NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BRIAN PIETRYLO, et al.,	
Plaintiffs,	Civil Case No. 06- 5754 (FSH)
v.	**OPINION & ORDER**
HILLSTONE RESTAURANT GROUP d/b/a HOUSTON'S,	Date: July 24, 2008
Defendant.	

HOCHBERG, District Judge

This matter having come before the Court on a motion for summary judgment (Docket #28), pursuant to Fed. R. Civ. P. 56, by Defendants Hillstone Restaurant Group and this Court having reviewed the submissions of the parties without oral argument pursuant to Fed. R. Civ. P. 78; the Defendant's motion for summary judgment is granted in part and denied in part.

I. BACKGROUND

Plaintiffs Brian Pietrylo ("Pietrylo") and Doreen Marino ("Marino") were employed by Defendant Hillstone Restaurant Group as servers. Defendant owns and operates Houston's restaurants including the Houston's at Riverside Square in Hackensack, New Jersey. Pietrylo created a group on MySpace.com ("Myspace") called the "Spec-Tator." Pietrylo stated in his initial posting that the purpose of the group would be to "vent about any BS we deal with out work without any outside eyes spying in on us. This group is entirely private, and can only be joined by invitation." Pietrylo then exclaimed "[l]et the s**t talking begin." The icon for the

group, Houston's trademarked logo, would appear only on the Myspace profiles of those who were invited into the group and accepted the invitation. Pietrylo invited other past and present employees of Houston's to join the group, including Plaintiff Marino. Once a member was invited to join the group and accepted the invitation, the member could access the Spec-Tator whenever they wished to read postings or add new postings.

Pietrylo also invited Karen St. Jean ("St. Jean"), a greeter at Houston's, to join the group; she accepted the invitation and became an authorized member of the group. While dining at the home of TiJean Rodriguez ("Rodriguez"), a Houston's manager, St. Jean accessed the group through her Myspace profile on Rodriguez's home computer and showed Rodriguez the Spec-Tator.

The details of how other managers got access to the Spec-Tator involves certain factual disputes between the parties. At some point, Robert Anton ("Anton"), a Houston's manager, asked St. Jean to provide the password to access the Spec-Tator, which she did. Although St. Jean states that she was never explicitly threatened with any adverse employment action, she stated that she gave her password to members of the management solely because they were members of management and she thought she "would have gotten in some sort of trouble." Anton used the password provided by St. Jean to access the Spec-Tator from St. Jean's Myspace page. Anton printed copies of the contents of the Spec-Tator.

The manner in which St. Jean's password was given to Robert Marano ("Marano"), a regional supervisor of operations for Houston's, is also disputed. Anton subsequently discussed the Spec-Tator with other members of senior management and human resources of Hillstone Restaurant Group. At some point, Anton may have asked St. Jean to provide the password again.

It is not clear whether Anton told St. Jean that he intended to show the Spec-Tator to other managers, but St. Jean testified that she understood that once the managers had access to the material, all of the managers would know about it.

The posts on the Spec-Tator included sexual remarks about management and customers of Houston's, jokes about some of the specifications ("specs") 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. Pietrylo explained in his deposition that these remarks were "just joking"; however, members of management, including Marano, testified that they found these postings to be "offensive." Marano also testified that he was concerned that the content of the Myspace group would affect the operations of Houston's, specifically by contradicting Houston's four core values, professionalism, positive mental attitude, aim to please approach, and teamwork. Marano subsequently terminated Pietrylo and Marino.

On November 30, 2006, Plaintiffs filed a complaint against Defendant alleging violations of the federal Wiretap Act (18 U.S.C. §§ 2510-22) (First Count), the parallel New Jersey Wiretapping and Electronic Surveillance Control Act (N.J.S.A. 2A:156A-3 and 4(d)) (Third Count), the federal Stored Communications Act (18 U.S.C. §§ 2701-11) (Second Count), the parallel provision of the New Jersey Act (N.J.S.A. 2A:156A-27) (Fourth Count), wrongful termination in violation of a clear mandate of public policy (Fifth Count), and common law tort of invasion of privacy (Sixth Count). Defendant filed a motion to dismiss on January 17, 2007, and Plaintiffs' filed a motion to amend complaint on February 20, 2007. The Court, in its Order of August 23, 2007, granted the motion to amend the complaint and denied the motion to dismiss. The Amended Complaint divided the Fifth Count into two counts of wrongful

termination in violation of a clear mandate of public policy: the new Fifth Count alleged violation of a public policy favoring freedom of speech and the Sixth Count alleged violation of a public policy against invasion of privacy. The Seventh Count (the former Sixth Count) alleged violation of the common law tort for invasion of privacy. On December 20, 2007, Defendant filed the instant motion for summary judgement. The Plaintiffs voluntarily dismissed the First Count (violation of the federal Wiretap Act) and Third Count (violation of the New Jersey Wiretapping and Electronic Surveillance Control Act) because they discovered that Defendant did not intercept any electronic communications as required by the federal and state wiretapping statutes. The Second, Fourth, Fifth, Sixth and Seventh Counts are before the Court on Defendant's summary judgment motion.

II. STANDARD OF REVIEW

Pursuant to Rule 56(c), a motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson, 477 U.S. at 248; Celotex, 477 U.S. at 322-26; Doe v. Abington Friends Sch., 480 F.3d 252, 256 (2007). All facts and inferences must be construed in the light most favorable to the non-moving party. Peters v. Delaware River Port Auth., 16 F.3d 1346, 1349 (3d Cir. 1994).

The party seeking summary judgment must initially provide the court with the basis for its motion. Celotex Corp., 477 U.S. at 323. This requires the moving party to either establish

that there is no genuine issue of material fact and that the moving party must prevail as a matter of law, or demonstrate that the nonmoving party has not shown the requisite facts relating to an essential element of an issue on which it bears the burden. Id. at 322–23. Once the party seeking summary judgment has carried this initial burden, the burden shifts to the nonmoving party. To avoid summary judgment, the nonmoving party must demonstrate facts supporting each element for which it bears the burden, and it must establish the existence of "genuine issue[s] of material fact" justifying trial. Celotex Corp., 477 U.S. at 324.

Once a moving party satisfies its initial burden of establishing a prima facie case for summary judgment under Fed. R. Civ. Pro. 56(c), the opposing party "must do more than simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving must set out specific facts showing a genuine issue for trial using affidavits or as otherwise provided in Fed. R. Civ. Pro. 56(e).

III. DISCUSSION

A. Second and Fourth Counts for violations of federal and state Stored Communications statutes

Plaintiffs allege violations of the federal Stored Communications Act, 18 U.S.C. §§ 2701-11 (Second Count), and the identical provision of the New Jersey Act, N.J.S.A. 2A:156A-27 (Fourth Count). These acts make it an offense to intentionally access stored communications without authorization or in excess of authorization. Id. Both statutes provide an exception to liability "with respect to conduct authorized . . . by a user of that service with respect to a communication intended for that user." 18 U.S.C. § 2701(c)(2); accord N.J.S.A. 2A:156A-27c(2).

Defendant argues that because St. Jean was an authorized user of the Spec-Tator who provided access on multiple occasions to Houston's management, there is no liability under these statutes based on the exception. Plaintiffs further contend that because Anton requested St. Jean's password while she was working at the workplace, St. Jean felt pressured to give Anton her password for fear of adverse employment action that may be taken if she did not comply. Plaintiffs argue that based on these circumstances, St. Jean's consent was not freely given based on an implied threat, and thus, access was not "authorized" under the meaning of the exception. Further, Plaintiffs argue that even if St. Jean gave her password to Anton, she did not give her password to Marano, who was responsible for terminating Pietrylo and Marino.

Congress and the New Jersey legislature provided little guidance on the definition of "conduct authorized" under these statutes. See Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 880 n.8 (9th Cir. 2002). Federal courts have equated "consent" under the Wiretap Act with "authorization" under the Stored Communications Act. In re DoubleClick, Inc. v. Privacy Litigation, 154 F. Supp. 2d 497, 514 (S.D.N.Y. 2001). Regarding the Wiretap Act, the First and Second Circuits have held that "Congress intended the consent requirement to be construed broadly." Griggs-Ryan v. Smith, 904 F.2d 112, 116 (1st Cir. 1990); States v. Amen, 831 F.2d 373, 378 (2d Cir. 1987).

The Ninth Circuit denied summary judgment in a case with strikingly similar facts; however, the issue there turned on whether or not the employees that authorized their employers to view the website were "users" of that website. Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 880 (9th Cir. 2002). In Konop, the plaintiff created a website that was critical of the company and provided invited two other employees to view the website. Id. at 873. These

employees never accepted their invitations to access the website until the vice president of Hawaiian Airlines asked them to provide him with access the website. Id. The Ninth Circuit reversed the District Court's grant of summary judgment because when viewing the facts in the light most favorable to the plaintiff, the two invited employees never "used" the site and therefore could not authorize access to the vice president. Id. at 880. Thus, the court there did not consider whether or not the vice president's request that the employees allow him to access the site with their names meant that his access was not authorized.

There is dearth of case law regarding what it means for authorization to be freely given under the federal and state statutes regarding stored communications. Defendant analogizes to criminal cases where consent to access is obtained from a criminal defendant with the promise of leniency in prosecution. According to this reasoning, if there is nothing involuntary in the criminal context where cooperation is rewarded, then St. Jean's cooperation with management in this context cannot be considered involuntary. Plaintiff responds that in an employer-employee relationship, there is a threat inherent in any demand made on an employee by management.

St. Jean testified[1] 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." (Pisani Certif., Ex. A.) 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." (Id.) When asked if she was "following orders" in giving Houston's management her password, St. Jean stated, "I wasn't

[1]This deposition of Karen St. Jean was taken on August 20, 2007.

following orders. They asked me and I didn't know what else to do so I just gave it to them." (Id.) 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." (Id.) Additionally, St. Jean testified that she "pretty much thought after I gave him [Anton] the password all the managers were going to see it. (Id.)[2]

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. Because of this disputed factual issue, summary judgment is denied as to the Second and Fourth Count.

B. Fifth and Sixth Count for Wrongful Termination in Violation of a Clear Mandate of Public Policy

1. Freedom of Speech (Fifth Count)

Plaintiffs allege wrongful termination in violation of a clear mandate of public policy. They argue that the Spec-Tator was a private group where employees could exercise their right to free speech, and that commenting and criticizing their employers is protected speech. (Am. Compl. ¶ 30-34.) Defendant argues that Houston's is a private employer, not a state actor, and that the constitutional obligations are directed only at state action. Defendant further argues that

[2] In a declaration submitted in connection with the current motion, St. Jean provided additional testimony. (St. Jean Decl., Jan. 7, 2008.) St. Jean stated that she never believed high level personnel in Houston's, such as Robert Marano, Tino Ciambriello (Vice President of Operations) and Michael Lamb (Director of Human Resources), would be given access to her MySpace account. (St. Jean Decl., ¶¶ 6-9.) Additionally, St. Jean stated that she felt violated by Houston's "impermissibly" taking her information to use it to "ease drop and spy" on the Spec-Tator. (St. Jean Decl. ¶ 10.) Because the Court finds that St. Jean's deposition testimony creates a sufficient disputed issue of material fact to preclude summary judgment, the Court need not rule on Defendants' contention that the supplemental declaration submitted by St. Jean should be excluded as contradictory and self-serving. This credibility determination will be left to the jury.

even if Plaintiffs were public employees, their speech is not protected because it does not touch upon a matter of public concern. Defendant suggests that occasional references to minimum wage are insufficient to demonstrate that the speech exercised on the Spec-Tator is a matter of public concern. Moreover, Defendant points out the undisputed fact that the majority of the postings on the Spec-Tator are derogatory remarks about both customers and management, as well as references to drug abuse.

In general, at-will employees may be terminated at any time with or without cause. If, however, an at-will employee is terminated for a reason that implicates a "clear mandate of public policy," the employee may have a claim for wrongful discharge. Pierce v. Orthro Pharmaceutical Corp., 84 N.J. 58, 72 (N.J. 1980). An at-will employee has a heavy burden to prove a clear mandate of public policy that was violated by his or her termination. New Jersey courts have held that a claim for wrongful termination based on a clear mandate of public policy requires that the termination of an employee must implicate more than just the private interests of the parties. DeVries v. McNeil Consumer Products Co., 250 N.J. Super. 159 (App. Div. 1991); House v. Carter-Wallace, Inc., 232 N.J. Super. 42, 48-49 (App. Div. 1989); Warthen v. Toms River Community Memorial Hospital, 199 N.J. Super 18, 29 (App. Div. 1985). Under the United States Constitution, the First Amendment protections for freedom of speech are directed only to state action, not to private action. See Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999); DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989). New Jersey state courts have not addressed whether or not a private employee may base a wrongful termination claim based on alleged interference with freedom of speech as protected by the New

Jersey Constitution. See Wiegand v. Motiva Enters., LLC, 295 F. Supp. 2d 465, 473-74 (D.N.J. 2003).[3]

The Third Circuit has held that the freedom of speech protections are not absolute even for public employees. Azzaro v. County of Allegheny, 110 F.3d 968, 976 (3d Cir. 1997). First Amendment protections extend to a public employee who speaks about an issue of public concern, as long as the interests of the employee outweigh the government's interests in efficiency of operation. Curinga v. City of Clairton, 357 F.3d 305, 310-11 (3d Cir. 2004). The Supreme Court has stated, "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." Connick v. Myers, 461 U.S. 138, 149 (1983). See Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). Speech related to private employment matters is not considered a mater of public concern. See Connick, 461 U.S. at 146 (speech on merely private employment matters is unprotected).

The Third Circuit has also provided a three step test for a *public* employees retaliation claim based on protected activity. Baldassare v. New Jersey, 250 F.3d 188, 195 (3d Cir. 2001). First, for issues concerning freedom of speech, the employee must show that the speech involved an issue of public concern. Id. Second, a plaintiff must show that "his interest in the speech outweighs the state's countervailing interest as an employer in promoting efficiency of the public service it provides through its employees. Id. Third, the protected activity must be a substantial or the motivating factor in the retaliation. Id.

---

[3] The court decided Wiegland on other grounds and did not determine whether private employees have a cause of action for wrongful termination based on protections for freedom of speech. Moreover, the Court finds that even if Plaintiffs here were public employees, they would have no cause of action in this case; therefore, the Court need not determine whether private employees ever have a cause of action based on protections for freedom of speech.

Plaintiffs have not adduced genuine material facts to support the Fifth Count. Even if Houston's were a public employer, Plaintiffs have failed to adduce sufficient facts from which a reasonable jury could find that the speech on the Spec-Tator implicated a matter of public concern.

2. Invasion of Privacy (Sixth Count)

Plaintiffs allege wrongful termination in violation of a clear mandate of public policy based on invasion of privacy under New Jersey common law. (Am. Comp. ¶ 35-36.) Defendants argue that Plaintiffs have failed to identify a source of public policy underlying this claim.

Plaintiffs rely on two cases for their privacy-based Pierce claim. They cite to the New Jersey Supreme Court in Hennessy v. Coastal Eagle Point Oil Co. 129, N.J. 81 (1992). In Hennessy, a case claiming invasion of privacy based on the employer's urinalysis testing, the court said that privacy may serve as a source of public policy, but that courts should balance the privacy interests against the interests of the employer. Id. at 99, 102. Because the court found that the employer's interest in deterring drug use was substantial, the court found that Hennessy's discharge did not fall under the public policy exception for the general rule that an employer can terminate an at-will employee at any time for whatever reason. Id. at 107. Plaintiffs also rely on the Third Circuit's holding that requiring an employee to submit to urinalysis testing and searches of personal property as part of a new drug prevention policy may violate public policy if the employer invaded the employee's privacy. Borse v. Pierce, 963 F.2d 611, 628 (3d Cir. 1992).

A right to privacy may be a source of "a clear mandate of public policy" that could support a claim for wrongful termination; however, these privacy interests will be balanced against the employer's interests in managing the business.

Plaintiffs created an invitation-only internet discussion space. In this space, they had an expectation that only invited users would be able to read the discussion. There is a disputed issue of material fact as to whether St. Jean voluntarily provided authorization to Defendant to access the website. This disputed fact is central to central to the cause of action asserted in the Sixth Count, and summary judgment is therefore denied on the Sixth Count.

C. Seventh Count for Violation of Common Law Tort of Invasion of Privacy

Plaintiffs claim that by viewing their private website, Defendant impermissibly intruded on their "seclusion or solitude, and/or private affairs," and this intrusion would be highly offensive to a reasonable person. (Am. Compl. ¶ 37-40.) Defendant argues St. Jean, an authorized user of the Spec-Tator, authorized Defendant to view the website. Further, Defendant contends that because most of the information on the Spec-Tator was public, there was no intrusion on anything private. Defendant also argues that Plaintiffs did not have a reasonable expectation, on an objective standard, that the Spec-Tator would remain private.

To prevail on a claim for intrusion upon Plaintiffs's seclusion or private affairs, Plaintiffs must prove that their solitude of seclusion or private affairs were infringed, and that the infringement would highly offend a reasonable person. Bisbee v. John C. Conover Agency Inc., 186 N.J. Super. 335, 339 (App. Div. 1982) (citing 3 RESTATEMENT (SECOND) OF TORTS § 652B). New Jersey courts have found that where a plaintiff consents to the invasion, this negates the invasion of privacy claim. Hall v. Heavey, 195 N.J.Super. 590, 597 (App.Div. 1984). New Jersey courts have also held the invasion must highly offend a reasonable person, and that "expectations of privacy are established by general social norms." White v. White, 344 N.J.

Super. 211, 223 (Ch. Div. 2001). This expectation of privacy must be objectively reasonable and a plaintiff's subjective belief that something is private is irrelevant. Id.

Like the Second and Fourth Counts based on statutory stored communication laws, the ability of Plaintiffs to recover on this Seventh Count for invasion of privacy turns on the disputed issue of whether or not St. Jean gave "consent" for Defendant to view the Spec-Tator. Additionally, the question of the reasonableness of the Plaintiffs' expectations of privacy is a question of fact for the jury to decide. For these reasons, the Court denies Defendant's motion for summary judgment on the Seventh Count.

Therefore, **IT IS** on this 24th day of July 2008, hereby

ORDERED that Counts One and Three of the Amended Complaint are **DISMISSED WITH PREJUDICE**; and it is

ORDERED that Defendant's motion for summary judgment in **GRANTED** as to Count Five of the Amended Complaint; and it is

ORDERED that Defendant's motion for summary judgment is **DENIED** as to Counts Two, Four, Six, and Seven of the Amended Complaint; and it is

ORDERED that a date shall be set for arbitration to commence within 45 days.

/s/ Hon. Faith S. Hochberg
Hon. Faith S. Hochberg, U.S.D.J.