and most health care providers. Business associates generally are persons or entities (other than members of the workforce of a covered entity) that perform functions or activities on behalf of, or provide certain services to, a covered entity that involve access to PHI.

The Privacy Rule, among other things, regulates the uses and disclosures that a covered entity or business associate may make of PHI. The Security Rule requires covered entities and business associates to implement administrative, physical, and technical safeguards to secure electronic PHI. The Breach Notification Rule requires covered entities to notify affected individuals, the Department of Health and Human Services (HHS), and, in some cases, the media (and business associates to notify covered entities), of breaches of unsecured PHI.

Q1: Do the HIPAA Rules apply to workplace wellness programs?

A1: Since the HIPAA Rules apply only to covered entities and business associates – and not to employers in their capacity as employers -- the application of the HIPAA Rules to workplace wellness programs depends on the way in which those programs are structured. Some employers may offer a workplace wellness program as part of a group health plan for employees. For example, some employers may offer certain incentives or rewards related to group health plan benefits, such as reductions in premiums or cost-sharing amounts, in exchange for participation in a wellness program. Other employers may offer workplace wellness programs directly and not in connection with a group health plan.

Where a workplace wellness program is offered as part of a group health plan, the individually identifiable health information collected from or created about participants in the wellness program is PHI and protected by the HIPAA Rules. While the HIPAA Rules do not directly apply to the employer, a group health plan sponsored by the employer is a covered entity under HIPAA,[1] and HIPAA protects the individually identifiable health information held by the group health plan (or its business associates). HIPAA also protects PHI that is held by the employer as plan sponsor on the plan's behalf when the plan sponsor is administering aspects of the plan, including wellness program benefits offered through the plan.[2]

Where a workplace wellness program is offered by an employer directly and not as part of a group health plan, the health information that is collected from employees by the employer is not protected by the HIPAA Rules. However, other Federal or state laws may apply and regulate the collection and/or use of the information.

Q2: Where a workplace wellness program is offered through a group health plan, what protections are in place under HIPAA with respect to access by the employer as plan sponsor to individually identifiable health information about participants in the program?

A2. The HIPAA Privacy and Security Rules place restrictions on the circumstances under which a group health plan may allow an employer as plan sponsor access to PHI, including PHI about participants in a wellness program offered through the plan, without the written authorization of the individual. Often, the employer as plan sponsor will be involved in administering certain aspects of the group health plan, which may include administering wellness program benefits offered through the plan. Where this is the case, and absent written authorization from the individual to disclose the information, the group health plan may provide the employer as plan sponsor with access to the PHI necessary to perform its plan administration functions, but only if the employer as plan sponsor amends the plan documents and certifies to the group health plan that it agrees to, among other things:

- Establish adequate separation between employees who perform plan administration functions and those who do not;
- Not use or disclose PHI for employment-related actions or other purposes not permitted by the Privacy Rule;
- Where electronic PHI is involved, implement reasonable and appropriate administrative, technical, and physical safeguards to protect the information, including by ensuring that there are firewalls or other security measures in place to support the required separation between plan administration and employment functions; and Report to the group health plan any unauthorized use or disclosure, or other security incident, of which it becomes aware.

See 45 CFR 164.314(b) and 164.504(f)(1)(i) and (f)(2).

Further, where a group health plan has knowledge of a breach of unsecured PHI at the plan sponsor (i.e., an unauthorized use or disclosure that compromises the privacy or security of the PHI), the group health plan, as a covered entity under the HIPAA Rules, must notify the affected individuals, HHS, and if applicable, the media, of the breach, in accordance with the requirements of the Breach Notification Rule.

Where the employer as plan sponsor does not perform plan administration functions on behalf of the group health plan, access to PHI by the plan sponsor without the written authorization of the individual is much more circumscribed. In these cases, the Privacy Rule generally would permit the group health plan to disclose to the plan sponsor only: (1) information on which individuals are participating in the group

health plan or enrolled in the health insurance issuer or HMO offered by the plan; and/or (2) summary health information if requested for purposes of modifying the plan or obtaining premium bids for coverage under the plan.

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[1] The HIPAA Rules also protect the individually identifiable health information held by a health insurance issuer or HMO providing coverage under the group health plan, which are themselves covered entities, or their business associates.

[2] However, an employee welfare benefit plan that has fewer than 50 participants and is self-administered is not a group health plan as defined at 45 CFR 160.103, and thus, not a covered entity, under the HIPAA Rules.

Frequently Asked Questions for Professionals - Please see the HIPAA FAQs for additional guidance on health information privacy topics.

Content created by Office for Civil Rights (OCR)

Content last reviewed on April 20, 2015