

Employment Law Alert

FEDERAL COMPUTER CRIMES STATUTE GIVES RISE TO CIVIL CLAIMS AGAINST FORMER EMPLOYEE WHO LEAVES TO COMPETE WITH HIS FORMER EMPLOYER

***Guest-Tek Interactive Entertainment, Inc. v. Pullen,*
2009 WL 3403129 (D. Mass. Oct. 19, 2009)**

Summary

A recent decision in the federal district court of Massachusetts by Judge Gorton interprets a federal statute -- the Computer Fraud and Abuse Act -- to permit an employer to bring a claim against its former employee when the case involves improper access to and use of information stored in the employer's computer. Because this claim arises under a federal statute, it will be possible to file such cases in federal court under the court's federal question jurisdiction regardless of the existence of diversity between the parties (and then join any state law claims in the case under the doctrine of pendent jurisdiction). By broadly interpreting a federal statute that imposes both civil and criminal liability, the court's decision raises the spectre that employees may now face fines, imprisonment for up to five years, and forfeiture of all their gains if they take with them information they obtained by exceeding their authorized computer access.

Judge Gorton's opinion does not bind other judges and the issues remain open until the First Circuit or the Supreme Court releases a definitive decision. But the potential implications of his decision are significant.

The Computer Fraud and Abuse Act

The Computer Fraud and Abuse Act (the "CFAA"), 18 U.S.C. § 1030, prohibits unauthorized access to certain computers. The statute currently provides, among other things, that an individual may be held liable if he or she "knowingly and with intent to defraud, accesses a protected computer, without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value...." In addition to criminal penalties, the CFAA also allows private civil actions to be brought for economic damages as long as a party suffers damage or loss by reason of a violation of the statute that causes an aggregate loss to one or more persons from the violation in any one year period of at least \$5,000. There is a two year statute of limitations.

The Case

The Defendant, Pullen, was Guest-Tek's Vice President of North American Sales. By virtue of his position, Pullen was involved in all aspects of Guest-Tek's sales and marketing efforts and had access to Guest-Tek's confidential and proprietary information and trade secrets. Guest-Tek alleged that during the eight months prior to Pullen's resignation from the company, Pullen surreptitiously transposed thousands of Guest-Tek's computer files onto his own USB device and conspired with one of Guest-Tek's largest competitors to form a new company, PureHD, which now competes with Guest-Tek. Guest-Tek further alleged that Pullen, as founder and President of PureHD, has made a series of false and misleading statements regarding PureHD's position in the industry, which Pullen, as a former employee of Guest-Tek, knows to be false.

In its complaint in federal court against Pullen and PureHD, Guest-Tek asserted a number of claims for relief, including that Pullen violated the CFAA. Pullen filed a motion to dismiss the CFAA claim, arguing that because Guest-Tek had granted him unlimited access to all of the information at issue, he did not access the information “without authorization” or exceed his “authorized access.” Guest-Tek argued that once Pullen breached his duty of loyalty to the company by secretly copying the files and intending to use them for a competitive venture, Pullen extinguished his authorization to access Guest-Tek’s computer files.

Some courts have interpreted the CFAA narrowly, holding that “without authorization” only reaches conduct by outsiders who do not have permission to access a company’s computers in the first place. Others have interpreted it more broadly, holding that an employee accesses a computer “without authorization” whenever the employee, without the employer’s knowledge, acquires an interest that is adverse to the employer or has committed a serious breach of loyalty.

Judge Gorton adopted the broader interpretation. While the First Circuit has not specifically addressed this issue, Judge Gorton noted that it has interpreted the CFAA broadly in another case. Judge Gorton also noted that a broader reading was supported by recent amendments to and judicial interpretations of the statute, expanding its use in the employment context. Thus, Judge Gorton denied the defendants’ motion to dismiss and allowed Guest-Tek to proceed with its CFAA claim against Pullen.

The Lessons

- Employers potentially have available to them a claim, pursuant to the CFAA, against former employees who misappropriate confidential information from the company’s computer files, even if the employee had authorized access to the information during his or her employment.
- Employees must now be aware that even if they are authorized to access certain information by virtue of their position, if they copy and/or use that information for purposes other than for the benefit of their employer, they expose themselves to potential civil claims and possible criminal prosecution under the CFAA.
- The expansive interpretation of the civil claims available under CFAA means that even in the absence of diversity, employers may have an increased ability to bring cases against former employees in federal court under federal question jurisdiction rather than being limited to state court.
- Although not litigated in this case, potential liability under the CFAA as conspirators must now be added to the list of concerns for companies which hire their competitors’ former employees.

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David A. Bunis
dbunis@dwyercollora.com
617-371-1021

Michael A. Collora
mcollora@dwyercollora.com
617-371-1002

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