US. v. Nosal — Another Strikeout in the Offing?

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The Ninth Circuit narrowly construes the Consumer Fraud and Abuse Act

David Nosal was a high level employee at Korn/Ferry International ("KFI") for over eight years. Apparently intending to start a competing business, he and several colleagues are alleged to have copied valuable information from "KFI's computer system, prior to and upon termination of their employment with KFI by using their own KFI password-protected user accounts." U.S. v. Nosal, 2009 WL 981336 (N.D.Cal. 2009) (Nosal I). He was indicted for alleged violations of 18 U.S.C. § 1832, the Economic Espionage Act (EEA); 18 U.S.C. § 1030, the Consumer Fraud and Abuse Act (CFAA); and 18 U.S.C. § 1341, mail fraud; as well as conspiracy to commit those offenses.

In 2009, *Nosal I* dismissed the mail fraud counts "for failure to state an offense." *Id*. at *9. Arguments challenging the EEA counts seem to have so far centered on whether Nosal knew his conduct was criminal. The court found them meritless. *Id*. at *3-4. Arguments that carried the day in U.S. v. Aleynikov, 2012 WL 1193611 (2d Cir.), have apparently not been asserted but may have more potential. See U.S. v. Aleynikov: Why is Theft of Valuable Code Not Criminal?

Challenges to the CFAA counts are of most interest here. They center on statutory text, but *Nosal I*, following the lead of First and Seventh Circuit cases, finds no ambiguity in the statute and refuses to apply "the rule of lenity in criminal cases." *Id*. at *7. After LVRC Holdings LLC v. Brekka, 581 F.3d 1127 (9th Cir.2009), cast doubt on that conclusion, however, a second opinion was issued. It dismisses several CFAA counts. U.S. v. Nosal, 2010 WL 934257 (Nosal II), at *8-9.

Brekka is a civil action under 18 U.S.C. § 1030(g). It centers on whether access was authorized, whereas the Nosal indictment centers on whether a person violates the CFAA by using legitimate access in a way that is forbidden. Thus, the government argued that *Brekka* is not dispositive. After parsing the statute in considerable detail, *Nosal II* approves counts that allege unauthorized access but, despite government protest, but it strikes counts alleging uses that exceed authorization.

On interlocutory appeal by the government, the Ninth Circuit affirms en banc. U.S. v. Nosal, 2012 WL 1176119 (Nosal III). As found there: "The government's construction of the statute would expand its scope far beyond computer hacking to criminalize any unauthorized use of information obtained from a computer. …. [W]e can properly be skeptical as to whether Congress, in 1984, meant to criminalize conduct beyond… breaking into a computer." *Id*. at *2. Expanding, the opinion says, "the government's interpretation of 'exceeds authorized access' makes every violation of a private computer use policy a federal crime." *Id*. at *3. Moreover, "although employees are seldom disciplined for occasional use of work computers for personal purposes… under the broad interpretation of the CFAA, such minor dalliances would become federal crimes. …. Employers wanting to rid themselves of troublesome employees without following proper procedures could threaten to report them to the FBI unless they quit. Ubiquitous, seldom-prosecuted crimes invite arbitrary and discriminatory enforcement." *Id*. at *4 (notes omitted).

In response to assurances that minor violations would not be prosecuted, the court says, "we shouldn't have to live at the mercy of our local prosecutor." *Id*. at *6. It then cites U.S. v. Kozminski, 487 U.S. 931, 949 (1988), where the rule of lenity was applied lest the Court "delegate to prosecutors and juries the inherently legislative task of

determining what type of ... activities are so morally reprehensible that they should be punished as crimes" and would "subject individuals to the risk of arbitrary or discriminatory prosecution and conviction." *Nosal III* at *6. Thus, risks posed by the prosecution of Nosal are more compelling than those posed in U.S. v. Aleynikov, 2012 WL 1193611, where, at *9, the same idea is brought to bear.

Two dissenters lament the court's failure to follow decisions of the Fifth and Eleventh Circuits, which "explicitly held that employees who knowingly violate clear company computer restrictions agreements 'exceed authorized access' under the CFAA." *Nosal III* at *9. The dissent concludes, "even if an imaginative judge can conjure up far-fetched hypotheticals producing federal prison terms for accessing word puzzles, jokes, and sports scores while at work, well, ... that is what an as-applied challenge is for. …. Because the indictment adequately states the elements of a valid crime, the district court erred in dismissing the charges." *Id*. at *11.

Answering, the majority says, "We remain unpersuaded by the decisions of our sister circuits…. These courts looked only at the culpable behavior of the defendants before them, and failed to consider the effect on millions of ordinary citizens caused by the statute's unitary definition of 'exceeds authorized access.' …. We therefore respectfully decline to follow our sister circuits and urge them to reconsider instead. For our part, we continue to follow in the path blazed by *Brekka* and the growing number of courts that have reached the same conclusion." *Id*. at *6-7 (citations omitted).

Failure to appeal dismissal of the CFAA counts against Aleynikov may indicate that the government has abandoned attempts to press such views. *See* 2012 WL 1193611 at *3. But that does not dispose of civil cases where the doctrine of lenity presumably does not apply and employers might file claims or counterclaims alleging that employees,

exceeding permissible use of workplace computers, checked Facebook or sent personal email. *See Nosal III* at * 4, n.6.

In any event, the game is not over. As noted above, other counts remain in Nosal's indictment. At least under the EEA, if the Ninth Circuit follows the Second, liability should turn on whether he downloaded, or possibly conspired to download, information to KFI –owned media then carried away. Should Congress wish to excise that limitation, the better approach would seem to be an amendment to the EEA.