

Warning to Employers:
You may be held liable for your employees' HIPAA violations

by
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On November 14, 2014, the Indiana Court of Appeals upheld a \$1.4 million jury verdict holding Walgreen Co., the owner of Walgreens pharmacies (“Walgreens”), liable after one of the company’s pharmacists shared a customer’s confidential medical records in violation of the Health Insurance Portability and Accountability Act (HIPAA). According to court records, the pharmacist searched the customer’s confidential prescription history for any records indicating that the customer had been treated for a sexually transmitted disease. The pharmacist then printed out the prescription history and provided it to the customer’s ex-boyfriend.¹

When the customer learned that her records had been disclosed, she filed a complaint against the pharmacist for malpractice and invasion of privacy. The customer also brought these claims against Walgreens under the theory of respondeat superior, commonly known as vicarious liability, in addition to claims for negligent training, negligent supervision, and negligent retention.²

The Walgreens lawsuit appears to be one of the first cases resulting in a substantial jury verdict in which a plaintiff has relied on HIPAA to establish the standard of care by which to prove a healthcare provider’s negligence. The HIPAA “Privacy Rule,” which generally prohibits health care providers from disclosing a consumer’s “protected health information” (PHI) without the consumer’s consent, does not allow private citizens to directly sue healthcare providers for violating the law.³ Nonetheless, several states have allowed plaintiffs to use HIPAA violations as the basis for showing that a healthcare provider breached a duty of care in state court negligence, professional liability, and violation of privacy actions.⁴ Thus, even though the Walgreens customer could not directly sue the pharmacist for committing a HIPAA violation, she was able to use that HIPAA violation to show that the pharmacist acted negligently by breaching her duty to protect the customer’s confidential health information.

This case is also significant because the customer successfully relied on the theory of respondeat superior to hold Walgreens liable for its pharmacist’s negligence. Respondeat superior is a legal doctrine that imposes legal responsibility on an employer for the wrongful act of its employees, provided that the acts occurred “within the scope of employment.” Generally, an employee’s behavior will be considered within the scope of employment if the employee commits a wrongful act while 1) performing work assigned by an employer; or 2) engaging in a course of conduct

¹ *Walgreen Co. v. Hinchy*, No. 49A02-1311-CT-950 (Ind. Ct. App. 2014)

² *Walgreen Co. v. Hinchy*, No. 49A02-1311-CT-950 (Ind. Ct. App. 2014)

³ 45 C.F.R. § 164.508 (a)(1)

⁴ See *I.S. v. Washington Univ.*, No. 4:11CV235SNLJ (E.D. Mo. 2011); *Acosta v. Byrum*, 638 S.E.2d 246 (N.C. App. 2006); *Byrne v. Avery Center for Obstetrics and Gynecology, P.C.*, 314 Conn. 433 (2014).

subject to the employer's control. An employee's wrongful act will generally not be considered to be within the scope of employment when it occurs within "an independent course of conduct not intended by the employee to serve any purpose of the employer."⁵

On appeal, Walgreens argued that the pharmacist was not acting within the scope of employment because the pharmacist's actions did not benefit or further any legitimate business interest of Walgreens. Nonetheless, the court ruled that a jury could reasonably find that the pharmacist was acting within the scope of employment because she was authorized to use the Walgreens computer system and printer, handle prescriptions for Walgreens customers, access information on the Walgreens computer system, and review customer prescription histories. Additionally, the court noted that the pharmacist was on the job when she accessed the customer's confidential information and was using Walgreens equipment when committing the violation.⁶

The Walgreens case should alert employers to the importance of implementing and abiding by a rigorous compliance program. The Office of Civil Rights, the federal agency charged with enforcing the HIPAA Privacy Rule, recommends that employers adopt the following strategies in order to prevent violations:

- Properly train staff – upon hiring and as policies are updated
- Document training – who received it; when did they receive it; and what did the training encompass
- Establish and publicize a disciplinary policy – disciplinary actions should range from further training to dismissal
- Audit and monitor systems to ensure that policies are followed
- Ensure that every staff member sees himself or herself as responsible for protecting the privacy and security of health information
- Make privacy part of the daily operation of business
- Document any known violation of privacy protection.⁷

⁵ *Walgreen Co. v. Hinchy*, No. 49A02-1311-CT-950 (Ind. Ct. App. 2014) *citing* Restatement (Third) of Agency, § 7.07 (2006)

⁶ *Walgreen Co. v. Hinchy*, No. 49A02-1311-CT-950 (Ind. Ct. App. 2014)

⁷ Office of Civil Rights, *HIPAA and You: Building a Culture of Compliance* (2013), <http://www.hhs.gov/ocr/privacy/hipaa/understanding/training/>