



## State Law Provides Relief for Victims of HIPAA Violations

By Allen Smith 7/11/2014

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Retaining a known violator of the Health Insurance Portability and Accountability Act (HIPAA) and sending her back to work at the scene of the HIPAA violations could result in a negligent retention and supervision lawsuit, a recent federal court decision in New York suggests.

Individuals injured from a breach of their personal health information in violation of HIPAA often bring civil lawsuits against health care or other HIPAA-covered entities under state law, according to Cynthia Marcotte Stamer, a Dallas-based employment and benefits attorney who writes and speaks extensively about HIPAA and related privacy matters.

According to Stamer, state law claims are used because, except for a possible claim of illegal retaliation, HIPAA doesn't give any rights to individuals to sue for damages when their personal health information is breached in violation of the act. Rather, HIPAA only empowers attorneys general to sue for damages on behalf of victims in their states.

This doesn't mean that individual victims are without civil remedies, however. According to Stamer, victims of HIPAA breaches may have rights to seek damages under a wide array of state law claims such as intentional infliction of emotional distress, malpractice, defamation, invasion of privacy and others.

Beyond seeking civil damages through state laws, victims of HIPAA breaches or others can use HIPAA to go after health care providers or other covered entities in other ways. For instance, when HIPAA is violated, victims and others may file complaints with the applicable medical board or other licensing agency to try and strip the professional licenses of those who have violated the law, Stamer said.

In a negligence action, there must be a duty that has been violated. When HIPAA is violated, plaintiffs often use the statutory duty imposed by HIPAA to establish the violation. And the damages can add up under state law actions, she remarked.

When the Department of Health and Human Services Office of Civil Rights (OCR) goes after HIPAA violators, the damages can add up as well. As one example, Parkview Health Systems Inc. in Indiana agreed with OCR to pay \$800,000 to settle charges that it violated HIPAA's privacy rule when its employees, aware that a retired physician was not at home, [left 71 cardboard boxes of medical records unattended on the home's driveway](#).

OCR takes the position that individual members of a covered entity's workforce are not subject to its civil sanctions. However, 2009 amendments to HIPAA make clear that any individual who willfully violates the act's privacy rules may face criminal prosecution. A

covered entity or business associate that employs a worker or agent who criminally violates HIPAA risks its own vicarious criminal liability. In some cases, there may even be a criminal lawsuit in addition to civil.

#### NYU Case

The recent New York case involved Kristen Haight, a pediatric nurse at New York University (NYU) Langone Medical Center, who began having problems with co-worker Michelle Blate in 2005. Blate allegedly discussed Haight's medical records with other NYU employees, tried to get Haight fired for not returning her late-night phone calls and refusing her advances, and put her hands down Haight's underwear to adjust a label without Haight's consent.

In January 2008, Haight faced medical problems, and she started treatment at NYU. She asked that certain information be left out of her chart out of fear that co-workers would see it, and the attending doctor agreed to leave out anything that would pique others' curiosity.

In the fall of 2008, Haight discussed her concerns about being a patient at NYU and the potential privacy violations with her supervisors. They assured her that her privacy would be protected, that she did not need to change her name on her medical chart, and that a HIPAA investigation would be implemented.

On Jan. 4 and 5, 2009, Blate breached security and viewed Haight's medical chart electronically.

On Jan. 26, 2009, Haight returned to work. A surgeon mentioned her surgery, and she asked for a HIPAA investigation, which was denied. She asked for a HIPAA investigation several more times, and one was granted in June 2009.

Blate had accessed Haight's chart again in March 2009, the investigation revealed. Early in 2010, Blate was fired.

#### She's Back ...

Soon thereafter, Blate was hired by Medtronic as a nurse educator and vendor fill-in, and one of the sites she worked at for Medtronic was Langone. Haight started running into Blate at the hospital. In April 2010, Blate called the office to see if Haight was there and said she was on her way over. Haight called NYU security, which advised her to call the New York Police Department to try to get a protective order against Blate.

Haight met with the NYU HIPAA compliance office and made a complaint about Blate, noting the HIPAA violations and the fact that Blate was coming to the hospital, which made Haight vomit and faint. Haight asked when and how many times Blate had accessed her medical chart, but received no answer.

NYU's HR and legal department sent Medtronic a letter in April 2010, saying that Blate was not allowed on the NYU campus. But Haight continued to see Blate working at the hospital.

In June 2010, an HR professional at NYU called and sent a letter to Medtronic, informing Medtronic of the reason for Blate's termination from NYU. But in July 2010, Haight met with her boss and again noted Blate's continued presence at the hospital, saying it was making her physically ill.

Haight saw Blate in an operating room in August 2010, and a surgeon confirmed Blate would be around the staff. He changed Haight's schedule to coincide with days that Blate was scheduled to be in the operating room.

Haight became sick again and, after calling NYU security when Blate came to her office, Haight was removed from work due to a work-related illness.

In October 2010, a workers' compensation judge ruled that Haight had post-traumatic stress disorder (PTSD) and worked in a hostile environment.

In January 2011, NYU again notified Medtronic by phone and letter of Blate's termination and the reasons why.

In June 2011, while Haight was on sick leave, NYU terminated her.

#### Negligent Supervision and Retention Claims

Haight sued, alleging that Medtronic negligently supervised or retained Blate. The U.S. District Court rejected Medtronic's argument

that the complaint failed to allege that the company had knowledge of Blate's alleged propensity for wrongdoing. Not so, the court decided, noting the letters and calls from NYU that specified why Blate had been terminated.

Medtronic also argued that the complaint failed to allege what the company did that was negligent.

"This is incorrect," the court stated. "The complaint alleges that Medtronic employed Ms. Blate and continued to assign her to NYU after Medtronic was informed that Blate was not welcome on the NYU campus and that she had been terminated for HIPAA violations. The complaint also alleges that plaintiff suffered from PTSD in large part due to Ms. Blate's harassment of her."

The court also allowed negligent supervision and retention, hostile work environment sexual harassment, and disability discrimination claims against NYU to advance.

Medtronic's motion to dismiss and motion for [summary judgment](#) were denied, meaning the case can go to trial. NYU's motion to dismiss on the negligent retention and supervision, hostile work environment sexual harassment and disability discrimination claims were denied, meaning the case can go to [discovery](#).

This decision is *Haight v. NYU Langone Medical Center*, 13 Civ. 04993 (S.D.N.Y. June 27, 2014).

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