

**Company “Trash-Talk” Websites & The Stored Communications Act:
The Internet As The “Office Water Cooler” Of The 21st Century**

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“Shush, the boss is coming this way....” Think back to those classic movies with Cary Grant, Doris Day, Rock Hudson, Spencer Tracy, and Katherine Hepburn. The grand and antiseptic, post-World War II office buildings. The employees huddled around the office water cooler placed on a spotless marble floor in the hallway. Sharing office gossip and complaining about their boss.

Well, who needs a water cooler when you have the Internet.

If an employee was fired back in the 1950’s for making derogatory remarks overheard by his boss at the water cooler, it is unlikely that employee would have claimed violation of his privacy rights. But what about derogatory remarks made on a “restricted” social networking site concerning events at (or, more often, gossip or complaints about) the workplace?

Just this Summer, the jury in *Pietrylo v. Hillstone Restaurant Group d/b/a Houston’s* found that Houston’s restaurant violated the federal Stored Communications Act and the New Jersey Wiretapping and Electronic & Electronic Surveillance Control Act (collectively, the “Acts”) when it used an employee’s password to “intentionally” access such a site “without authorization.”¹

Background Of Case

More specifically, the plaintiffs in the case were Brian Pietrylo and Doreen Marino, servers at a Houston’s restaurant at Riverside Square Mall in Hackensack, New Jersey. Mr. Pietrylo set up an “invite-only,” password-protected MySpace group called “Spectator.” According to the Complaint, The Spectator indicated it was “a place for those of us at Riverside to talk about all the crap/drama/and gossip occurring in our workplace, without having to worry about outside eyes prying in... but because this group is oh so private, only participants will stay members. Past and present employees welcome.”

In his initial posting, Mr. Pietrylo stated that the purpose of the group would be to “vent about any BS we deal with out [sic] work without any outside eyes spying on us. This group is entirely private, and can only be joined by invitation.” Then, he stated “[l]et the s**t talking begin.”

According to court documents, once a member was invited to join the group and accepted the invitation, as did Ms. Morino and other employees, the member could access The Spectator whenever she wished to read postings or add new postings. Ms. St. Jean, a greeter at Houston’s, accepted the invitation and became an authorized member of the group. While dining at the home of a Houston’s manager, Ms. St. Jean accessed the group through her MySpace profile on the manager’s home computer and showed the manager The Spectator.

¹ *Pietrylo v. Hillstone Restaurant Group d/b/a Houston’s*, United States District Court, District of New Jersey, Civil Case No. 2:06-cv-5754-FSH-PS.

Also according to court documents, at some point, another Houston's manager asked Ms. St. Jean to provide her password to access The Spectator, which she did. Ms. St. Jean stated she gave her password to members of the management because they were members of management and she thought she "would have gotten in some sort of trouble." One of the Houston's managers used the password to access The Spectator from Ms. St. Jean's MySpace page, and printed copies of the contents. Other Houston's management also saw the contents of the Spectator.

Court documents indicate that the posts on The Spectator included sexual remarks about management and customers of Houston's, jokes about some of the specifications that Houston's had established for customer service and quality, references to violence and illegal drug use, and a copy of a new wine test that was to be given to the employees. Mr. Pietrylo testified in his deposition that these comments were "just joking." Nevertheless, members of Houston's management testified that they found these postings to be "offensive," with a Houston's regional supervisor of operations testifying that he was concerned the content would affect the operations of Houston's and contradict Houston's core values, professionalism, positive mental attitude, aim to please approach, and teamwork. That regional manager terminated Mr. Pietrylo and Ms. Morino.

Mr. Pietrylo and Ms. Morino sued Houston's for alleged violations of their common law right to privacy, freedom of speech, wrongful termination, and violation of the Acts.

The Jury's Verdict Against Houston's

The federal Stored Communications Act, and its parallel New Jersey Wiretapping and Electronic & Electronic Surveillance Control Act, make it an offense to, *inter alia*, intentionally access "without authorization" a facility through which an electronic communication service is provided. One exception to liability is "conduct authorized... by a user of that service with respect to a communication of or intended for that user." Among other things, the Stored Communications Act allows for an award of minimum statutory damages of \$1,000 per violation, as well as attorneys' fees under specified circumstances.

Houston's filed a summary judgment motion in the district court, arguing it was not liable under the Acts as a matter of law because Ms. St. Jean had authorized management's access to The Spectator. The district court disagreed. The district court commented on Ms. St. Jean's deposition testimony, as follows (footnotes and citations omitted):

St. Jean testified that if she didn't give the password to the manager who asked for it: "I knew that something was going to happen. I didn't think that I was going to get fired, but I knew that I was going to get in trouble or something was going to happen if I didn't do it." She also testified that, although no one specifically told her she would be fired, "[i]t wasn't an overwhelming feeling, but I knew. It sounds bad, but I didn't want to lose my job.... I didn't want to lose my job for not cooperating with them." When asked if she was "following orders" in giving Houston's management her password, St. Jean stated, "I wasn't following orders. They asked me and I didn't know what else to do so I just gave it to them." When asked if she felt pressured into giving her password, St. Jean explained "[n]o and yes," yet later explained that Houston's "would have kept on pressuring me and I'm not good under pressure." Additionally, St. Jean testified that she "pretty much thought after I gave him [Anton] the password all the managers were going to see it.

Under these circumstances, St. Jean's testimony regarding whether her consent was voluntary demonstrates a material issue of disputed fact. If her consent was only given under duress, then the Defendants were not "authorized" under the terms of the statute....

In so ruling, the district court noted that "there is a dearth of case law regarding what it means for authorization to be freely given under the federal and state statutes regarding stored communications," and concluded that Ms. St. Jean's testimony created a factual dispute that required a jury to resolve whether she had freely given her consent. Hence, the parties went to trial.

On June 16, 2009, the jury rendered its verdict. With respect to the plaintiffs' claims under the Acts, the jury found that Houston's "knowingly or intentionally or purposefully access[ed] The Spectator without authorization from Karen St. Jean," and that Houston's did so five times. In connection with the various claims considered, the jury's verdict awarded actual damages, entitled plaintiffs to punitive damages, and triggered the right to attorneys' fees under the Stored Communications Act. Interestingly, on the plaintiffs' invasion of privacy claim, the jury found that The Spectator was "a place of solitude and seclusion designed to protect the Plaintiffs' private affairs and concerns." However, it also found that plaintiffs did not have "a reasonable expectation of privacy in the Spectator."²

What To Take Away From *Pietrylo*

Communication in the 21st century is being influenced, if not dominated in certain instances by the Internet, blogging, emails, texting, and the list goes on. Accordingly, policy manuals often address company computer/PDA/cell usage, Internet use monitoring and blogging - - as well as confidential information and trade secrets. Indeed, a whole cottage industry has arisen - - devoted to computer maintenance and electronic data storage/discovery.

Given the proliferation of social networking sites on the Web, companies also should consider how to address a situation such as faced by Houston's in *Pietrylo v. Hillstone Restaurant Group*. Of course, the facts of the case - - as well as the law - - dictate the results. With that in mind, the results potentially could have been different in *Pietrylo* if the company would have documented Ms. St. Jean's knowing, voluntary and signed consent and authorization before using her password to access The Spectator, or obtained access through the court system.

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² As of mid-July 2009, the author understands that the parties are still engaged in post-verdict motion practice/litigation.