

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

WENDI J. LEE,

Plaintiff/Counter-Defendant,

v.

Case No. 8:10-cv-2904-T-23TBM

PMSI, INC.,

Defendant/Counter-Plaintiff.

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**DEFENDANT/COUNTER-PLAINTIFF'S RESPONSE IN OPPOSITION TO
PLAINTIFF/COUNTER-DEFENDANT'S MOTION TO STRIKE
DEFENDANT'S UNTIMELY AMENDED PLEADING AND
COUNTERCLAIM, OR ALTERNATIVELY TO DISMISS
DEFENDANT'S COUNTERCLAIM**

Defendant/Counter-Plaintiff, PMSI, INC., by and through undersigned counsel, hereby files its Response in Opposition to Plaintiff/Counter-Defendant's Motion to Strike Defendant's Untimely Amended Pleading and Counterclaim, or Alternatively to Dismiss Defendant's Counterclaim ("Motion to Strike/Motion to Dismiss), and in support thereof states the following:

On or about December 12, 2010, Plaintiff/Counter-Defendant filed her two-count Complaint in the Thirteenth Judicial Circuit in and for Hillsborough County, Florida. Count I of the Complaint is brought under Pregnancy Discrimination Act. Count II of the Complaint is a discrimination claim brought under the Florida Civil Rights Act, Chapter 760, Florida Statutes.

Defendant/Counter-Plaintiff removed Plaintiff/Counter-Defendant's Complaint to this Court. Soon thereafter, Defendant filed an Answer and Defenses as to Count I of the Complaint and a Motion to Dismiss as to Count II of the Complaint. On, January 13, 2011, the Court denied Defendant's Motion to Dismiss. Thus, an Amended Answer was required on January 31,

2011. To close the pleadings, Defendant filed an Amended Answer to address the paragraphs in Count II that were not addressed in the original Answer and a Counterclaim. Because the Counterclaim was not filed in the original Answer or within 14 days of the Court's Order denying the Motion to Dismiss, Plaintiff has responded by filing the instant Motion to Strike/Motion to Dismiss.

DISCUSSION

1. Plaintiff's Motion to Strike/Motion to Dismiss should be denied because an Amended Answer was required by Defendant.

After the Court entered its Order denying Defendant's Motion to Dismiss, Defendant filed its Amended Answer, Defenses and Counterclaim. The difference between the original Answer and Defenses and the Amended Answer, Defenses and Counterclaim, involve answering the allegations under Count II of the Complaint and the addition of the Counterclaim.

Plaintiff has asked this Court to strike Defendant's Amended Answer, Defenses and Counterclaim as untimely. In considering Plaintiff's Motion to Strike, this Court should be guided by the well settled principle that Motions to Strike are generally disfavored. For example, the district court noted:

Rule 12(f) of the Federal Rules of Civil Procedure permits the Court to strike any "insufficient defense;" however it is well settled among courts in this circuit that motions to strike are generally disfavored and will usually be denied unless it is clear the pleading sought to be stricken is insufficient as a matter of law. Fabrica Italiana Lavorazione Materie Organiche S.A.S. v. Kaiser Aluminum & Chemical Corp., 684 F.2d 776 (11th Cir. 1982); Thompson v. Kindred Nursing Centers East, LLC, 211 F.Supp.2d 1345 (M.D. Fla. 2002); In re Sunbeam Securities Litigation, 89 F.Supp.2d 1326 (S.D. Fla. 1999)). A "court will not exercise its discretion under the rule to strike a pleading unless the matter sought to be omitted has no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party." Reyher v. Trans World Airlines, Inc., 881 F.Supp. 574 (M.D. Fla. 1995).

Blanc v. Safetouch, Inc., 2008 WL 4059786 (M.D. Fla. Aug. 27, 2008). Applying this standard to the present case should lead this Court to deny Plaintiff's Motion. While Plaintiff raises the timeliness argument, Plaintiff has not shown that Defendant's Amended Answer, Defenses and Counterclaim have no possible relationship to the controversy, will result in confusion, or otherwise will prejudice a party. Indeed, prejudice cannot be shown because Plaintiff had not served any discovery at the time that Defendant filed its Amended Answer, Defenses, and Counterclaim.

Plaintiff's timeliness argument ignores the fact that a response was due following the Court's denial of Plaintiff's Motion to Dismiss. While more than 21 days elapsed between the entry of the Court's Order and the filing of the Amended Answer, Defenses and Counterclaim, Plaintiff did not move for default and the Court did not enter default against Defendant. Because Defendant's Amended Answer was filed before entry of default, Plaintiff's Motion to Strike/Motion to Dismiss should be denied.

Recognizing that motions to strike and entry of defaults are disfavored, Florida courts have regularly accepted untimely answers. Defendant's argument is supported by Advance Concrete Materials, LLC v. Con-Way Freight, Inc., 2009 WL 2973265 (S.D. Fla. Sept. 11, 2009). In Advance Concrete Materials, the defendant moved for default arguing that the plaintiff's answer to the defendant's counterclaim was untimely. The district court accepted the untimely answer ruling that "defaults are seen with disfavor because of the strong policy of determining cases on their merits." Id. at *2 (quoting Florida Physicians Inc. Co. v. Ehlers, 8 F.3d 780, 783 (11th Cir. 1993)). The court observed that while the answer was untimely, a default had not been entered. Id. The court further noted that the defendant did not show that

the untimely answer caused it to experience prejudice. The court concluded that the best course of action was to allow the case to be decided on the merits.

Likewise, the district court in Birdsong v. Ehlke, 2010 WL 3610251 (N.D. Fla. Sept. 14, 2010), accepted an untimely answer despite a plaintiff's argument seeking default. The Birdsong court also recognized that defaults are viewed with disfavor and there is a strong policy for deciding a case on its merits. Id. (citing In re Worldwide Web Sys., 328 F.3d 1291, 1295 (11th Cir. 2003)).

Finally, Defendant's argument has stronger support from the decision in Continental Insurance Company v. Carib Link, S.A., 2007 WL 2774255 (S.D. Fla. Sept. 24, 2007). In that case, the plaintiff filed a motion to strike the defendant's answer, affirmative defenses and counter-claim. The district court denied that motion finding that the plaintiff had not shown any prejudice as a result of the delay. Id. As noted above, while Plaintiff in the present case has argued that Defendant's Amended Answer, Defenses and Counterclaim is untimely, she has not presented any argument showing that the untimely filing will have a prejudicial result. Therefore, Plaintiff's Motion to Strike should be denied.

Plaintiff also argues that the Court should strike Defendant's Amended Answer because leave to amend the original answer was not sought by Defendant. Defendant did not need to seek leave to amend to file the Amended Answer. Because the Defendant's Motion to Dismiss was denied, an Amended Answer was required to close the pleadings. Indeed, Plaintiff's approach would provide an additional burden to the Court that would not be necessary. For example, under Plaintiff's approach, Defendant would have to file the amended answer to address Count II of the Complaint, and file a separate motion asking the Court for leave to file a

Second Amended Answer and Counterclaim. Such an approach is cumbersome and would create an unnecessary burden on the parties and the Court.

Notwithstanding Plaintiff's argument to the contrary, Rule 15(a)(1) of the Federal Rules of Civil Procedure does not apply because after entry of the Court's Order, Defendant was required to file the Amended Answer. Defendant did not require consent from the Court or the Plaintiff to file the Amended Answer. Defendant was required to address the portions of the Complaint that were not addressed in the original answer. Nothing in the Federal Rules of Civil Procedure or Local Rules suggests that an Amended Answer following the entry of a Court order should be limited to the unanswered counts. Defendant fulfilled the requirement of responding to the unanswered counts and added the Counterclaim. Plaintiff's Motion to Strike should therefore, be denied.

For similar reasons, Rule 13(a) does not prevent Defendant from pursuing the counterclaim against Plaintiff. As noted above, the entry of the Court's Order allowed Defendant to file an Amended Answer. Rule 13(a) does not prevent a party from filing an amended pleading. Rather, Rule 13(a) prevents a party from filing a second lawsuit in a different proceeding. See Pollution Prevention Services, Inc. v. Inter Recycling, Inc., 1996 WL 378990 (M.D. Fla. 1996)(ruling that the purpose of Rule 13(a) is to prevent a multiplicity of actions and to achieve a resolution in a single lawsuit)(citing Southern Construction Co. v. Pickard, 371 U.S. 57, 60 (1962)).¹

¹ To the extent that the Court agrees with Plaintiff on the timeliness issues, Defendant is prepared to file a Motion for Leave to File and Amended Answer, Defenses, and Counterclaim. Defendant further anticipates that Plaintiff would oppose the relief sought in this Motion.

2. Plaintiff's Motion to Dismiss should be denied because Defendant pled the elements of a claim under the Computer Fraud and Abuse Act.

In the Amended Answer, Defendant sets forth a claim against Plaintiff/Counter-Defendant under the Computer Fraud and Abuse Act. Plaintiff has moved to dismiss arguing that Defendant failed to plead that Plaintiff accessed a "protected computer" as defined by the Act.

The pertinent provisions of the Act read as follows, "whoever . . . intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer if the conduct involved an interstate or foreign communication . . . shall be punished" as provided in section (c) of the statute. 18 U.S.C. § 1030(a)(2)(C). Additionally, § 1030(g) provides that: "[a]ny person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief." 18 U.S.C. § 1030(g). A "protected computer" means a computer "which is used in interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2)(B). "The term 'exceeds authorized access' means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6).

The allegations of the Counterclaim satisfy the requirements of the Computer Fraud and Abuse Act. In paragraph 4 of the Counterclaim, Defendant alleges that Ms. Lee was a proposal developer in the PMSI Marketing Department. The nature of Defendant's business and Plaintiff's former duties satisfy the interstate commerce requirement set forth in the statute. Among other things, Plaintiff was required to prepare proposals for bid responses. Defendant provides workers compensation pharmacy benefits management and other services throughout

the United States. In her position, Plaintiff routinely communicated to individuals outside the state of Florida concerning her work on behalf of Defendant.

In paragraph 6, of the Counterclaim, Defendant alleged that Plaintiff was criticized in an evaluation for excessive internet usage. In paragraph 10, Defendant alleged that Plaintiff intentionally accessed Defendant's computer system. Thus, Plaintiff has met the requirement of pleading that Plaintiff accessed a "protected computer." Defendant's Counterclaim also satisfied the requirement in paragraph 11 where Defendant alleges that:

During her employment with PMSI, Lee exceeded her authorization to use the internet by accessing and spending large amounts of paid work time visiting personal websites such as Facebook and her monitoring and sending personal emails through her Verizon web mail account, while on company paid time and from a company owned computer.

Because the Court must accept all allegations in the Counterclaim as true and make all reasonable inferences in favor of the Defendant/Counter-plaintiff, Counter-defendant's Motion to dismiss must be denied. See Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683 (1974).

Plaintiff also argues that a narrow definition should be accorded the Computer Fraud and Abuse Act in light of this Court's decision in Clarity Services, Inc. v. Barny, 689 F.Supp. 2d 1309 (M.D.Fla. 2010). Plaintiff's argument ignores the fact that Clarity Services, involved a motion for summary judgment. In that case, the Court considered the discovery and determined whether the claim under the Computer Fraud and Abuse Act could proceed to trial. Here, Plaintiff is attempting to skip the discovery process by using a summary judgment case to obtain a motion to dismiss. As noted in the previous paragraph, Defendant has satisfied the elements of pleading a claim under the Act. At this stage, Defendant should be permitted to engage in discovery to determine whether the evidence supports the allegations of the Counterclaim.

Plaintiff's argument also ignores the fact that over the years Congress has expanded the scope of the CFAA. Initially, the CFAA was a criminal statute designed to protect government

computers. After a number of amendments, the CFAA has been expanded to provide a civil remedy for computers in the private sector. See 18 U.S.C. § 1030(g).

The plain language of the Computer Fraud and Abuse Act also prevents Plaintiff from escaping liability through a Motion to Dismiss. Defendant alleged that Plaintiff exceeded her authorized use of the company's computer's for personal purposes. Indeed, Plaintiff received a critical evaluation for her excessive use of the computer to access the internet. As a result of her actions, Defendant suffered losses from her unproductive time. Plaintiff's Motion to Dismiss must be denied. See U.S. v. Rodriguez, 2010 WL 5253231 (11th Cir. 2010)(ruling that an employee's violation of a company policy to access a computer for personal use exceeds authorized access as defined by the Act).

Defendant's reliance on the CFAA is further supported by the Eleventh Circuit's recent decision in United States v. Rodriguez, 2010 WL 5253231 (11th Cir. 2010). Although Rodriguez is a criminal case, the principles are applicable to the present case. In Rodriguez, the employee challenged the government's reliance on the statute asserting that he did not use information from his office computer for a criminal purpose. The Eleventh Circuit disagreed with the employee's argument emphasizing that the act focuses on an employee's obtaining information without authorization or as a result of exceeding authorized access. *Id.* (citing 18 U.S.C. §1030(a)(2)(B)). The court concluded that the employee violated the CFAA because he exceeded his authorized access when he obtained personal information for a non-business reason. Likewise, in the present case, Plaintiff exceeded her authorized access to the Defendant's computers when she violated the company's policy to visit internet sites for personal purposes. Therefore, this Court should find that the CFAA applies in the present case and deny Plaintiff's Motion to Dismiss.

WHEREFORE, for all of the foregoing reasons, Defendant/Counter-plaintiff respectfully requests that this Court enter an Order denying Plaintiff's Motion to Strike/Motion to Dismiss.

Respectfully submitted this 10th day of March, 2011.

s/Richard L. Bradford

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 10th day of March, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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