IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WENDI J. LEE,

Plaintiff,

v. **Case No.: 8:10-cv-02904-SDM-TBM**

PMSI, INC.,

Defendant.

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PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S UNTIMELY AMENDED PLEADING AND COUNTERCLAIM, OR ALTERNATIVLY TO DISMISS DEFENDANT'S COUNTERCLAIM

COMES NOW the Plaintiff, WENDI J. LEE, by and through undersigned counsel, and hereby moves this Court pursuant Rule 12(f), Fed. R. Civ. P., to strike Defendant PMSI, INC.'s, (hereinafter "PMSI") Untimely Amended Pleading and Counterclaim (hereinafter "Amended Pleading"), or in the alternative dismiss Defendant's Counterclaim pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and for grounds do state as follows:

I. GENERAL FACTS

1. On or about December 12, 2010 Defendant PMSI was served with Plaintiff's Complaint.

2. Defendant removed this matter from the Thirteenth Judicial Circuit in and for Hillsborough County to this Court.

3. On or about January 4, 2011 Defendant filed its Answers and Defenses, as well as its Motion to Dismiss Count II of Plaintiff's Complaint. (Dkt. No. 4 & 5)

4. On January 13, 2011, Judge Merryday issued his Order denying Defendant's Motion to Dismiss. (Dkt. No. 7)

5. Defendant filed its Amended Pleading, to include a newly added counterclaim, on February 7, 2011; thirty-four (34) days after filing its original Answer and Motion to Dismiss Count II and twenty-five (25) days after the Court's Order denying Defendant's Motion to Dismiss Count II of Plaintiff's Complaint.

6. Defendant has failed to comply with Federal Rules of Civil Procedure 12(a)(4)(A), 13(a)(1)(A) and 15(a)(1)(a).

7. Moreover, Defendant has failed to state a claim in its untimely Counterclaim pursuant to Rule 12(b)(6) and should be dismissed as a matter of law.

II. MOTION TO STRIKE AND MEMORANDUM OF LAW

A. Untimely Amended Pleading

8. Under Rule 12(a)(4)(A), Defendant had 14 days from this Court's Order of January 13, 2011 to file a responsive pleading. Because Defendant failed to comply with this Rule or seek leave of court, Defendant's Amended Pleading and Counterclaim are untimely and should be stricken as a matter of law.

9. Under Rule 15(a)(1), Defendant had 21 days from its original pleading or from a 12(b)(6) motion to amend, seek leave of court or opposing party's written consent. Plaintiff failed to comply with these requirements and thus its Amended Pleading should be stricken as a matter of law.

10. Undersigned counsel for the Plaintiff conferred with opposing counsel in compliance with Local Rule 3.01(g), but the parties could not resolve this issue.

B. Untimely Compulsory Counterclaim

11. Under Rule 13(a)(1)(A), Defendant is required to serve any Compulsory Counterclaim that is available at the time of service of the Complaint.

(a) **Compulsory Counterclaim**

(1) In general a pleading must state as a counterclaim any claim that - at the time of service - the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim...

Fed. R. Civ. P. 13(a).

12. Defendant failed to serve its Compulsory Counterclaim when it filed its original responsive pleading on January 4, 2011. Defendant's alleged Counterclaim existed at that time, as Defendant asserted the factual basis for such a Counterclaim by asserting its counterclaim. (See Dkt. 12, Pg. 6, Para. 8) (asserting that Plaintiff was terminated because of extensive usage). Accordingly there is no dispute that Defendant could have, and is required by Rule 13, to file any then available counterclaim with its original Answer.

13. Defendant's filing of its Compulsory Counterclaim on February 7, 2011, without leave of court or any consent by the opposing party is a direct violation of this Court's Rules, and should be stricken as improper.

WHEREFORE, Plaintiff, WENDI J. LEE, respectfully requests that this honorable court strike the Defendant's Amended Pleading and Counterclaim.

III. MOTION TO DISMISS COUNTERCLAIM AND MEMORANDUM OF LAW

14. Defendant is attempting to bring a counterclaim under the Computer Fraud and Abuse Act (hereinafter referred to as "CFAA"), 18 U.S.C. § 1030, and the Stored Communications Act (hereinafter referred to as the "SCA"), 18 U.S.C. § 2701 et seq. (Dkt. 12, Pg. 5-6, Para. 1, 4, 9).

15. The Defendant correctly states that 18 U.S.C. § 1030(g) does provide that any person who suffers damages or loss from a violation of the Act "may maintain a civil action against the violator[.]"18 U.S.C. § 1030(g). However, the Defendant mistakenly asserts that sections 1030 and 2707 are the appropriate vehicles which to bring an action to recover the value of lost productivity attributed to a worker spending time on the internet as alleged.

16. Additionally, in paragraph 9 of its Counterclaim, the Defendant fails to properly state the required elements which must be proven to recover under the CFAA. (Dkt. 12, Pg. 6, Para. 9). Specifically, to recover on a claim under 18 U.S.C. 1030(a)(2)(C) the Defendant must allege and demonstrate the culpable conduct involved a protected computer. 18 U.S.C. §1030(a)(2)(C).

17. Defendant fails to allege in its counterclaim that the computer accessed by Plaintiff, WENDI J. LEE, was a "protected computer." Thus, Defendant's counterclaim should be dismissed for failure to state a claim upon which relief can be granted under 18 U.S.C. 1030.

A. Dismissal Standard

18. A claim can be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Glover v. Liggett, 459 F.3d 1304, 1308 (11th Cir. 2006). The application of Rule 12(b)(6) in appropriate situations "streamlines litigation by dispensing with needless discovery and factfinding." Neitzke v. Williams, 490 U.S. 319, 326-27 (1989). A plaintiff must provide enough factual allegations, which are assumed to be true, "to raise a right to relief above the speculative level." Bell v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1965 (2007).

B. Background behind 18 U.S.C. §§ 1030, 2707

19. In an effort to protect classified information, financial records and credit information on governmental and financial institutions' computers, Congress first enacted the "Counterfeit Access Device and Computer Fraud and Abuse Act of 1984," which was significantly amended in 1986, and again by the enactment of the Computer Abuse Amendments Act of 1994. The 1994 amendments added 18 U.S.C.A. § 1030(g), which allows any person who suffered damage caused by an act in violation of section 1030 to "maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief." Deborah F. Buckman, Annotation, *Validity, Construction, and Application of Computer Fraud and Abuse Act (18 U.S.C.A. § 1030)*, 174 A.L.R. FED. 101 (2001 & Supp. 2009). Though "Congress has continuously broadened the scope and coverage of the Computer Fraud and Abuse Act since its original enactment[,]" the underlying purpose of Act has not changed, which is to punish individuals who intentionally damage, destroy, or misappropriate the data contained in computers used by governmental entities, financial institutions or that are otherwise identified as "protected." Id.

20. In addition to 18 U.S.C. 1030, Congress enacted the Stored Communications Act, which is part of the Electronic Communications Privacy Act of 1986, and was codified as 18 U.S.C. §§ 2701-2712. The SCA provides an additional mechanism for prosecuting individuals who intentionally obtain unauthorized and impermissible access to data stored on computer facilities not their own. Section 2701 is designed to provide criminal sanctions for anyone who "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic

communication while it is in electronic storage in such system." 18 U.S.C. §2701(a). Section 2707 provides that a civil right of action may be maintained by any "provider of electronic communication service, subscriber, or other person aggrieved by any violation of [the SCA] in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind...." 18 U.S.C. §2707(a).

C. Plaintiff's Allegations Are Insufficient to State A Claim Under the Computer Fraud and Abuse Act

21. "[A] person suing under section 1030(g) must prove: (1) damage or loss (2) by reason of (3) a violation of some other provision of section 1030, and (4) conduct involving one of the factors set forth in section 1030(a)(5)(B)(i)-(v)." Motorola, Inc. v. Lemko Corp., 609 F. Supp. 2d 760 (N.D. Ill. 2009); Clarity Services, Inc., v. Barny, 689 F. Supp. 2d 1309 (M.D. Fla. 2010). Defendant claims that the Plaintiff violated provision 1030(a)(2)(C). (Dkt. 12, Pg. 6, Para. 9). The three elements that must be proven to demonstrate a violation of 1030(a)(2)(C) are: (1) intentional access to a computer; (2) without authorization or that exceeds authorization; and (3) whereby information is obtained from a "protected computer." 18 U.S.C. §1030(a)(2)(C); see Motorola, 609 F. Supp. 2d at 766. Additionally, the Defendant must demonstrate that the "conduct involves 1 of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i)." 18 U.S.C. 1030(g).

22. As applied in section 1030, a "protected computer" is defined as:

> **(A)** exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or
>
> **(B)** which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States;

18 U.S.C. §1030(e)(2)(A)-(B).

23. The Defendant, PMSI, did not assert in their Counterclaim that the computer provided to the Plaintiff was for the exclusive use of a financial institution or the United States Government. Additionally, the Defendant fails to allege that the Plaintiff accessed a "protected computer."

D. Browsing the Internet and Checking Personal Email is Not Criminal Conduct Punishable Under the Computer Fraud and Abuse Act or the Stored Communications Act

24. The FCAA and the SCA were intended in pertinent part to criminalize conduct that compromised the confidentiality of a computer or storage facility – not to make it illegal to check your personal email. 18 U.S.C. §§ 1030(a)(2), 2701(a); Clarity Services, 698 F. Supp. 2d at 1316 (discussing Orin Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes,* 78 N.Y.U. L. Rev. 1596, 1634 (2003)). This Court should decline, as it did when deciding Clarity Services, to adopt such a "strikingly broad interpretation of a criminal statute." Clarity Services, 698 F. Supp. 2d at 1316.

25. In Clarity Services this Court addressed the validity of a civil claim brought by an employer under 18 U.S.C. §§ 1030(a)(2)(C), (g), against an employee for soliciting and reading an email from a customer after the employee had tendered his resignation. Id. at 1312. Specifically, the defendant's access to the email account provided to him by the plaintiff company was not discontinued until approximately three days after he had resigned. Id. In Clarity Services, this Court was faced with determining whether or not the employee was "without authorization or exceeded his authorization by reading the email after resigning." Id. at 1314 (internal quotations omitted). The decisive issue was how to interpret the ambiguous term of authorization. Id. at 1314-1316. The plaintiff in Clarity Services argued for "an expansive, agency definition of 'authorization' promoted in International Airport Centers, LLC v. Citrin,

440 F.3d 418, 420-21 (7th Cir.2006), and Shurgard Storage Centers, Inc. v. Safeguard Self Storage, Inc., 119 F.Supp.2d 1121, 1125 (W.D.Wash.2000)." Id. at 1314. Alternatively, the defendant in Clarity Services argued for the application of a narrower definition of "authorization," which this Court found "implement[ed] the plain meaning of the statutory language[.]" Id. at 1315. This Court held that applying the agency definition would violate the rule of lenity, which requires a narrow construction of ambiguous terms in a criminal statute." Id. at 1316 (citing LVRC Holdings, LLC v. Brekka, 581 F.3d 1127, 1134-35 (9th Cir.2009); Lockheed Martin Corp. v. Speed, 2006 WL 2683058, at *5-6 (M.D.Fla.2006)). Ultimately, this Court held that the plaintiff failed to present any evidence that the defendant had lacked authorization to access the email at issue or that the defendant exceeded his authorization to access the email at issue even though he had resigned from being in the employ of the plaintiff, and thus the plaintiff's claim failed under the narrow definition of authorization. Id. at 1316.

26. Similar to the plaintiff in Clarity Services, Defendant PMSI attempting to fabricate a cause of action under section 1030(a)(2)(C) on the grounds that the Plaintiff, WENDI LEE, exceeded her authorized access by using a computer provided to her by the company to access her email account, as well as social media websites. (Dkt. 12, Pg. 6, Para. 11). As in Clarity Services, where the plaintiff did not discontinue the defendant's access to the email account, PMSI did not disable or discontinue WENDI LEE's internet access to any of the websites which PMSI discuss in their Counterclaim. (Dkt. 12, Pg. 7, Para. 13). In fact, PMSI acknowledges that employees who worked in the same department, had similar responsibilities and were similarly situated to WENDI LEE were permitted to access a variety of websites on the internet at their own discretion. (Dkt. 12, Pg. 7, Para. 14). The only action that PMSI claims to have taken regarding WENDI LEE's authorization to access the internet was to criticize her

usage during the 90-day performance evaluation issued on or about August 25, 2009. (Dkt. 12, Pg. 5, Para. 6). Given the lack of any additional assertions of steps taken to limit or restrict WENDI LEE's authorization to access the internet, PMSI has failed to provide enough factual allegations, if assumed to be true, "to raise a right to relief above the speculative level" in light of the decision in Clarity Services, thus Defendant's counterclaim should be dismissed for failure to state a claim upon which relief can be granted. Bell, 550 U.S. at 555, 127 S.Ct. at 1965; Clarity Services, 698 F. Supp. 2d 1309.

27. Simply put, to permit this civil claim to go forward would require that Court to adopt the "strikingly broad interpretation of a criminal statute, ... which violates the rule of lenity," and rule that 18 U.S.C. §§ 1030 and 2701 et seq., was intended by Congress to make it a crime for an employee to access his or her personal email account while at work. Clarity Services, 698 F. Supp. 2d at 1316. Such a ruling would be unconscionable.

IV. CONCLUSION

28. The Defendant has failed to properly obtain either the written consent of opposing counsel or leave of this Court to file their Amended, Defenses and Counterclaim, as required by the Rules of Federal Procedure. Additionally, the Defendant has failed to properly plead the required elements of a claim upon which relief can be granted. Finally, the Defendant has misconstrued the scope and intent of the Computer Fraud and Abuse Act – a criminal statute that permits civil remedies for those damaged as a result of criminal conduct - in an attempt to recover the monetary value of loss of productivity for an employee checking his or her personal email while at work.

WHEREFORE, the Plaintiff, WENDI J. LEE, by and through undersigned counsel, respectfully requests this Court Strike Defendant PMSI, INC.'s, Amended Pleading and

Counterclaim, or in the alternative dismiss the Defendant's Counterclaim, and award reasonable fees and costs for having to bring this motion before the Court, along with any other relief this Court deems necessary and proper.

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