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## Exec Fired For Opening Co-Worker Email Loses At 11th Circ.

By **Alex Wolf**

Law360, New York (January 25, 2017, 8:14 PM EST) -- The Eleventh Circuit on Wednesday upheld multiple trial court rulings in favor of furniture manufacturer Brown Jordan International Inc. in a case against a terminated former executive who accessed co-workers' emails and reported potential wrongdoing, saying the access was unauthorized and the company showed a loss under applicable federal law.

In a published opinion, a panel for the Eleventh Circuit found that a Florida federal court correctly ruled in favor of Brown Jordan on claims that former employee Christopher Carmicle violated the Stored Communications Act and Computer Fraud and Abuse Act.

The panel also found that summary judgment was properly granted in favor of the company on Carmicle's claims for wrongful discharge and in determining that Carmicle was terminated for cause.

Carmicle, who last served as president of the company's two largest subsidiaries — Brown Jordan Co. and Brown Jordan Services — was fired after he reported his concerns to the company board that several senior management officials, including CEO Gene Moriarity, had created two different sets of financial projections for the company when it was considering finding a buyer in 2013 with the apparent goal of attempting to buy out a division themselves.

Carmicle cooperated with an internal investigation into his allegations, but also revealed during that process that he discovered the information by secretly accessing those colleagues' work email accounts by using a universal password after they had failed to create personalized passwords.

In his hopes to undo a spate of lower court losses, including a bench ruling after an 11-day trial, **Carmicle argued** that the evidence established that Brown Jordan suffered no loss as it is defined in the CFAA because he caused no damage to the company's computer system and there was no "interruption of service." In so doing, he disputed the company's claim that it incurred a loss stemming from a payment to an outside consultant to assess how Carmicle accessed the emails, and a payment to a contractor to sweep the office building for audio and video surveillance devices.

But the panel, in keeping with prior decisions in the Fourth and Sixth Circuits, said that loss can be defined as reasonable costs incurred in connection with responding to a violation, assessing the damage done, and restoring the affected data, program system, or information to its condition prior to the violation.

"Thus, under a plain reading of the statute, a loss does not need to be related to an interruption of service in order to be compensable," the court said.

The company's losses were incurred in the course of responding to the offense and are therefore compensable under the CFAA, the panel said.

The circuit court also agreed with the trial court that Carmicle was unauthorized under company policy to exploit a generic password that allowed him to access others' email accounts "without

requesting such access through appropriate and otherwise necessary channels — solely on suspicion of dishonesty concerning the content of communications between others, without any reason to suspect wrongful or illegal conduct prior to doing.”

Though Carmicle argued on appeal that he did not violate the SCA because the emails he accessed had already been opened by their intended recipients and therefore were not held in “electronic storage” as that term is defined by the statute, the court said it would not consider this argument because it was not raised in the district court.

The panel also affirmed the lower court’s rejection of Carmicle’s claim for wrongful termination under Kentucky law, observing that the statute he cited did not apply because he was not a director or corporate officer. The panel also said that the lower court was correct to consider each of Carmicle’s separate access of emails as a separate event and hold that he was terminated for cause under his employment agreement.

Speaking to Law360 on Wednesday, Brown Jordan attorney Lloyd B. Chinn of Proskauer Rose LLP said the opinion was important because it shows that there are limitations on the rights of purported whistleblowers.

“This case stands for the idea that employees don’t have an unlimited right to access and take company communications whatever the purported rationale,” he said. “That may have been lost with some of the enthusiasm over whistleblowing over the years.”

An attorney for Carmicle did not immediately respond to a request for comment Wednesday evening.

Circuit Judges Stanley Marcus and Susan H. Black and District Judge Mark H. Cohen sat on the panel for the Eleventh Circuit.

Carmicle is represented by Glenn A. Cohen and Lynn M. Watson of Seiller Waterman LLC and Daniel F. Blonsky and Susan E. Raffanello of Coffey Burlington.

Brown Jordan is represented by Lloyd B. Chinn, Allan H. Weitzman and Jurate Schwartz of Proskauer Rose LLP.

The cases are Brown Jordan International, et al. v. Carmicle and Carmicle v. BJI Holdings LLC, et al., consolidated on appeal as case number 16-11350, in the U.S. Circuit Court for the Eleventh Circuit.

--Additional reporting by Nathan Hale. Editing by Joe Phalon.