

Social Media Privacy Breaches in the News

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Analysis of a recent spate of cases involving healthcare employees and the misuse of social media illustrates how one employee's actions can cause an entire organization to be brought under intense scrutiny by the media, the public, and respective licensing boards.

In a 2009 Minnesota case, *Yath v. Fairview Clinics*, a patient attempted to impose liability upon the clinic and its employee through the theory of vicarious liability due to an employee's unauthorized access and dissemination of her medical record.ⁱ The employee, wondering why an acquaintance was at the clinic, improperly accessed and read the patient's medical file learning that she had a sexually transmitted disease and a new sex partner other than her husband. The employee shared this information with another employee, who then disclosed it to others, and eventually the information reached the patient's estranged husband. During this time, someone created a MySpace webpage posting the information on the Internet. The patient sued the clinic and the individuals allegedly involved in the disclosure. The district court granted summary judgment to the clinic on the invasion-of-privacy and vicarious liability claims and the patient appealed. The court of appeals overturned the trial court on the invasion-of-privacy argument, stating that the "number of actual viewers [of the site] was irrelevant." Rather, the determination depends on "whether the content is conveyed through a medium that delivers the information directly to the public." Since the MySpace webpage was not password protected, and it was available to the public for at least 24 hours, the publicity element of the invasion-of-privacy claim was satisfied.

On the issue of vicarious liability, the appellate court agreed with the district court on the fact that the clinic could not be held vicariously liable for the acts of the employees in this instance. Utilizing the two-part test for vicarious liability, the court reasoned that an employer may be held liable for the intentional misconduct of its employees when (1) the source of the harm is related to the duties of the employee and (2) the harm occurs within work-related limits of time and place. In determining whether the source of harm was related to the duties of the employee, the court analyzed the foreseeability of the employee's acts. In this case, the court found that the clinic could not be held liable for the employee's wrongful access and dissemination of patient information because the patient did not present any evidence that the employee's actions were foreseeable. Notably, the clinic did have a policy against such behavior by employees, which the court acknowledged in its opinion. Without such a policy in place, the court may have found that an employee's wrongful access and dissemination of private information would be foreseeable, and thereby hold the employer responsible.

Similar incidents, unfortunately, are not uncommon. Since the popularity of social media sites has increased, more and more healthcare staff and employees have faced fines and sanctions for their misbehavior through social media.

In December 2008, an employee of a gynecologist decided to vent her frustrations on her online blog, ridiculing the patients giving birth and using expletives. Although the employee did not use patient names or any other identifying information in her post, two of the patients recognized

themselves in the blog due to the detailed nature of the post and filed HIPAA complaints against the doctor and the practice.ⁱⁱ

Two nurses were fired from Mercy Walworth Medical Center in Lake Geneva, Wisconsin, after an anonymous call from another employee led police to investigate a story that the two had taken photos of a patient and posted them on the Internet. Each was found to have taken photos of x-rays of a patient who was admitted to the emergency room with an object lodged in his body. Although investigators were unable to find anyone who had actually seen the photos posted online, discussion of the incident was posted to one of the nurse's Facebook pages.ⁱⁱⁱ

In June 2010, five California nurses were fired from Tri-City Medical Center in Oceanside for discussing patients on Facebook.^{iv} Notably, no patient names, photos, or other identifying information was included in the posts. Just a short month later, Tri-City implemented a new policy, requiring employees to sign a new social media agreement concerning such sites as MySpace, Zoho, and Eventful, specifically stating, "Even if the patient is not identified by name or by the medical record number the information you disclose may identify that patient," in an effort to educate employees about what constitutes private medical information.^v

In a particularly gruesome and cruel case, an elderly man who was stabbed more than a dozen times by a fellow nursing home resident and almost decapitated, became a source of entertainment for the nurses assigned to treat him at St. Mary Medical Center in Long Beach.^{vi} At least seven staff members and two nurses snapped pictures of the dying man, instead of focusing on saving his life, and posted them on Facebook. The incident brought the hospital under intense scrutiny from the California Department of Health, who along with investigating the particular incident, also opened investigation on eight other potential breaches of patient information reported at the hospital in the same year.

A nursing assistant in Oregon was convicted by a jury for invasion of privacy for posting graphic photos of patients using bed pans.^{vii} Not only did she spend several days in jail for her conduct, she was forced to surrender her nursing certificate and fired by her employer, Regency Pacific Nursing and Rehab Center in the Portland suburb of Gresham. The Nursing Center was subjected to a thorough investigation by the Oregon Department of Human Services in order to determine whether the Center, along with the nursing assistant, was responsible for the invasion of privacy. According to a statement released by the Center, the employee's actions were immediately reported to the local police department, the Oregon State Department of Human Services, and the Oregon State Board of Nursing to ensure their immediate involvement in the investigation, and all appropriate notifications were made to the family members involved.

ⁱ Yath v. Fairview Clinics, 767 NW2d 34 (Minn. App., 2009)

ⁱⁱ Online Comments lead to privacy complaint. <http://www.phiprivacy.net/?p=806>

ⁱⁱⁱ Nurses Fired Over Cell Phone Photos Of Patient.

<http://www.wisn.com/news/18796315/detail.html#ixzz1odIP2558>

^{iv} Five Nurses Fired for Facebook Postings. June 14, 2010. Jennifer Fink. <http://scrubsmag.com/five-nurses-fired-for-facebook-postings/>

^v When Facebook Goes to the Hospital, Patients may Suffer. August 08, 2010|By Molly Hennessy-Fiske, Los Angeles Times. <http://articles.latimes.com/2010/aug/08/local/la-me-facebook-20100809>

^{vi} Id.

^{vii} Ore. Nurse Aide Posted Facebook Photos of Patients. Duara, Nigel. March 7, 2012.

<http://abcnews.go.com/US/wireStory/oregon-nursing-assistant-convicted-photos-15869323>

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