Employer Access to Employee Prescription Records: Dilemmas for Pharmacists

In an important legal decision, the Third Circuit Court of Appeals held that a public employer can review the individualized prescription drug records of its employees without invading their right to privacy. This has serious implications for patients and practitioners in all settings, including managed care. What do managed care pharmacists need to know about this issue? And what are their rights and responsibilities?

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In *Doe v. Southeastern Pennsylvania Transportation Authority (SEPTA)*,¹ the U.S. Court of Appeals overturned a federal district court jury's award of \$125,000 to John Doe against SEPTA, his former employer. The district court jury found that SEPTA and Judith Pierce, a SEPTA employee, had violated Doe's Section 1983² civil rights by an unauthorized disclosure of his HIV-positive status through review of prescription drug records. On appeal, however, a divided Third Circuit Court ruled that the strong public interest in containing health care costs and saving tax money outweighs the minimal intrusion of privacy suffered by Doe.

FACTS OF THE CASE

SEPTA, a public transportation authority operating mass transit facilities in the metropolitan Philadelphia area,

hired John Doe in 1988. Unbeknownst to his new employer, Doe was HIV-positive. He began taking zidovudine in 1991. But before getting his prescription filled, he told Dr. Richard Press, head of SEPTA's Medical Department and Doe's direct supervisor, that he wished to keep his illness a secret from his coworkers. Dr. Press assured Doe that employee prescription records were reviewed only when someone was suspected of abusing narcotic drugs. Doe then had his prescription filled under SEPTA's health insurance plan.

A year later, SEPTA entered into an agreement with Rite Aid to provide prescription services for its employees under the health plan. In November 1992, Judith Pierce, chief administrative officer for SEPTA, requested and received utilization review reports from Rite Aid for all SEPTA employee prescriptions. Rite Aid provided the reports, which included statistics on the number of employees with five or more prescriptions filled in a one-month period, the top 25% of drugs by cost, and a list of employees who were filling prescriptions at a cost of \$100 or more per employee in the past month. The report included the names of the employees or dependents, a code to identify the prescribing physician, the dispensing date, the name of the drug, the number of days the drug was supplied for, and the total cost.

Pierce later approached Dr. Van de Beek, another SEPTA employee, and asked him about some drugs on the list, including some of the medications being taken by Doe. The doctor told Pierce that if she was trying to determine what illnesses employees had by reviewing their prescriptions, he felt that this was improper and possibly illegal. Pierce then ended the conversation and asked Dr. Van de Beek to keep their exchange confidential.

Pierce then went to Dr. Press and asked him to perform an audit using the information in the report, at which time he noted that she had highlighted specific employee names and drugs. All of the highlighted drugs were HIV- or AIDS-related. Dr. Press refused to perform the

audit and went to SEPTA's legal counsel about his concerns. As a result, Pierce destroyed the report and instructed Rite Aid to submit all future utilization reports without employee names.

Doe learned that his HIV-positive status had been disclosed from Dr. Van de Beek and filed suit in district court against Pierce and against SEPTA for violating his constitutional right to privacy. After a week-long trial, the jury ruled in Doe's favor and awarded him \$125,000 in compensatory damages for emotional stress.³ Doe also filed a related suit against Rite Aid and its employees in state court. That case was settled when Rite Aid agreed to modify its procedures to prevent these types of disclosures in the future.⁴ Both SEPTA and Pierce appealed the verdict.

COURT OF APPEALS OVERTURNS THE RULING

The Court of Appeals first addressed whether or not a person's medical prescription record is protected by the Constitution. The court noted that when the underlying claim is for invasion of privacy, the complaint must be limited to those rights of privacy that are "fundamental" or "implicit in the concept of ordered liberty." Citing previous case law, the court noted that medical records fall within this scope of privacy rights. However, the court noted that this right of privacy is not absolute. An individual's privacy interest in his or her prescription records, the court said, must be weighed against the interests of the employer. In a previous case, *United States v. Westinghouse Electric Co.*,⁵ the Third Circuit Court had enumerated the factors to be weighed to determine whether or not a given disclosure constitutes an actionable invasion of privacy. These so-called "Westinghouse factors" include:

- ▲ the type of record requested;
- ▲ the information it does or might contain;
- ▲ the potential for harm in any subsequent nonconsensual disclosure;

- ▲ the injury from disclosure to the relationship in which the record was generated;
- ▲ the adequacy of safeguards to prevent unauthorized disclosure;
- ▲ the degree of need for access; and
- ▲ whether there is an express statutory mandate, articulated public policy, or other recognizable public interest favoring access.

Applying these factors to the facts of the Doe case, the court concluded that some of these factors may be in Doe's favor. However, the balance weighs in favor of permitting the disclosure that occurred. The court characterized the intrusion in this case as "minimal," particularly given the lack of evidence of economic loss, discrimination, or harassment. On the other hand, the court stated that there is a strong public interest in the Transportation Authority containing its costs and saving tax money by permitting this sort of research by authorized personnel. In a dissenting opinion, one judge stated that there was sufficient evidence to support the jury's conclusion that Doe's constitutional right to privacy had been violated.

IMPLICATIONS FOR PHARMACISTS

This case raises several concerns regarding the release of patient-specific prescription records. It is difficult to argue that an employer does not have a legitimate interest in monitoring its health care expenditures for fraud and waste. Yet, the court failed to distinguish between the need for employee-specific and general expenditure information. In the majority of such cases, utilization review and auditing of employee prescription records can be done without the need for identifying information of individual employees or patients. In the rare case where an employer needs employee-specific confidential information, procedures and policies should be in place to preserve the confidentiality of the information.

Also of concern is the appellate

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court's focus on the lack of significant damages in this case. The majority opinion noted that the invasion of privacy here was "minimal" because Doe did not suffer any economic injury, discrimination, or harassment. This characterization undermines the deterrent effect of the invasion of privacy claim. A Section 1983 claim for violation of a constitutional right specifically allows for nominal damages. The nature and extent of the plaintiff's injuries should speak to the measure of damages, not to the extent of financial liability.⁶

The Doe case also illustrates how ethical and legal obligations may not always be congruous or clearly drawn. For example, Rite Aid may have had an ethical duty not to release patient names; however, it is unclear if the company had any legal obligation to release this information to the employer.

Managed care organizations receiving prescription drug information and the pharmacies providing such data should take steps to ensure that patients' reasonable expectations of privacy are maintained. Doyle and Perez⁷ have outlined some guidelines for medical benefit plan administrators to use regarding confidential medical information. First, pharmacy benefit administrators should ask for and retain only such information that is necessary for the reasonable administration of the health care plan. Access to files that contain confidential information should be limited to those with a legitimate need to know, and all

such files should be signed in and out with a record of who reviewed them. In addition, the confidentiality of computerized files should be maintained via the use of passwords and codes. Finally, pharmacy benefit administrators should test the extent of their confidentiality measures to see if they work.

When providing prescription drug information to managed care entities, pharmacists also have an ethical obligation to ensure that their patients' privacy expectations are met. These professionals can follow several guidelines⁷ to ensure confidentiality and privacy are maintained:

- ▲ Never disclose more information than is necessary to further the purpose for which the disclosure is required.
- ▲ Where information is being provided only for statistical, research, and other purposes not related to particular individuals, eliminate identifying information.
- ▲ If patient-specific information is sought, require written consent specifically identifying the person to whom information may be released and the purposes of the release prior to disclosure.
- ▲ Instruct all employees handling prescription information, including technical and clerical staff, about the need to maintain confidentiality.

Managed care pharmacists who don't know their companies' policies

and procedures regarding the release of information should find this out immediately. If policies are nonexistent or vague, they should take the lead to ensure clear policies are developed and put in place and that all pharmacy staff understand their obligations, rights, and responsibilities regarding the release of patient information. Everyone from department heads to clerical staff needs to understand the legal and ethical implications of releasing information that could be considered a violation of a patient's rights.

It is likely that the Doe case will not be the last word on this issue. However, as Rite Aid learned the hard way, it pays to put policies in place before a problem arises instead of implementing regulations in response to a lawsuit or threat of one. This is an important lesson for pharmacy. ■

References

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