

THOMAS W. RIECK
trieck@rieckcrotty.com
JEROME F. CROTTY
jcrotty@rieckcrotty.com
RONALD P. DUPLACK
rduplack@rieckcrotty.com
DOUGLAS C. CONOVER
dconover@rieckcrotty.com
KEVIN P. BROWN
kbrown@rieckcrotty.com
BERNARD A. HENRY
bhenry@rieckcrotty.com

RIECK AND CROTTY

ATTORNEYS AT LAW
A PROFESSIONALS CORPORATION
55 WEST MONROE STREET, SUITE 3390
CHICAGO, ILLINOIS 60603-5062

TELEPHONE:
(312) 726-4646

TELECOPIER:
(312) 726-0647

FIRM WEB SITE:
<http://www.rieckcrotty.com>

March 2009

THE COURTHOUSE PERSONNEL DEPARTMENT

THE COMPUTER FRAUD AND ABUSE ACT

IMPACTS VIRTUALLY ALL DEPARTING EMPLOYEES

Almost all employees use computers in their employment. As a result, employees should be knowledgeable about The Computer Fraud and Abuse Act ("CFAA"). Legal issues under the CFAA generally arise for the employer when an employee's employment is terminated and for an employee when he or she contemplates termination.

The CFAA criminalizes various fraudulent or damaging activities related to the use of computers. The CFAA allows an employer who suffers damage or loss by reason of a violation of the CFAA to maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. Specifically, a violation of the CFAA occurs when an individual knowingly, and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct obtains anything of value or causes damage and loss.

The February 2009 case of Ervin & Smith Advertising and Public Relations, Inc. illustrates these issues. This case involved Ervin & Smith Advertising and Public Relations, Inc. ("Ervin & Smith"), a Nebraska corporation engaged in the business of advertising, marketing, and public relations. Defendants William Ervin and Thomas Ervin (collectively, "the Ervin Brothers") were employees of Ervin & Smith as executive designers working primarily on agricultural accounts. For a period of time during their employment, the Ervin Brothers were officers of Ervin & Smith. During their employment, the Ervin Brothers formed their own company, Ervin Group, as a competing advertising agency. Following their resignation from Ervin & Smith, the Ervin Brothers worked solely for the Ervin Group.

Ervin & Smith filed a complaint against the Ervin Brothers and other former employees alleging 12 separate causes of action based on claims for breach of fiduciary duty, unlawful restraint of trade,

Rieck and Crotty, P.C. publishes ***THE COURTHOUSE PERSONNEL DEPARTMENT*** not less frequently than bi-monthly to keep employers and employees advised of current issues and decisions throughout the United States relating to discrimination, civil rights and other employment law matters which may impact future employment decisions. If you desire additional information concerning any of the articles, please telephone us. Your comments concerning this publication are welcome.

violation of the Nebraska Computer Crimes Act, fraud, deceptive trade practices, computer fraud and abuse, and violations of federal copyright law. This article only discusses the claims under the CFAA.

Ervin & Smith alleged that, while in positions of substantial trust and confidence, and in the few months before they resigned from their positions with Ervin & Smith, the Ervin Brothers e-mailed confidential, trade secret, and copyrighted documents to their home computers in order to use the information for their own personal gain; and they concealed certain job orders from customers, which they then diverted to their own company, the Ervin Group, to fill after they resigned their employment. Ervin & Smith complained that they were damaged because they lost revenue as a result of these actions.

The Ervin Brothers contended that, because they were employees at the time they allegedly accessed Ervin & Smith's computers, they had "authorization" and thus did not access the computers "without authorization" or in excess of "authorized access" as is required by the CFAA to establish a violation. Thus, they argued, Ervin & Smith's CFAA claim failed.

The Eighth Circuit Court of Appeals, where Nebraska is located, had not directly addressed this issue, so they looked to the decisions of other courts. In the Seventh Circuit, where Illinois is located, the Court has held that an employer may pursue his claim against an employee who accessed information he is ordinarily authorized to access when the alleged act is committed "in violation of the duty of loyalty that agency law imposes on [the] employee." Following that ruling, the Nebraska Court concluded that while the Ervin Brothers ordinarily may have been authorized to access the information they appropriated from Ervin & Smith, that authorization was terminated when the Ervin Brothers destroyed the agency relationship by accessing and appropriating the protected information for their own personal gain and against the interest of their employer; in other words, the Ervin Brothers violated their duty of loyalty to Ervin & Smith.

In addition, the Court stated that the Confidential Agreement in the Ervin & Smith Employee Handbook ("Handbook") supported Ervin & Smith's contention that the Ervin Brothers were only authorized to access this protected information so long as they abided by the agreed-upon terms found within the Handbook. The Handbook stated that employees were only allowed access to Ervin & Smith's protected information so long as they did not "use, directly or indirectly, any confidential information for [their own] or any third party's benefit." Consequently, the Court concluded that the Ervin Brothers never had authorization to access Ervin & Smith's protected information to further solely their own competitive business interests.

Thus, the Court denied the Motion to Dismiss filed by the Ervin Brothers and allowed the case by Ervin & Smith to proceed.

The CFAA is another arrow in the employer's quiver to prevent unfair competition by terminated employees. Employees who are contemplating termination of employment should contact us for advice about what information, if any, they can download from their computer and retain in order to avoid a violation of the CFAA, otherwise they might unwittingly subject themselves to damages, legal fees for defense, and a disruptive start in their new endeavor.

* * * * *

Be sure to visit our website at www.riECKcrotty.com to read prior issues of *The Courthouse Personnel Department* and *A Potpourri*.