

PUBLICATION

Remember That Post You Wrote About Me on MySpace? You're Fired.

Authors: Christie M. Hayes

January 06, 2010

Employee gossip about supervisors is as ancient as chatter around the water cooler. But the dynamics of workplace gossip have gone through massive changes since online social networking sites like MySpace and Facebook found their way into the lives of employees with a notion to complain. In the case of *Pietrylo v. Hillstone Restaurant Group*, a federal jury in the United States District Court for the District of New Jersey sent a stern message to employers regarding social networking and its effect on the workplace. On June 16, 2009, the Pietrylo jury issued a verdict against Hillstone Restaurant Group, the operator of a Houston's restaurant in Hackensack, New Jersey.

The case stemmed from a complaint filed against Hillstone by former servers Brian Pietrylo and Doreen Marino. During his employment with Houston's, Pietrylo created a group on MySpace called "Spec-Tator." Members who were invited to join the group and accepted the invitation could read or add postings. In his initial post, Pietrylo wrote that the group's purpose was to vent about work without "any outside eyes spying," as the group was intended to be "entirely private" and could only be joined by invitation.

Some time after the formation of the group, Pietrylo invited a greeter from Houston's, Karen St. Jean, to join Spec-Tator. St. Jean, in turn, accessed the MySpace group through her manager's home computer and showed the manager postings from Spec-Tator. The manager informed other managers of the existence of Spec-Tator and requested the Spec-Tator group password from St. Jean.

Spec-Tator's postings included sexual remarks about restaurant management and customers, jokes about customer service standards and references to violence and illegal drug use. Members of management testified that they found the postings to be "offensive." Based on these postings, management subsequently fired Pietrylo and Marino, who responded by filing suit against the restaurant owner, asserting a number of claims like wrongful termination, invasion of privacy, violations of the Stored Communications Act (SCA) and violations of the Wiretap Act.

The federal jury returned a verdict against the employer for violating the federal SCA and invasion of privacy. The jury awarded Pietrylo and Marino the maximum amount of back pay to which they were entitled, and the parties continued to argue about whether Pietrylo and Marino can recover their attorneys' fees under the SCA.

The SCA is a federal law that creates Fourth Amendment-like privacy protection for email and other digital communications stored on the internet. The SCA addresses voluntary and compelled disclosure of "stored wire and electronic communications and transactional records" held by third-party internet service providers. In *Pietrylo*, the jury's verdict hinged on its finding that restaurant management had obtained the password for Spec-Tator through implied coercion. Instead of accessing the discussion group directly, management could have asked a member to print out screenshots. In light of the employee's testimony, the court found that the jury had reasonably concluded the managers had not been authorized to enter the site and refused to toss out their verdict.

Pietrylo reminds us of the complexities involved in accessing employees' social networking sites, as well as that of using information obtained from social networking sites to discipline or terminate employees. The jury

award in *Pietrylo* was limited to \$2,500 and \$903 in compensatory damages to Pietrylo and Marino, respectively. Pietrylo and Marino were also awarded four times that amount for punitive damages. While the amount awarded was relatively small because of the minimal amount of ascertainable lost wages, other situations involving employees with higher incomes may warrant much larger jury verdicts. Employers in the hospitality industry should carefully consider the risks of privacy invasion claims associated with obtaining information from social networking sites and weigh the potential liabilities in basing employment action decisions on non-workplace behaviors.