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NOTES

HELPING EMPLOYERS HELP THEMSELVES: RESOLVING THE CONFLICT BETWEEN THE FAIR CREDIT REPORTING ACT AND TITLE VII

*Meredith J. Fried**

INTRODUCTION

A small business owner was shocked to hear the judgment against him in the sexual harassment case brought by a former employee. Because he had not conducted an adequate investigation into the plaintiff's harassment complaint, the employer was held liable for plaintiff's damages arising from the harassment. Determined to protect his employees and avoid liability in the future, the employer asked his attorney to help him conduct adequate and independent investigations. The attorney, who until recently was a staff attorney at the Federal Trade Commission ("FTC"), gave him some discouraging news. According to the FTC, correcting the flaws in his investigations may allow the employer to avoid sexual harassment liability to the harassed employee, but instead make him liable to the alleged harasser for violations of the Fair Credit Reporting Act ("FCRA" or "Act").

Title VII of the Civil Rights Act of 1964¹ prohibits an employer from discriminating against an employee based on race, color, religion, sex, or national origin.² Sexual harassment is a form of prohibited workplace discrimination.³ Employers may be liable for the actions of the harasser if they fail to exercise their duty of

* The author would like to thank her family John, Gloria and Mathew Fried for their unconditional love and unflagging support. Most of this Note, and the reasoning contained therein, predates the House Subcommittee Hearings of May 4, 2000 on the conflict between the FRCA and workplace investigations. The discussions and resultant bills from those Hearings have been incorporated into the Note.

1. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

2. Title VII states that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(1).

3. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

reasonable care to prevent or correct harassment.⁴ Congress enacted the FCRA to protect individuals from being denied credit, insurance, or employment opportunities due to inaccurate, obsolete, or disputed information collected or disseminated by credit bureaus or investigators.⁵

In April 1999, an FTC staff attorney issued an unofficial interpretation of the FCRA opining that employers who use law firms or other investigative agencies ("outside agencies") to conduct sexual harassment investigations are subject to the requirements of the FCRA.⁶ In March 2000, the FTC officially adopted this staff attorney interpretation of the FCRA, creating a conflict between the consumer protections of the FCRA and employer obligations with respect to Title VII investigations.⁷ An employer who relies on an outside agency to conduct a sexual harassment investigation must comply with FCRA consumer protections, the purpose of which is to protect the subject of an investigation from arbitrary or unfair treatment.⁸ To

4. See discussion *infra* at Part I.A.1. Heightened awareness of sexual harassment, due in part to the Clarence Thomas confirmation hearings and the Paula Jones sexual harassment suit, in addition to the availability of compensatory and punitive damages under the Civil Rights Act of 1991, has increased the number of sexual harassment claims and the average awards levied against employers found liable in court. See Francis Achampong, *Workplace Sexual Harassment Law* 157 (1999). In 1991, 6,892 sexual harassment suits were filed, with the number almost doubling to 12,537 in 1993. In 1998, there were an estimated 18,000 such suits. See *id.*

5. See Alexander Hamilton Institute, *Privacy in the Workplace: When Employer-Employee Rights Collide* 10 (1987) (indicating that the FCRA is implicated when an employer investigates improper employee activity). See generally Philip H. Myers, Annotation, *Construction and Application of Fair Credit Reporting Act* (15 U.S.C. §§ 1681 *et seq.*), 17 A.L.R. Fed. 675, 678 (1973 & 1999 Supp.) Myers states that:

[I]t is the purpose of the [FCRA] to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce . . . in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of the Act.

Id. at 678.

6. See Letter from Christopher W. Keller, Attorney, Federal Trade Commission, Division of Financial Practices, to Judi A. Vail, Attorney (Apr. 5, 1999) (visited Nov. 17, 1999) <<http://www.ftc.gov/os/statutes/fcra/vail.htm>> [hereinafter *Keller Letter*]. The *Keller Letter* is an informal staff opinion and not an official FTC interpretation of the FCRA. The FTC provides the public with a method to receive staff assistance and "industry counseling." 16 C.F.R. § 1.72 (1999). The public may send inquiries to the FTC and staff attorneys will interpret the statute and its application. See *id.* Such interpretations "represent informal staff opinion which is advisory in nature and not binding upon the Commission as to any action it may take in the matter." *Id.* While the FTC is the administrative agency primarily responsible for the enforcement of the FCRA, the FTC does not have substantive rulemaking authority under the FCRA. Therefore, staff opinions are advisory in nature. See Note, *The Fair Credit Reporting Act*, 56 Minn. L. Rev. 819, 826 (1972) [hereinafter *Fair Credit Note*].

7. See Letter from Robert Pitofsky, Chairman, Federal Trade Commission, to Representative Pete Sessions, United States House of Representatives (Mar. 31, 2000) [hereinafter *FTC Letter*].

8. See *Keller Letter*, *supra* note 6.

comply with the FCRA in the context of this type of investigation, an employer must (1) get permission to initiate an investigation from the employee accused of harassment and (2) disclose to that individual any investigative report prepared by the outside agency. A conflict arises, however, if an employer fulfills these notice and disclosure requirements for the protection of the harasser, as he may violate the duty of reasonable care, owed to the harassed.⁹

This Note examines the conflict between the FTC's interpretation of the FCRA and an employer's duty under Title VII to investigate sexual harassment in the workplace. Part I discusses employer liability for sexual harassment, employer obligations under the FCRA, and the dilemma created by the FTC interpretation for employers who retain outside agencies to investigate harassment complaints. This part further examines why an employer may benefit from the assistance of outside counsel or an independent investigator in the effort to avoid liability for harassment.

Part II argues that the FTC's position regarding the applicability of the FCRA to employers investigating harassment allegations is not supported by the statutory language, congressional purpose, or legislative history of the Act. Interpreting the FCRA to extend to these investigations appears to provide an accused employee with federal statutory protection against wrongful discharge due to an employer's investigation that yields incorrect, incomplete, or obsolete information. This protection, however, is illusory and contravenes the intent of Congress with respect to the application of the FCRA and the importance of Title VII investigations. The FCRA's notice and disclosure requirements, if applicable to employer harassment investigations conducted by a third party, would contravene the intent of the FCRA, Title VII, and the guidelines promulgated by the Equal Employment Opportunity Commission ("EEOC") to implement Title VII's protections. Furthermore, it would frustrate an employer's ability to take prompt remedial action and thereby avert liability.¹⁰ An accused employee should be protected against wrongful discharge or other disciplinary action based upon false, unsubstantiated, or improper harassment complaints. The FCRA, however, is not the appropriate mechanism to provide this protection.

Part III explores the solutions currently proposed by Congress and the FTC to resolve this dilemma. Presently, there are two proposals in the House of Representatives to amend the FCRA and eliminate the statutory conflict between Title VII and the FCRA. Either of these amendments, if enacted, would eliminate the employer's Catch-22 with regard to third party investigations. It is not clear, however,

9. For further discussion on the conflict, see *infra* at Part II.A.

10. See discussion *infra* at Part I.A.2. about the employer's affirmative defense to employer liability for sexual harassment.

that these amendments are necessary, as the statutory language of the FCRA and the Act's legislative history do not fully support the FTC's interpretive opinion.

The FCRA is an inappropriate mechanism to protect a person wrongfully accused of sexual harassment. Congress should clarify that the consumer protections of the FCRA are inapplicable to an employer who retains an outside agency to investigate allegations of Title VII workplace discrimination. Given the complexities of workplace discrimination law and the importance of preventing and correcting harassment, it is incongruous to discourage employer recourse to outside agencies that may help an employer efficiently and fairly resolve a harassment complaint.

I. SEXUAL HARASSMENT AND THE FAIR CREDIT REPORTING ACT

This part details the current state of the law with respect to employer liability for sexual harassment. It further discusses why an employer has an incentive to use a third party such as outside counsel or an independent investigator to develop anti-harassment policies and investigate allegations of harassment. In addition, it describes the scope of the FCRA, its content, and its application to employee harassment complaint investigations. Finally, this part addresses the conflict created by applying the FCRA to instances when employers retain outside agencies to conduct sexual harassment investigations, as required by Title VII.

A. *Title VII Sexual Harassment and the Employer's Affirmative Defense to Liability*

Pursuant to Title VII of the Civil Rights Act of 1964, employers are liable for employee discrimination based on race, color, religion, sex or national origin.¹¹ Moreover, § 102 of the Civil Rights Act of 1991 authorizes punitive damages for intentional violations of Title VII.¹²

Although Congress passed Title VII in 1964, it was not until 1998 in *Burlington Industries Inc. v. Ellerth*¹³ and *Faragher v. City of Boca Raton*¹⁴ that the Supreme Court clarified the nature and extent of employer liability for sexual harassment.¹⁵ The following part

11. See 42 U.S.C. § 2000e-2 (1994).

12. See *id.* §1981a.

13. 524 U.S. 742 (1998).

14. 524 U.S. 775 (1998).

15. Title VII states that an employer is liable for employment discrimination, but does not set forth a standard for employer liability. See Justin P. Smith, Note, *Letting the Master Answer: Employer Liability for Sexual Harassment in the Workplace after Faragher and Burlington Indus.*, 74 N.Y.U. L. Rev. 1786, 1789 (1999). The statute does indicate congressional intent to hold an employer vicariously liable for the actions of its agents by including "agent" in the statutory definition of "employer." See 42 U.S.C. § 2000e(b). Because Title VII itself provides no explicit mandate

discusses the current standard determining employer liability for sexual harassment.

1. Employer Liability for Sexual Harassment

The Supreme Court in its companion decisions in *Ellerth*¹⁶ and *Faragher*¹⁷ created a two-factor test providing three distinct employer liability standards. Employer liability is dependent upon two considerations: first, does the harasser have authority over the plaintiff; and second, was tangible employment action¹⁸ taken against the plaintiff.¹⁹ These two factors form a tripartite regime of liability.²⁰

The employer is strictly liable for harassment if the alleged harasser has authority over the plaintiff and the employer has taken a tangible

regarding liability, both the Equal Employment Opportunity Commission ("EEOC"), the agency authorized by Congress to administer Title VII, and courts interpreting Title VII, have applied various liability standards to employers. *See Smith, supra*, at 1789. In doing so, the court or EEOC weighed factors such as the nature and result of the harassment, the relationship between the plaintiff and the harasser, and the steps taken by the plaintiff and the employer-defendant to alleviate the situation. *See id.* at 1787 (discussing liability standards that varied depending upon the underlying facts at issue). Generally, the EEOC proposed, and courts applied, strict liability to employers for quid pro quo harassment, which is harassment that occurs when a supervisor withholds employment benefits as a means of coercing sexual favors. *See Karibian v. Columbia Univ.*, 14 F.3d 773, 777 (2d Cir. 1994) (citing 29 C.F.R.

§ 1604.11(a)(2)); *Achampong, supra* note 4, at 17. The EEOC, and courts following the EEOC's guidance, have applied a constructive notice liability standard to employers for hostile work environment sexual harassment, *i.e.*, an employer is liable for harassment if it knew or should have known of the offensive behavior. *See Smith, supra*, at 1794, 1838. Hostile work environment sexual harassment occurs when an employee is subject to unwelcome conduct that is sufficiently severe or pervasive to alter the conditions of employment. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986).

16. 524 U.S. 742 (1998).

17. 524 U.S. 775 (1998).

18. The EEOC defines "tangible employment action" as any employment action that is "a significant change in employment status." EEOC Compl. Man. (BNA), *Enforcement Guidance on Vicarious Liability for Harassment by Supervisors*, No. 249, N:4075, N:4078 (June 18, 1999) [hereinafter *EEOC Enforcement Guidance*] (quoting *Ellerth*, 524 U.S. at 761). This includes discharge, demotion or undesirable reassignment. *See id.* at N:4078.

19. *See Ellerth*, 524 U.S. at 761; *Faragher*, 524 U.S. at 807. The Court in *Faragher* explained why it is reasonable to hold employers more accountable for the actions of supervisors than for the actions of ordinary employees:

Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.

Id. at 803.

20. The considerations that the Supreme Court set forth to determine liability are in sharp contrast to prior lower court holdings that looked mainly to the type of harassment to which the plaintiff was subjected—whether quid pro quo or hostile work environment. *See supra* note 15.

employment action with respect to the plaintiff.²¹ In this situation, the employer has no affirmative defense against liability for the conduct of its employees or other agents.²²

The employer is vicariously liable for harassment if the alleged harasser has authority over the plaintiff even if the harassment resulted in no negative employment action with respect to the plaintiff.²³ In this situation, however, the employer has an affirmative defense to vicarious liability.²⁴ This defense has two elements: the defendant employer must show by a preponderance of the evidence “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”²⁵

Lastly, if the alleged harasser has no authority over the plaintiff, the employer is liable for harassment by a co-worker or other individual if the employer is negligent under a constructive notice standard.²⁶ To

21. See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

22. See Smith, *supra* note 15, at 1795 (citing *Ellerth*, 524 U.S. at 765, and *Faragher*, 524 U.S. at 807-08).

23. See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

24. See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

25. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. By creating the employer's affirmative defense, the Supreme Court afforded less protection to employees subjected to supervisor harassment than did the EEOC and prior circuit court holdings, which generally imposed strict liability in all instances of supervisory harassment without an affirmative defense. In the past, EEOC guidelines held an employer responsible for all harassment by a supervisor “regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.” 29 C.F.R. § 1604.11(c) (1993). The EEOC's position was based on the reasoning that the supervisor essentially “relies upon his apparent or actual authority to extort sexual consideration from an employee.” *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982). In accord, a majority of circuits held an employer strictly liable for quid pro quo harassment once established by the plaintiff, regardless of whether tangible employment action was taken. See *Bundy v. Jackson*, 641 F.2d 934, 953 (D.C. Cir. 1981); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 914-15 (1st Cir. 1988); *Karibian v. Columbia Univ.*, 14 F.3d 773, 778 (2d Cir.), cert. denied, 512 U.S. 1213 (1994); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 581-82 (2d Cir. 1989); *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 79 (3d Cir. 1983); *Katz v. Dole*, 709 F.2d 251, 257 (4th Cir. 1983); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803-04 (6th Cir. 1994); *Crimm v. Missouri Pacific R.R.*, 750 F.2d 703, 713 (8th Cir. 1984); *Nichols v. Frank*, 42 F.3d 503, 515-16 (9th Cir. 1994); *Henson*, 682 F.2d at 905. The EEOC rescinded its guideline of unqualified vicarious employer liability for supervisor harassment after the *Ellerth* and *Faragher* decisions. See EEOC, *EEOC Updates Guidelines to Comply with Supreme Court Rulings on Employer Liability for Harassment by Supervisors* (last modified Oct. 29, 1999) <www.eeoc.gov/press/10-29-99.html>.

26. See Smith, *supra* note 15, at 1795. The Supreme Court has never decided a case of non-supervisory sexual harassment. Almost all circuits addressing hostile work environment by a non-supervisory employee have applied a constructive notice standard. See *id.*; see also note 15 *supra* (discussing the constructive notice standard

prevail on a claim of non-supervisory sexual harassment, a plaintiff must show that his or her employer knew or should have known of the offensive behavior and nevertheless failed to take prompt remedial action.²⁷ This standard is in accord with the EEOC guidelines.²⁸

2. The Two-Pronged Affirmative Defense

If a supervisor harasses an employee, but that employee suffered no significant change in employment status, the employer can escape liability by asserting an affirmative defense.²⁹ The employer must show that (1) he or she exercised reasonable care to prevent and correct the harassment; and (2) the employee failed to take advantage of the preventative or corrective opportunities that the employer provided.³⁰

The first prong of the affirmative defense requires a "showing by the employer that it undertook reasonable care to prevent and promptly correct harassment."³¹ A comprehensive compliance program, including a clear anti-harassment policy and complaint procedure, is essential for an employer to show that it is exercising such care.³² This type of policy should include a formal statement

for hostile work environment sexual harassment).

27. See *supra* note 15 and accompanying text.

28. See 29 C.F.R. § 1604.11(d) (1999).

29. See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808. See also *EEOC Enforcement Guidance*, *supra* note 18, at N:4081 (discussing the Supreme Court's decisions for the benefit of small business owners wishing to comply with current liability standards).

30. There remains a constructive notice standard for employee liability when the alleged harasser is a non-supervisory employee or other individual. See *supra* notes 26-28. Thus, there is, in effect, an affirmative defense based on constructive notice. Many of the actions taken by an employer to establish facts for the affirmative defense for supervisory harassment would also establish a defense to employer negligence for non-supervisory harassment based on the constructive notice standard.

31. *EEOC Enforcement Guidance*, *supra* note 18, at N:4081.

32. See *id.* at N:4081-83 ("Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms.") (quoting *Ellerth*, 524 U.S. at 764 (1998)). As a matter of law, a harassment policy is not necessary to find that an employer exercised reasonable care. The Supreme Court, however, indicated that failure to have a policy will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment. See *Ellerth*, 524 U.S. at 764. The EEOC provides advice to employers to help them comply with Title VII and to take advantage of the affirmative defense articulated by the Supreme Court. See generally *EEOC Enforcement Guidance*, *supra* note 18, at N:4079-87 (discussing the duty of both an employee and employer to exercise reasonable care as a two-prong affirmative defense). Every workplace and every case of harassment is different and the steps an employer must take to discharge its duty will vary from case to case. The sufficiency of policies, investigations, and remedial measures depend upon the size of the employer and the specific facts of the harassment itself. See *id.* at N:4085-86. For instance, small employers may be able to address harassment complaints by an informal process, while a larger corporation may need to provide more formal measures. See *id.* Similarly, an employer's duty of care is dependent upon, among other things, the nature and effect of the harassment and the relationship between the

prohibiting harassment,³³ protection against retaliation,³⁴ a complaint process,³⁵ an investigative process,³⁶ and assurance of immediate and appropriate corrective action when necessary.³⁷ Finally, EEOC Guidance Manuals underscore the importance of the assurance of confidentiality.³⁸

To satisfy the second prong of the affirmative defense, the employer must show that the plaintiff “unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.”³⁹ Thus, an employer who exercised reasonable care to prevent or correct harassment is not liable to a plaintiff if that person could have avoided harm or taken measures provided by the employer to reduce it.⁴⁰

By establishing a clear standard for employer liability, the Supreme Court created an incentive for employers to establish effective anti-harassment policies and complaint procedures and to conduct comprehensive investigations upon the filing of a complaint.⁴¹ Furthermore, employees who are subject to harassment are required to use the employer’s complaint procedure, thereby alerting the employer to possible harassment.⁴²

Although the Supreme Court clarified the standard of liability, it remains unclear how these standards will be implemented in any given case. The EEOC warns employers that “[t]here are no ‘safe harbors’ for employers” and that “[e]ven the best policy and complaint procedure will not alone satisfy the burden of proving reasonable care if, in the particular circumstances of a claim, the employer failed to implement its process effectively.”⁴³ As a result, should a case go to

complainant and the alleged harasser. *See id.* at N:4077-78.

33. *See EEOC Enforcement Guidance, supra* note 18, at N:4082 (“An employer’s policy should make clear that it will not tolerate harassment based on sex (with or without sexual conduct).”).

34. *See id.* at N:4082 (“An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints.”).

35. *See id.* at N:4082-83 (“An employer’s harassment complaint procedure should be designed to encourage victims to come forward.”).

36. *See id.* at N:4083 (“An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment.”).

37. *See id.* at N:4084-85 (“An employer should make clear that it will undertake immediate and appropriate corrective action, including discipline, whenever it determines that harassment has occurred in violation of the employer’s policy.”).

38. *See id.* at N:4083 (“An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible.”).

39. *Id.* at N:4086 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) and *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998)).

40. *See EEOC Enforcement Guidance, supra* note 18, at N:4086. If the employee could have avoided some, but not the entire harm, the employer’s affirmative defense will mitigate damages. *See id.*

41. *See id.* at N:4081.

42. *See id.*

43. *Id.* The EEOC provides an example: if an employer has an effective policy

trial, an employer cannot know with certainty whether it has taken adequate measures to avoid the court's imposition of liability.

3. The Use of Outside Counsel or an Independent Investigator

Many employers turn to outside counsel or independent investigators for assistance in the development and implementation of anti-harassment policies.⁴⁴ An attorney or an independent investigator can help an employer minimize liability by developing effective anti-harassment policies and complaint procedures prior to a complaint and by conducting an independent investigation when an employee files a complaint. Small employers may not have adequate resources or experience to conduct a sufficient investigation, so they may hire an outside agency to do the job.⁴⁵ Larger corporations may benefit from a comprehensive compliance program that promulgates appropriate standards of conduct and is enforced by training, monitoring, and detection procedures. In all cases, employers will be aided greatly by outside counsel or independent investigators who have more experience in creating programs and investigating allegations in compliance with applicable law.

Moreover, after a complaint has been filed with an employer, outside counsel or an independent investigator can help an employer by directing an appropriate response to the complaint, conducting an independent investigation, and making recommendations based upon the findings.⁴⁶ The enhanced credibility of an independent investigation becomes particularly important when complaints allege misconduct by high-ranking supervisory employees.

4. Title VII Protections and Common Law Remedies for Wrongful Discharge

An employer is prohibited by Title VII from retaliating against an employee who files a harassment complaint.⁴⁷ For instance, an

and complaint procedure and adequately responded to employee's complaint, it may still be liable for harassment if management in the past had ignored similar complaints about the same alleged harasser. *See id.*

44. *See* Titus E. Aaron, *Sexual Harassment in the Workplace: A Guide to the Law and a Research Overview for Employers and Employees* 125 (1993).

45. Many small businesses have limited financial resources, compounding the devastation of an adverse judgment. *See* Achampong, *supra* note 4, at 158.

46. *See EEOC Enforcement Guidance, supra* note 18, at N:4083 ("The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation.").

47. *See* 42 U.S.C. § 2000e-3(a) (1994). This section states that:
it shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or

employer cannot discharge or take any other adverse employment action against an employee who has filed a complaint.⁴⁸ By providing this protection, Title VII alters the traditional employment-at-will doctrine under common law, which allows an employer to terminate an employee for good cause or no cause without being subject to civil liability.⁴⁹

Title VII offers no similar protections to the employee accused of harassment or terminated on the basis of a false or unsubstantiated complaint.⁵⁰ As a result, unless otherwise modified by an employment contract or applicable state law, the accused employee is subject to the common law employment-at-will doctrine, and can be terminated by the employer for good cause or no cause.⁵¹ A wrongfully discharged employee is left only with common-law remedies, such as breach of contract,⁵² intentional infliction of emotional distress,⁵³ defamation,⁵⁴ invasion of privacy,⁵⁵ abuse of process,⁵⁶ negligent misrepresentation,⁵⁷

participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Id.; see also *supra* note 34 and accompanying text (discussing the EEOC's directive that an employer may not retaliate against an employee who files a harassment complaint).

48. See 42 U.S.C. § 2000e-3(a) (1994).

49. See Aaron, *supra* note 44, at 140-41.

50. See *id.* at 13.

51. See Mark A. Rothstein, *Employment Law* § 8.2 (2d ed. 1999).

52. A cause of action for breach of an employment contract must be premised on the existence of an actual employment contract or an implied employment contract arising from an employee handbook or employer policy, which serves to alter the traditional at-will employment agreement. See Aaron, *supra* note 44, at 141. Courts have looked at whether the handbook, or other document upon which the employee relies, is sufficiently definite to give rise to a contractual employment relationship and if the parties intended to be bound by the handbook provisions. See *id.* Employee handbooks that constitute an implied employment contract often establish procedures for employee discharge that must first be exhausted. See *id.* These procedures can include a duty to investigate or they may provide for termination only for "just cause" or "good cause." See *id.*

53. An employee may make a common-law claim for intentional infliction of emotional distress if the employer "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress . . ." Restatement (Second) of Torts § 46(1) (1965).

54. An employer may be vicariously liable to the accused harasser for unauthorized defamatory statements made by the complainant-employee during the scope and course of employment, unless the employer is found to be immune. See Aaron, *supra* note 44, at 159. As a general rule, employers are granted immunity from defamation for statements made during the course of administrative and judicial proceedings. See *id.*

55. An employer or complainant-employee may be liable for invasion of privacy resulting from publicity that places a wrongfully accused employee in a false light, where the publicity is highly offensive to a reasonable person, and where the speaker had knowledge of or acted in reckless disregard as to the falsity of the publicized matter. See *id.* at 158 (citing Restatement (Second) of Torts § 652E (1977)).

56. An employer may be vicariously liable to the accused harasser for abuse of process if the complainant-employee files an administrative proceeding or a lawsuit against him for an improper purpose, such as to retaliate against him or to gain an

civil conspiracy,⁵⁸ or malicious prosecution.⁵⁹ All of these causes of action are based upon a complainant's untruthful allegations and/or the employer's reliance upon them, resulting in an employee's wrongful discharge or other negative consequences. The remedies vary from state to state and do not offer the same protection to the wrongfully accused employee against employer retaliation that Title VII offers to the complainant.

The FTC has officially endorsed the interpretation that the protections of the FCRA apply to employers who utilize an outside agency to investigate harassment allegations.⁶⁰ This interpretation serves to provide some form of federal statutory protection to an employee accused of harassment in addition to the common-law remedies discussed above. Under this interpretation, the employer must fulfill notice obligations prior to initiating an investigation and must also comply with disclosure obligations before terminating or taking any other adverse employment action against an employee.⁶¹ These protections, however, are arguably neither sufficient nor properly devised to afford an accused employee with substantive protection against false complaints or discharge by an employer who does little or no investigation.⁶² The FCRA was not designed or intended to apply in the case of third party investigations into sexual harassment. Such an application of the FCRA frustrates an employer's recourse to the affirmative defense for vicarious liability for sexual harassment, as set forth by the Supreme Court in *Ellerth* and *Faragher*.

B. *The Fair Credit Reporting Act*

Congress enacted the FCRA in 1970 to regulate the information reporting industry and to protect consumer privacy.⁶³ Businesses that

undue advantage in a promotion decision. *See id.* at 159 (citing Restatement (Second) of Torts § 682 (1977)).

57. A claim for negligent misrepresentation is premised upon the complainant's negligence in giving false information to the employer, upon which the employer relies. *See id.* at 160 (citing Restatement (Second) of Torts § 552 (1977)).

58. The employer, the complainant-employee, and others may be liable for civil conspiracy where two or more people agree to wrongfully accuse an employee of sexual harassment to cause the discharge of that employee. *See id.* at 161. The wrongfully accused employee must allege (1) the existence of a conspiracy; (2) wrongful acts in furtherance of the conspiracy; and (3) damages resulting from these acts. *See id.*

59. The complainant-employee may be liable for malicious prosecution if he brings a sexual harassment claim against an employee without probable cause and for an improper purpose. *See id.* at 158-61.

60. *See FTC Letter, supra* note 7.

61. *See infra* Part I.B.3. for a discussion of notice and disclosure requirements triggered when an employer retains a third party to investigate sexual harassment allegations.

62. *See infra* Part I.C.

63. *See Fair Credit Note, supra* note 6, at 819. Congress amended the Consumer

offer credit, insurance, or employment to individuals often seek to minimize the risk of loss by purchasing information to screen applicants to determine, among other things, credit risk.⁶⁴ Congress considered the collection and sale of personal information to be invasive of an individual's privacy.⁶⁵ Moreover, an individual could be denied credit, insurance, or employment based upon inaccurate, disputed, or obsolete information.⁶⁶ Thus, the main purpose of the FCRA is to ensure that agencies that gather and report personal information act with "fairness, impartiality, and a respect for the consumer's right to privacy."⁶⁷ An individual has a cause of action under the FCRA if either the information provider or the information user willfully or negligently fails to comply with the protective measures of the FCRA.⁶⁸

The FCRA regulates data collection agencies and the type of information these agencies may collect, compile, and disseminate.⁶⁹ It also restricts the circumstances under which a business may request a report from an agency about an individual.⁷⁰

1. Information Reporting Agencies Regulated by the FCRA

Only agencies that fall under the FCRA's definition of "consumer reporting agency" ("CRA") are subject to the restrictions of the FCRA.⁷¹ The statute defines a CRA as:

[A]ny person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.⁷²

Credit Protection Act, 15 U.S.C. § 1681, which addresses truth and lending and related credit matters, by adding a new title, Title VI, known as the Fair Credit Reporting Act, Pub. L. 91-508 § 602, 84 Stat. 1136.

64. See *Fair Credit Note*, *supra* note 6, at 819.

65. See *id.*

66. See *id.* During the House Hearings on the Act, examples of this risk were discussed. See *Fair Credit Reporting: Hearings Before the Subcomm. of Consumer Affairs of the House Comm. on Banking and Currency*, 91st Cong., 2d Sess. 65 (1970).

67. FCRA § 602(a)(4), 15 U.S.C. § 1681. Prior to the enactment of the FCRA in 1970, this industry was completely unregulated by federal statute. See *Fair Credit Note*, *supra* note 6, at 819 n.1. Only Oklahoma regulated the industry to some extent with a state statute. See *id.*

68. See FCRA §§ 616-617, 15 U.S.C. §§ 1681n-o.

69. See *id.* § 605, 15 U.S.C. § 1681c.

70. See *id.* § 604, 15 U.S.C. § 1681b.

71. See *id.* § 603(f), 15 U.S.C. § 1681a(f).

72. *Id.*

There are two main types of information reporting agencies, depository and investigative, that fall within this definition.⁷³ Depository CRAs are retail credit bureaus and other agencies that routinely collect information on individuals without regard to whether the collected information is requested or likely to be requested by a user of a report.⁷⁴ Depository CRAs generally collect credit history information, such as existing obligations and past payment performance, and public information, such as arrests, indictments, suits, liens, and outstanding judgments.⁷⁵ Upon a request for a report from an employer or business, the depository CRA does not seek out new information that had not already been collected on the individual.

Unlike a depository CRA, an investigative CRA does not routinely collect and maintain information on individuals. Rather, an investigative CRA obtains necessary and relevant information when an employer or business requests it. For example, an employer may engage an investigative CRA to speak to past employers of a prospective employee about that individual's job performance. An investigative CRA may supply some or all of the same information provided by a depository CRA, but it will supplement that information with personal interviews of neighbors, friends, or associates of the subject of the report. Information provided by an investigative CRA tends to be more comprehensive than that provided by a depository CRA.⁷⁶

According to the FTC, an outside agency, such as a law firm or a private investigator, is a CRA because, as per the CRA statutory definition, it, in whole or in part, "assemble[s] or evaluate[s]" information on an individual at the request of its client, the employer.⁷⁷ Assume, as an example, that an employer receives a formal complaint of sexual harassment filed by an employee.

73. See *Fair Credit Note*, *supra* note 6, at 819-20.

74. Examples of agencies that fall into this category are Equifax Credit Information Services, First Data Solutions, Lexis-Nexis, Trans Union Corp., and CDB InfoTek. These agencies and others have collaborated to "respond, as an industry, to heightened interest in the industry's practices," specifically with regard to compliance with the FCRA. See *Individual Reference Services Industry Practices* (visited July 2, 1999) <<http://www.cdb.com/public/new.irsg.html>>. Depository CRAs typically collect information from credit card companies and other institutions that extend credit to individuals, such as department stores. They also collect public information, such as information from the court system. See *Fair Credit Note*, *supra* note 6, at 820.

75. See *Fair Credit Note*, *supra* note 6, at 820 (citing *Fair Credit Reporting: Hearing on S. 823 Before the Subcomm. on Financial Institutions of the Senate Banking and Currency Comm.*, 91st Cong., 1st Sess. 91 (1969)).

76. See *id.* For instance, an insurance company may direct an investigative CRA to collect information regarding an applicant's health, morals, hobbies, and drinking and smoking habits. See *id.*

77. See *Keller Letter*, *supra* note 6 ("It seems reasonably clear that the outside organizations utilized by employers to assist in their investigations of harassment claims 'assemble or evaluate' information," which is the primary consideration in the definition of a CRA.).

Pursuant to the employer's anti-harassment policy, the employer refers the complaint to an outside agency for a quick, thorough, and independent investigation. Should the outside agency gather and evaluate any information about the alleged harasser, or any other individual involved, the agency is a CRA according to the FTC.⁷⁸

2. Types of Information Regulated by the FCRA

The FCRA provides that a CRA may only issue a "consumer report" under certain circumstances.⁷⁹ The FTC considers information provided by an outside agency pursuant to a harassment investigation a "consumer report" as defined by the FCRA.⁸⁰ The FCRA defines "consumer report" as follows:

[A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purposes authorized under section 604.⁸¹

The FTC official opinion interprets this definition as including a report prepared on sexual harassment allegations.⁸² First, the report prepared by an outside agency necessarily reflects upon the character, general reputation, or personal characteristics of the subject of the report.⁸³ Second, the outside agency collects information with the expectation that the resultant report will be used for employment purposes.⁸⁴ A report is used for "employment purposes" if it is used for "the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee."⁸⁵ For instance, an employer receives a consumer report when it requests information from a CRA regarding a prospective employee's past criminal history. By the plain meaning of the statute, the employer

78. See *FTC Letter*, *supra* note 7.

79. See FCRA § 604(a), 15 U.S.C. § 1681b.

80. See *FTC Letter*, *supra* note 7.

81. FCRA § 603(d), 15 U.S.C. § 1681a(d). See also *Korotki v. Attorney Servs. Corp.*, 931 F. Supp. 1269, 1274-75 (D. Md. 1996) (holding a report is a consumer report even if not ultimately used by the individual that requests the information for one of the purposes in the FCRA). None of the other authorized purposes included in § 604 are remotely applicable to workplace investigations of any kind.

82. See *Keller Letter*, *supra* note 6.

83. See *id.*; Letter from Thomas E. Kane, Attorney, Federal Trade Commission, Division of Credit Practices, to Carolann G. Hinkle (July 9, 1998) (visited July 1, 1999) <<http://www.ftc.gov/os/statutes/fcra/hinkle.htm>>.

84. See *Keller Letter*, *supra* note 6.

85. FCRA § 603(h), 15 U.S.C. § 1681a(h).

also requests a consumer report if it requests a report prepared in response to a harassment investigation.⁸⁶

The CRA prepares an “investigative consumer report,” which is a special type of consumer report, if it obtains information about an individual from interviews with his or her friends, neighbors, or associates.⁸⁷ The FCRA places additional restrictions on the use of investigative consumer reports to provide increased privacy protection for the individual by recognizing that interviews can be particularly invasive of the individual’s privacy.⁸⁸

In summary, the FTC interprets the FCRA to extend to harassment investigations conducted by outside agencies because: (1) an outside agency “assembles or evaluates” information upon the employer’s request and is, therefore, a CRA;⁸⁹ (2) the CRA prepares a consumer report on the alleged harasser or other subject because the report will contain information reflecting upon the employee’s reputation and character;⁹⁰ and (3) the CRA collects the information knowing that the employer will use the report for employment purposes, namely to decide whether to retain an employee.⁹¹

3. Consumer Protections Imposed by the FCRA

Both the CRA that prepares a report and the party that requests it—in this case the employer—have FCRA obligations to the subject of a consumer report, the alleged harasser.⁹²

To procure a consumer report, an employer must comply with notice and disclosure requirements.⁹³ The employer must provide notice to the subject that it intends to procure a consumer report from a CRA for employment purposes.⁹⁴ Statutory notice consists of two elements. First, the employer must notify the employee that the

86. See *Keller Letter*, *supra* note 6.

87. See FCRA § 603(e), 15 U.S.C. § 1681a(e).

88. See *infra* text accompanying notes 98-100 for a discussion of FCRA consumer protections implicated in the use of an investigative consumer report.

89. See *supra* note 77 and accompanying text.

90. See *supra* note 83 and accompanying text.

91. See *Keller Letter*, *supra* note 6.

92. A detailed discussion of the duties and obligations in contexts other than employment is beyond the scope of this Note. For such a discussion, see *generally* Myers, *supra* note 5 (discussing the construction, application, and enforcement of the FCRA).

93. See FCRA §§ 604(b)(2)(A)(i), (ii), 15 U.S.C. § 1681b(b)(2)(A), (B) & 604(b)(3)(A)(i), (ii), 15 U.S.C. § 1681b(b)(3)(A), (B). Congress adopted the FCRA notice and disclosure requirements in the context of employment investigations in 1996, along with a number of other amendments to the Act. See FCRA, Pub. L. No. 104-208 (1996).

94. See *id.* § 604(b)(2)(A)(i), 15 U.S.C. § 1681b(b)(2)(A). For the purposes of this obligation, the employer may not proceed with the request for a consumer report unless “a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured . . . in a document that consists solely of the disclosure.” *Id.*

employer intends to obtain a consumer report.⁹⁵ Second, the employee, in writing, must authorize the employer to procure the report.⁹⁶ The employer must then certify to the CRA that it has complied, and will continue to comply, with all statutory notice and disclosure requirements.⁹⁷

If the employer intends to retain an outside agency to prepare an investigative consumer report, additional consumer safeguards apply.⁹⁸ The employer must "clearly and accurately" disclose to the employee that the report to be procured will include "information as to the subject's character, general reputation, personal characteristics and mode of living."⁹⁹ Notice obligations extend beyond those required when the employer requests an ordinary consumer report. Upon written request by the employee, the employer must "make a complete and accurate disclosure of the nature and scope of the investigation requested."¹⁰⁰

If an employer takes an adverse employment action¹⁰¹ with respect to any employee based in whole or in part on a consumer report, the employer must comply with additional FCRA disclosure requirements.¹⁰² The employer must disclose an unredacted report to the subject, as well as a written description of his or her rights under the FCRA.¹⁰³ For example, if an employer decides on the basis of a consumer report to transfer, demote, or terminate the employment of an alleged harasser, the employer must provide the report, in full, to the employee.¹⁰⁴

CRAs have a duty to follow "reasonable procedures" to assure "maximum possible accuracy"¹⁰⁵ and are required to disclose information to a consumer upon the consumer's request.¹⁰⁶ The CRA cannot include obsolete information in a report,¹⁰⁷ and it must employ

95. *See id.* § 604(b)(2)(A)(i), 15 U.S.C. § 1681b(b)(2)(A).

96. *See id.* § 604(b)(2)(A)(ii), 15 U.S.C. § 1681b(b)(2)(B).

97. *See id.* § 604(b)(1)(A)(i)-(ii), 15 U.S.C. § 1681b(a)(1)(A)-(B).

98. *See text at note 87 supra* for the definition of an investigative consumer report.

99. FCRA § 606(a)(1), 15 U.S.C. § 1681d(a)(1). This notice must be mailed or otherwise delivered within three days after the date on which the report was requested. *See id.* § 606(a)(1)(A), 15 U.S.C. § 1681d(a)(1)(A).

100. *Id.* § 606(b), 15 U.S.C. § 1681d(b).

101. The FCRA defines "adverse action" in the employment context as "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee." *Id.* § 603(k)(1)(B)(ii), 15 U.S.C. § 1681a(k)(1)(B)(ii).

102. *See id.* § 604(b)(3)(A), 15 U.S.C. § 1681b(b)(3)(A).

103. *See id.* § 604(b)(3)(A)(i)-(ii), 15 U.S.C. § 1681b(b)(3)(A)-(B).

104. *See Keller Letter, supra* note 6.

105. FCRA § 607(b), 15 U.S.C. § 1681e(b).

106. *See id.* § 609(a), 15 U.S.C. § 1681g(a).

107. *See id.* § 605(a)(1)-(5), 15 U.S.C. § 1681c(a)(1)-(6). For the purposes of the FCRA, civil suits, judgments, liens, paid tax liens, arrests, and convictions that antedate the report by seven years, and bankruptcies older than ten years, are

reasonable verification procedures to guard against inaccurate information.¹⁰⁸ In the event that the subject of a report disputes information in the report, the CRA must reinvestigate the information.¹⁰⁹ Additionally, the CRA must determine that employers who request an investigation and report have identified themselves and certified that they intend to use the report for a permissible purpose under the FCRA, such as for employment purposes.¹¹⁰ The CRA must also ensure that the employer certifies that he or she has discharged the FCRA notice and disclosure obligations.¹¹¹

The FCRA imposes civil liability on any person who willfully or negligently fails to comply with any requirement of the Act.¹¹² An employee can file suit against either the CRA for failure to follow reasonable procedures to ensure maximum accuracy, or against his or her employer for failure to comply with notice and disclosure requirements. Recovery is limited by the FCRA to actual damages and costs suffered as a result of the failure to comply.¹¹³ In the case of willful noncompliance, however, the court may award punitive damages against the CRA or the employer.¹¹⁴

Applying the FCRA consumer protections to harassment investigations by outside agencies would marginally protect the privacy of the accused employee, but would also greatly reduce an employer's ability to conduct thorough, prompt, independent and fair investigations, which are required to limit Title VII liability, as the next section demonstrates.

obsolete and may not be collected or reported by a CRA. *See id.*

108. *See id.* § 607(b), 15 U.S.C. § 1681e(b).

109. *See id.* § 611(a)-(b), 15 U.S.C. § 1681i(a)-(d). The CRA's reinvestigation of the disputed transaction must be done free of charge and within 30 days. *See id.* § 611(a)(1)(A), 15 U.S.C. § 1681i(a)(1)(A). The consumer may submit information to be considered by the CRA during the reinvestigation. *See id.* § 611(a)(4), 15 U.S.C. § 1681i(a)(4). If, after the reinvestigation, the CRA determines that the disputed information is "inaccurate or incomplete or cannot be verified," the CRA must delete the information from the consumer's file and from all consumer reports. *Id.* § 611(a)(5)(A), 15 U.S.C. § 1681i(a)(5)(A). If the investigation does not resolve the dispute, the consumer may "file a brief statement setting forth the nature of the dispute," to be included in all subsequent consumer reports prepared for employers or businesses. *Id.* § 611(b), 15 U.S.C. § 1681i(b). Prior to the FCRA, a merchant might attempt to coerce payment for defective merchandise by threatening to report an instance of non-payment to a credit bureau, which would tarnish a consumer's credit rating. *See Fair Credit Note, supra* note 6, at 832.

110. *See* FCRA § 607(a), 15 U.S.C. § 1681e(a).

111. *See id.* § 607(d)(1), 15 U.S.C. § 1681e(d). Employer and business notice and disclosure obligations are discussed *supra* at notes 94-104 and accompanying text.

112. *See* FCRA §§ 616-617, 15 U.S.C. § 1681n-o.

113. *See id.* §§ 616(a)(1)(A)-(B), 617(a)(1), 15 U.S.C. § 1681n(a)(1)(A)-(B), o(a)(1).

114. *See id.* § 616(a)(2), 15 U.S.C. § 1681n(a)(2).

C. *The Dilemma Created by the FTC's Interpretation*

In recent months, the conflict between an employer's simultaneous obligations under the FCRA and Title VII has been well documented, culminating in a House of Representative Subcommittee Hearing on May 4, 2000.¹¹⁵ This part discusses the conflict created by the FTC position from the perspective of the employer, the employee who believes he or she is being harassed, witnesses to the alleged harassment, and the employee suspected of this behavior.

The FTC position discourages employers from seeking independent professional guidance to aid in the development of anti-harassment procedures and the investigation of harassment complaints. The employer's affirmative defense to Title VII sexual harassment liability encourages employers to take steps to prevent harassment and to take prompt, remedial actions should it occur.¹¹⁶ To that end, employers have an incentive to retain outside agencies to develop effective policies and perform independent investigations.¹¹⁷ The FCRA simply does not allow this.

Consistent with the FTC's position, an employer must notify an alleged harasser of a pending investigation and get that employee's authorization to begin.¹¹⁸ Satisfaction of these requirements may delay an employer's response to a complaint.¹¹⁹ The authorization requirement gives the alleged harasser control over the employer's investigation. As such, the employee could refuse to authorize the investigation, disabling the employer from carrying out its own anti-harassment procedures, which may include an investigation by an outside agency. The employer would have to carry out an investigation without experienced help. A delayed response to a complaint or the lack of an independent investigation make it much more difficult for the employer to show that it exercised reasonable care in a subsequent harassment suit.¹²⁰ This could be especially

115. A hearing was held in the Committee on Banking and Financial Services, Subcommittee on Financial Institutions and Consumer Credit, in response to H.R. 3408, a house bill introduced by Representative Pete Sessions in an attempt to resolve this dilemma by congressional action. Transcripts of testimony presented at the Subcommittee Hearing are available on the Internet at <http://www.house.gov/banking.htm>.

116. See *supra* Part I.A.2. The affirmative defense to vicarious liability requires a court to evaluate the adequacy of an employer's complaint procedures and actions in response to the complaint of harassment.

117. See Part I.A.3. *supra* for a discussion of the benefits of using outside counsel or another independent investigative agency to develop and enforce an anti-harassment policy.

118. See discussion *supra* at notes 93-100 and accompanying text.

119. See *supra* note 37 and accompanying text discussing the importance of immediate corrective response by the employee.

120. See *supra* notes 31-38 and accompanying text for a discussion on the employer's duty of reasonable care, including prompt response to a complaint and an independent harassment investigation.

troublesome for an employer facing potential liability for a high-level supervisory employee's alleged harassment of a subordinate where it may be difficult for an employer to show that it conducted an independent and impartial investigation.¹²¹

If, after an outside agency's investigation, the employer takes any adverse employment action with respect to the subject of the report, the employer must first disclose the contents of the report to that employee.¹²² Employees cannot rely on any assurance of confidentiality if disclosure of the investigative report is statutorily required.¹²³ Full disclosure will likely have a chilling effect on employee reporting of offensive behavior.¹²⁴ Similarly, it may discourage witnesses from participating in the investigation.¹²⁵ An employer who is unable to offer any assurance of confidentiality will have a difficult time showing that it took reasonable care to prevent or correct harassment, or that an employee's failure to use the established complaint procedure was unreasonable. Moreover, the disclosure requirement may delay an employee's complaint response because it must deliver the report to the accused employee prior to taking any adverse action.¹²⁶

The FCRA also presents a dilemma from the perspective of the employee whom the FTC is purportedly protecting. At first glance, FCRA notice and disclosure requirements appear to provide protection from unfair treatment to an employee who is wrongfully accused of harassment.¹²⁷ This protection, however, is illusory. Because FCRA consumer protections only apply if the employer procures a report to use for employment purposes, such as to "evaluat[e] a consumer for employment, promotion, reassignment or retention as an employee,"¹²⁸ the FCRA is not triggered if the

121. See *supra* note 36.

122. See discussion *supra* at notes 101-104 and accompanying text.

123. See *supra* note 38 and accompanying text for a discussion of the importance of the assurance of confidentiality of harassment investigations. It should be recognized that the employer must disclose the report to the harasser prior to taking some adverse employment action against him or her. Thus, the alleged harasser will likely have reason to be upset with those that participated in the investigation, and feel that he or she has little to lose in venting these feelings.

124. The American Bar Association, in a letter to the FTC requesting a reinterpretation of the FCRA, discussed the importance of confidentiality in harassment complaints and investigations. See Pitney, Hardin, Kipp & Szuch LLP, *ABA Asks FTC to Revoke FCRA Application to Sexual Harassment Investigations*, 12 N.J. Employment L. Letter 5, Oct. 1999. Requiring notice to the accused employee and disclosure of the final and unredacted report may discourage an employee from filing a complaint.

125. See *id.* (indicating that an empty assurance of confidentiality may prevent witnesses from cooperating in investigations).

126. See *supra* note 37 discussing the employer's duty to take immediate corrective action when harassment has been found to exist or have taken place.

127. See *supra* notes 63-68 and accompanying text.

128. FCRA § 603(h), 15 U.S.C. § 1681(a)(1994).

employer terminates the employee before initiating an outside agency investigation. If the individual no longer works for the employer, the report could not be generated for employment purposes.¹²⁹ Under the FTC's position, an employer will best avoid both Title VII and FCRA liability by immediately terminating any employee against whom a complaint is filed.

The Supreme Court has made it quite clear that an employer can avoid vicarious liability for sexual harassment by providing adequate complaint procedures for employee-reporting and by taking prompt corrective action when a complaint is filed.¹³⁰ The FTC's application of the FCRA to an employer's harassment investigation conducted by a third party conflicts with the employer's obligation under Title VII and impedes an employer's recourse to the affirmative defense.¹³¹ Moreover, the employee whom the FTC has attempted to protect by interposing the FCRA requirements is also in a worse position, as a trigger-happy employer wishing to avoid all possible liability now has an increased incentive to terminate the employment of any employee against whom a complaint is filed.¹³²

II. THE FCRA SHOULD NOT APPLY TO THIRD PARTY HARASSMENT INVESTIGATIONS

The FTC has indicated that its interpretation of the FCRA is merited because of the important privacy and procedural rights that the Act provides to employees when an employer retains an outside agency to conduct a workplace investigation.¹³³ Although under a very broad reading of the FCRA the FTC position may be supported by the plain meaning of the Act, it is not logical in practice. The FCRA should not apply to employers who retain outside agencies to conduct sexual harassment investigations. First, an employer who retains an outside agency to investigate harassment does so for a legal purpose, not for an employment purpose as defined by the FCRA. Second, applying the FCRA to investigative reports does not serve the

129. In an employment-at-will arrangement, the employer may terminate an employee for good cause or no cause. See Aaron, *supra* note 44, at 140. The employment-at-will doctrine in the United States has "become the unquestioned and central rule of employment law." Rothstein, *supra* note 51, § 8.2. An employer would have no obligations under the FCRA should he or she terminate the employee because the report subsequently procured from the CRA could not possibly be used to evaluate the employee for any employment purpose, due to the fact that the individual is no longer in the employ of the employer.

130. See *supra* Part I.A.2. for a discussion on the affirmative defense to liability created by the Supreme Court in the *Ellerth* and *Faragher* decisions.

131. See *supra* Part I.A.3. discussing the conflict.

132. See *supra* Part I.A.3. discussing the conflict.

133. See *Hearing on the Fair Credit Reporting Act Before the Subcomm. on Financial Institutions and Consumer Credit (2000)* (prepared statement of Debra Valentine, General Counsel of the FTC) available at <http://www.house.gov/5400val.htm> [hereinafter *FTC Testimony*].

congressional purpose of the Act. Finally, the employment agreement between the employer and employee should supersede the obligations of the FCRA, just as, in the case of insurance, the insurance contract between the insured and the insurer supersedes FCRA requirements.

A. *Legal Purpose, Not Employment Purpose*

An employer retains an outside agency, particularly outside counsel, to provide legal advice to the employer in order to comply with Title VII duties and prepare an affirmative defense to employer liability for sexual harassment.¹³⁴ The FCRA only applies when employers use reports to take "corrective or disciplinary action" with respect to an employee.¹³⁵ If a report is not used for this purpose, the FCRA does not apply.

Recently, one court has refused to consider a report by outside counsel, prepared to provide legal advice to an employer, as within the definition of consumer report of the FCRA. In *Robinson v. Time Warner, Inc.*,¹³⁶ an employee brought a Title VII workplace harassment action against his employer and sought discovery of an investigation report prepared by the employer's outside counsel to investigate the employee's allegations.¹³⁷ The plaintiff relied upon the FCRA and the FTC's opinion in the *Keller Letter* to compel disclosure of the law firm's report.¹³⁸ A Southern District of New York court held that the questions asked by outside counsel and the responses received during the course of the investigation were all done for a legal purpose and in anticipation of litigation. Therefore, according to the court, this particular report "[fell] squarely within the ambit of *Upjohn Co. v. United States*," and was protected against compelled discovery by the attorney-client privilege and the work product doctrine, absent a showing of need.¹³⁹ The court declined to apply the FCRA to compel the employer to disclose the report.¹⁴⁰

This reasoning is consistent with the Supreme Court's holdings in *Ellerth*¹⁴¹ and *Faragher*.¹⁴² With the formulation of the affirmative defense, employers have greater incentive to conduct a full, adequate,

134. See *supra* Part I.A.2. discussing the employer's affirmative defense to liability.

135. See *Keller Letter*, *supra* note 6; see also *supra* Part I.B.

136. 187 F.R.D. 144 (S.D.N.Y. 1999).

137. See *id.* at 146.

138. See *id.* at 148 n.2; *Keller Letter*, *supra* note 6.

139. *Robinson*, 187 F.R.D. at 146 (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)). As a result, the plaintiff was not entitled to ask counsel or any other employee about the substance of the report or the particular questions asked or answers received during the course of employee interviews. See *id.* ("[T]he [attorney-client] privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.") (quoting *Upjohn*, 449 U.S. at 390).

140. See *id.* at 148.

141. 524 U.S. 742 (1998).

142. 524 U.S. 775 (1998). See *supra* Part I.A.

and independent investigation of sexual harassment complaints in order to strengthen their defense in the event of a lawsuit. As the *Robinson* Court found, these investigations are conducted for a legal purpose.¹⁴³ This incentive would be greatly reduced by a reclassification of the report's goal as one prepared for an "employment purpose." One purpose of the attorney-client privilege, to encourage the free-flow of information, would be compromised if the employer and all witness-employees were aware that the harassment investigation report would be disclosed to the alleged harasser should the employer take adverse action against him or her. This would greatly reduce the value of any investigation undertaken by outside counsel.

B. *Notice and Disclosure to the Alleged Harasser Does Not Further the Intent of the FCRA*

Congress enacted the FCRA, as reflected in its language and its legislative history, in order to protect consumers' financial well-being and the financial system from the effects of inaccurate credit reports.¹⁴⁴ FCRA consumer protections provide a consumer with notice that an insurance company, credit agency, or employer is using information to evaluate him or to provide the consumer with an opportunity to correct any inaccurate, obsolete, or disputed information that leads to an adverse decision.¹⁴⁵ The consumer's cause of action under the FCRA is predicated on the reporting of, and reliance upon, inaccurate, obsolete, or disputed information. The FCRA is neither a proper nor an efficient way to protect an employee accused of harassment from the reporting of, or an employer's reliance upon, such information.

An alleged harasser will not generally be able to inspect an investigative sexual harassment report the same way that he might check a credit report for inaccuracies. Interviews with the complainant-employee and other employees or witnesses conducted by outside agencies during an investigation are likely to be subjective opinions and observations, and thus, not easily shown by the accused to be inaccurate. Witness interviews will yield observations on workplace atmosphere and the accused employee's conduct. For instance, an outside agency, having conducted interviews with witnesses to the alleged harassment, may include in a report that a witness indicated that the offensive conduct by the alleged harasser made him or her uncomfortable. This information is important to the employer to determine if there is harassment, for which the employer

143. See *Robinson*, 187 F.R.D. at 146.

144. See FCRA § 604(a)(4), 15 U.S.C. § 1681; see also 116 Cong. Rec. 35,941 (1970) (emphasizing the importance of providing consumer protection for credit report inaccuracies).

145. See *supra* notes 63-70 and accompanying text.

may be liable, especially for hostile work environment sexual harassment, for which a reasonable person similarly situated to the complainant must perceive the offensive behavior to be severe or pervasive.¹⁴⁶ FCRA consumer protections will be ineffective in this context to protect against most inaccuracies as the employer is not in a position to check the accuracy of the opinions and observations of the complainant-employee or other witnesses interviewed by the outside agency.

In its traditional application, the FCRA protects individuals from the reporting of and reliance upon obsolete information by requiring that CRAs omit adverse information predating the report by more than seven years.¹⁴⁷ An employer wary of liability for sexual harassment, however, can not always disregard this information during an investigation. EEOC guidelines indicate that the past disciplinary record of an accused employee is important for an employer to record and consider in a current investigation.¹⁴⁸ The employer has another reason to consider past history of the alleged harasser: to escape the imposition of large punitive damage awards.¹⁴⁹

Finally, there seems little question that the information contained in an investigative report will be disputed by the accused harasser. The FCRA, however, does not simply compel a CRA to omit disputed information from a report. Rather, if an individual disputes information in a consumer report, the CRA is obligated to reinvestigate the information.¹⁵⁰ A reinvestigation, however, of the investigation just completed is unlikely to be satisfactory to the alleged harasser. Likewise, in the event that the reinvestigation by the

146. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (holding that to be actionable, harassment must be severe and pervasive such that the complainant found the conduct to be subjectively harassing and a reasonable person similarly situated to the complainant would also find the conduct offensive); see also *supra* Part I.A. (discussing factors that determine employer liability for harassment).

147. See FCRA § 605(a), 15 U.S.C. § 1681c (1994); see also discussion *supra* at note 107 and accompanying text.

148. See *EEOC Enforcement Guidance*, *supra* note 18, at N:4084 (indicating that an employer should take into account a person's history of similar offensive behavior in evaluating witness credibility and determining if harassment actually occurred).

149. See Note, *Leading Cases: Civil Rights Acts*, 113 Harv. L. Rev. 359, 359 (1999). In *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 546 (1999), the Supreme Court held that a court may award punitive damages against an employer for violations of Title VII upon a showing by the plaintiff that the employer acted with malice or reckless indifference to plaintiff's federally protected rights. In *Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510 (Ct. App. 1998), the defendant employer paid punitive damages to the plaintiff because of prior unresolved complaints filed against the harasser. Plaintiff introduced evidence of the alleged harasser's prior conduct, not to show conformity with current conduct, but rather to show (1) intent on the part of the alleged harasser, who having been reprimanded in the past, acted with a clear regard that similar conduct would cause injury, and (2) that the employer was negligent for failing to take appropriate corrective action. See *id.* at 532.

150. See *supra* note 109 (discussing CRA obligations in the event a consumer disputes information).

CRA does not resolve the dispute, the backup remedy under the FCRA will also be unsatisfactory.¹⁵¹ The opportunity to annotate the report with a 100-word statement with his or her version of the allegedly harassing events will hardly satisfy the harasser nor resolve the dispute. In a thorough investigation, the employer has already interviewed the alleged harasser and the report already reflects his or her version of the dispute.

As applied to sexual harassment investigations, the FCRA cannot protect an individual from the use of inaccurate, obsolete, or disputed information against him or her. The alleged harasser is not in a position to review an investigative report for inaccuracies, the employer is not in a position to ignore prior history, and the FCRA procedure to resolve disputed information is inapplicable and unsatisfactory. Applying the FCRA to an employer's investigation conducted by an outside agency and allowing the alleged harasser access to an unredacted copy of the investigative report will not improve the accuracy or fairness of that report.

C. *Employment Agreement Should Supersede FCRA Requirements*

The FCRA provides an employer with an incentive to terminate the employment of an employee accused of harassment upon receiving the complaint.¹⁵² The protection the FCRA purports to provide to an employee is illusory if the employee is terminated. In the event of termination pursuant to an at-will employment agreement on the basis of a false or unsubstantiated harassment complaint, the employee's only recourse against the employer are the common law wrongful discharge claims.¹⁵³ If employment was pursuant to a modified at-will agreement or for a term, the employee can also sue the employer for breach of contract.¹⁵⁴

The FCRA may supply important protection to a prospective employee against the use of inaccurate, obsolete, or disputed information that bears upon the employment decision. This protection, however, should not extend after the employer hires the individual, and that person becomes an employee. The FCRA is inapplicable to the investigation of insurance claims, indicating that

151. See *supra* note 109 (discussing the consumer's ability to update the report with his or her version of the disputed event or transaction).

152. See *supra* notes 128-29 and accompanying text.

153. See *supra* Part I.A.4.

154. If an employee has a written employment contract for a term, the contract may limit the ability of the employer to fire the employee. See Rothstein, *supra* note 51, § 8.2. At common law, an employee with a definite term contract may not be fired before the expiration of that term except for cause or material breach, unless the contract otherwise provides. See *id.* The requirement of cause provides an incentive for an employer to conduct an investigation prior to firing an employee accused of harassment. See *id.* This incentive works with, rather than against, the Title VII incentive to investigate.

perhaps Congress did not intend the FCRA to apply after the establishment of a relationship between the subject of a report and the person requesting the report.

The FCRA protects an individual who applies for insurance from the use of inaccurate, obsolete, or disputed information in a consumer report used to determine that individual's eligibility for insurance.¹⁵⁵ The protections of the FCRA, however, do not apply after the development of a contractual relationship between the insurance company and the individual, specifically, when reports are prepared in response to an insured's claim on a policy.¹⁵⁶ For example, if a consumer ("A") applies to an insurance company ("B") for insurance, B may procure from a CRA a consumer report on A to determine A's eligibility for insurance.¹⁵⁷ If B decides not to provide A insurance based on the CRA's report, B must provide A with a copy of the consumer report.¹⁵⁸ A then has the opportunity to review the report for inaccuracies or otherwise disputed or obsolete information. The FCRA prevents A from being denied insurance on the basis of inaccurate, obsolete, or disputed information, and A may cause his application to be reevaluated. However, if B were to extend A insurance and A were to later make a claim against the policy, B may use a CRA to investigate that claim and not be subject to FCRA notice and disclosure requirements.¹⁵⁹

Congress specifically excluded insurance claim reports from the definition of consumer reports.¹⁶⁰ The FTC has also confirmed that CRA reports provided to insurers solely to assess the validity of a claim are not consumer reports.¹⁶¹ Moreover, courts have held, consistent with statutory language and congressional intent, that a

155. See FCRA § 603(d)(1), 15 U.S.C. § 1681a(d)(1) (1994) (defining "consumer report" as a report used "for the purpose of serving as a factor in establishing the consumer's eligibility for . . . insurance . . .").

156. See *Hovater v. Equifax, Inc.*, 823 F.2d 413, 419 (11th Cir. 1987) (holding that the FCRA does not apply when a report is issued by a CRA to an insurer to evaluate an insured's claim for benefits under an existing policy).

157. The insurance company is obligated to provide the same notice and authorization protection to the applicant, as discussed *supra* at notes 94-97 and accompanying text.

158. See *supra* notes 101-04 and accompanying text (discussing the report user's disclosure obligations upon taking adverse action).

159. See *infra* note 160 and accompanying text.

160. Three years after Congress enacted the FCRA, the original sponsor of the Senate bill, Sen. William Proxmire, noted that insurance claim reports were not covered by the FCRA and proposed an amendment to include them. See *Cochran v. Metropolitan Life Ins. Co.*, 472 F. Supp. 827, 832 (N.D. Ga. 1979) (citing *Hearings on S.2360 Before the Subcomm. on Consumer Credit of the Senate Banking, Housing and Urban Affairs Comm.*, 93rd Cong., 1st Sess. 62 (1973)). This amendment was never enacted, and CRA investigations of insurance claims remain unregulated by the FCRA. See *id.* (citing Note, *Judicial Construction of the Fair Credit Reporting Act: Scope of Civil Liability*, 76 Colum. L. Rev. 458, 465, nn.44-47, 480 n.119 (1976)).

161. See 16 C.F.R. pt. 600, App. § 6(A).

report prepared to investigate the validity of an insurance claim is not within the scope of the FCRA.¹⁶²

Congress does not explicitly state the reason for distinguishing between reports used to determine eligibility for insurance and reports used to evaluate subsequent claims. However, claim reports are arguably outside of the FCRA's scope for two reasons. First, claim investigation is part of an insurance company's ordinary course of business and this type of investigation should neither come as a surprise nor unduly prejudice an insured seeking to collect on a policy claim. Second, the contractual relationship between the insurer and insured imposes rights and responsibilities that the FCRA would only duplicate or encumber. The insurance contract itself provides the insured with protection from an insurance company that makes arbitrary decisions with respect to coverage.

This distinction, between an insurance provider's initial insurance decision and subsequent claim reports, should be applied in the employment context. The FCRA should be limited to protecting only prospective employees from the employer's use of inaccurate, obsolete, or disputed information when making a hiring decision. Once an employee is hired and an employment relationship is formed between the parties, the FCRA should no longer apply. Rather, the terms of the employment contract or the implied covenant of good faith incumbent in an at-will employment agreement provide an employee with adequate protection from arbitrary and unfair employment decisions made with respect to promotion, reassignment, and retention.

III. SOLUTIONS TO THE CONFLICT

The FTC and Congress have recognized the dilemma presented to an employer who attempts to comply with the FCRA and have outside agencies investigate workplace harassment.¹⁶³ Two FCRA

162. See *Hovater v. Equifax, Inc.*, 823 F.2d 413, 421 (11th Cir. 1987); *Cochran*, 472 F. Supp. at 831-32 (holding that a third-party investigation at the request of insurer into the authenticity of plaintiff's insurance claim is not within the scope of the FCRA); *Soto v. Industrial Comm'n.*, 500 P.2d 313, 314 (Ariz. Ct. App. 1972) (holding that a third-party investigation at the request of an employer into an employee's workman compensation claim was not within the scope of the FCRA). *But see* *Kiblen v. Pickle*, 653 P.2d 1338, 1342-43 (Wash. Ct. App. 1982) (holding that insurance claims reports are not consumer reports unless later used to deny claimant benefits); *Beresh v. Retail Credit Co.*, 358 F. Supp. 260, 262 (C.D. Cal. 1973) (ignoring plain meaning of the FCRA and holding that reports on insurance claims are covered by the statute even if not within the definition of consumer report).

163. See *FTC Testimony*, *supra* note 133, at 3 ("The Commission fully appreciates that practical problems may arise in applying all the FCRA requirements to investigations by third parties of workplace misconduct."); H.R. 4373, 106th Cong. (2000) (proposing to amend the FCRA to limit disclosure of report if obtained pursuant to a workplace investigation); H.R. 3408, 106th Cong. (1999) (proposing to amend the FCRA to exempt certain investigative consumer reports from the Act).

statutory amendments have been proposed in the House of Representatives to alleviate this dilemma.¹⁶⁴ H.R. 4373 is an amendment suggested by the FTC that would provide employees some of the FCRA consumer protections, yet allow an employer to retain an outside agency to conduct workplace investigations.¹⁶⁵ The amendment proposed by H.R. 3408 excludes entirely investigations by outside agencies from FCRA requirements.¹⁶⁶ These solutions, however, fall short, either in their drafting or more important, their conceptualization. It is the position advocated in this Note that the FCRA does not, and was not meant to, apply to workplace investigations in the first place, making an FCRA amendment unnecessary except for the purpose of clarifying the Act's inapplicability. If Congress does intend to extend some type of statutory protection to an employee wrongfully accused of harassment, similar to Title VII's proscription against retaliation with respect to the complainant, it should do so outside of the confining scope of the FCRA. In the alternative, in light of the fact that the FTC has no rulemaking authority,¹⁶⁷ Congress should not further amend the FCRA, but allow courts to interpret the language and legislative intent of the Act so as not to apply in the context of employee harassment investigations.

A. *FTC Solutions and H.R. 4373*

The FTC, in an unofficial letter opinion and in testimony at the House Subcommittee Hearing on this issue on May 4, 2000, presented several solutions to the dilemma created by its official interpretation of the FCRA.¹⁶⁸ These proposed solutions were born of the FTC's desire to "strike a balance between the need to facilitate efficient, timely investigations and the need to preserve the basic safeguards for employees [provided by the FCRA]."¹⁶⁹

Initially, in an unofficial advisory opinion by FTC Associate Director of the Division of Financial Practices, the agency proposed two mitigating solutions that, in the opinion of that FTC staff attorney, would allow an employer to comply with the FCRA and still

164. See H.R. 4373, 106th Cong. (2000); H.R. 3408, 106th Cong. (1999).

165. See H.R. 4373, 106th Cong. (2000); *FTC Testimony*, *supra* note 133, at 4.

166. See H.R. 3408, 106th Cong. (1999); *FTC Testimony*, *supra* note 133, at 3 (indicating that the effect of this proposed amendment is a "blanket exclusion" from the FCRA).

167. See FCRA § 621(a)(4), 15 U.S.C. § 1681s (1994) (specifying that the FTC is not permitted to issue rules or regulations with respect to the FCRA).

168. See Letter from David Medine, Associate Director, Division of Financial Practices, Federal Trade Commission, to Susan R. Meisinger, Society for Human Resource Management (Aug. 31, 1999) (visited Nov. 17, 1999) <<http://www.ftc.gov/os/statutes/fcra/meisinger.htm>> [hereinafter *Medine Letter*]; *FTC Testimony*, *supra* note 133 *passim*.

169. *FTC Testimony*, *supra* note 133.

hire outside agencies to conduct harassment investigations.¹⁷⁰ In the *Medine Letter*, the FTC suggested that an employer may get the accused employee's consent to procure a report by "routinely [obtaining consent] at the start of employment, thereby relieving the employer of the awkward prospect of having to ask a suspected wrongdoer for permission to allow a third party to provide an investigative (or other) consumer report to the employer."¹⁷¹ This proposal is an unsatisfactory solution. Should the FCRA be applicable, procuring routine notice and consent from employees at the start of employment, rather than at the start of an investigation, arguably does not provide an employee with the degree of protection Congress intended the FCRA to provide. Routine consent from the employee at the start of employment, which allows an employer to conduct an investigation at any time, is in effect a waiver of the employee's FCRA rights to actual notice that an investigation is underway. The FTC has said that despite the conflict between the employer's obligations under the FCRA and Title VII, it is important that FCRA protections extend to employees.¹⁷² Yet, according to this proposal, an employer may comply with the statutory safeguards of the FCRA by requiring employees to waive FCRA rights of *actual* notice at the start of an investigation.¹⁷³

Moreover, routine notice and consent would not satisfy the FCRA statutory requirements when a CRA prepares an investigative consumer report containing interviews. The FCRA imposes additional notice and disclosure obligations on employers who procure and use investigative consumer reports.¹⁷⁴ The FTC does not make clear in its opinion how blanket notice would satisfy these strict requirements of additional disclosure.¹⁷⁵ In fact, the *Medine Letter* only indicates that "[e]mployers seeking to obtain reports on employees can meet the disclosure requirements [for investigative consumer reports] in a similar fashion [by routinely obtaining consent at the start of employment]."¹⁷⁶ Without actual notice that an employer is in the process of procuring an investigative report, an

170. See *Medine Letter*, *supra* note 168. These two mitigating solutions were presented in response to the perceived conflict created by the *Keller Letter*, *supra* note 6, prior to the FTC's official adoption of the FCRA interpretation in the *FTC Letter*, *supra* note 7.

171. *Medine Letter*, *supra* note 168.

172. See *FTC Letter*, *supra* note 7.

173. See *Medine Letter*, *supra* note 168.

174. See *supra* notes 98-100 and accompanying text (discussing FCRA notice and disclosure requirements for investigative consumer reports). The FCRA requires the employer, "upon written request made by the consumer within a reasonable period of time after the receipt by him of the [notice that an investigative report will be prepared], [to] make a *complete and accurate disclosure of the nature and scope of the investigation requested.*" FCRA § 606(b), 15 U.S.C. § 1681d (1994) (emphasis added).

175. See *Medine Letter*, *supra* note 168.

176. *Id.*

employee could not possibly request, within a reasonable period of time, additional disclosure of the "nature and scope" of the investigation.¹⁷⁷

The second FTC initial proposed solution is equally unsatisfactory. According to the FTC official FCRA interpretation, when an employer takes adverse employment action against an employee on the basis of a consumer report, the employer must first disclose the report in full to the employee.¹⁷⁸ The *Medine Letter* proposes that "an investigative agency may draft its report to the employer to minimize risks attendant to such disclosure, most importantly by not naming parties that provide negative information regarding the employee."¹⁷⁹ This is an unsatisfactory solution from the perspective of an employer interested in conducting a prompt and thorough investigation in preparation for the affirmative defense to vicarious liability for workplace discrimination. A vague or incomplete report by a CRA will decrease the value of the investigation and the effectiveness of the employer's response to a harassment complaint. The plaintiff-employee may challenge an incomplete or vague report as being the product of a haphazard investigation.¹⁸⁰ As one commentator noted, "[e]mployers are second-guessed all the time about whether they conduct a thorough sexual harassment investigation and one of the elements that a good lawyer will go for is that they failed to get back-up evidence for their conclusion. Cutting names and critical information out of the report just opens you up to claims that the investigation is incomplete."¹⁸¹

A more recent FTC-proposed solution does not refer to the suggestions in the *Medine Letter*, but rather proposes a legislative amendment, the form of which was introduced in the House of Representatives as H.R. 4373, to clarify the applicability of the FCRA.¹⁸² The FTC proposed a new FCRA provision, § 626, "applicable to investigations of alleged or suspected workplace

177. The purpose of additional disclosure for investigative consumer reports is to allow an individual applicant for credit, insurance, or employment the "opportunity to decide whether credit, insurance, or other benefits are sufficiently important to sacrifice his privacy." *Fair Credit Note*, *supra* note 6, at 834. If the individual does not want his privacy invaded by the interviews conducted in preparation of an investigative consumer report, "he can withdraw his application and there will be no investigation." *Id.* This reasoning does not apply when the employer is obliged to do an investigation, whether alone or with the aid of a third-party, regardless of the individual's desire not to be investigated, as is the case for sexual harassment investigations. *See id.* at 834 n.91.

178. *See* discussion on disclosure requirements *supra* at notes 101-104 and accompanying text.

179. *Medine Letter*, *supra* note 168 (citation omitted).

180. *See* Eli Research, *Sexual Harassment: FTC Sticks to its Guns on FCRA's Application to Harassment Inquiries*, Hosp. Personnel Mgmt., Oct. 1999, at 41, 42.

181. *Id.* (quoting Rod Satterwhite).

182. *See* *FTC Testimony*, *supra* note 133, at 4.

illegality, which would provide that, in cases in which a consumer report is obtained for the purpose of investigating suspected or alleged illegal misconduct by an employee, compliance with [certain FCRA sections] is not required."¹⁸³ The FTC would exempt employers from having to (1) provide notice to employees,¹⁸⁴ (2) get the accused employee's authorization to proceed,¹⁸⁵ (3) disclosing the report to the employee upon adverse action,¹⁸⁶ and (4) comply with additional safeguards applicable for the use of the investigative consumer report.¹⁸⁷

The FTC approach leaves in place every other FCRA relevant requirement, such as the CRA's obligation to follow reasonable procedures and employ accuracy safeguards,¹⁸⁸ as well as the employer's obligation, in the case of adverse action, to provide to the employee "the name and other identifying information about the [CRA], and notification of the [employee's] right to obtain a disclosure of the [report's nature and substance]."¹⁸⁹ In the case of an investigative consumer report, this disclosure would be "a summary of the 'nature and substance' of the report," and would allow the employee "to obtain a degree of meaningful, genuine disclosure of the information that served as the basis for the adverse decision."¹⁹⁰ Moreover, the employer would not be obligated to comply with this remaining applicable FCRA provision until after taking adverse action, thus allowing the employer to take prompt remedial action if necessary.¹⁹¹

H.R. 4373 eliminates the conflict created by the FTC official interpretation by amending the FCRA to exempt employers from most substantive FCRA requirements. It does not address the fact that an employer, in many instances, might immediately terminate any employee upon the receipt of the complaint, and then not be responsible for even providing the terminated employee with the name of the outside agency that prepared the report.

This amendment allows an employer to proceed with the retention of outside agencies to conduct investigations into sexual harassment allegations. It does so, however, by exempting employers from all substantive provisions of the FCRA, and making inapplicable all the

183. *Id.* H.R. 4373 does not incorporate the proposed amendment as a new section in the FCRA, but the intended effect of the amendment is the same as the FTC proposed.

184. *See supra* notes 94-95 and accompanying text for notice requirement.

185. *See supra* notes 96-97 and accompanying text for authorization requirement.

186. *See supra* notes 101-104 and accompanying text for disclosure requirement.

187. *See supra* notes 98-100 and accompanying text for additional safeguards for use of investigative consumer reports.

188. *See discussion supra* at notes 105-108.

189. *FTC Testimony, supra* note 133, at 5 (referring to FCRA §§ 615 and 609(a)(1), still applicable to an employer and CRA under their legislative proposal).

190. *Id.* at n.19.

191. *See id.* at 5.

consumer protections the FTC believed to be important enough to raise this dilemma in the first place. H.R. 4373 further complicates the FCRA and fosters a piecemeal approach to protecting an employee wrongfully accused of sexual harassment.

B. *H.R. 3408 and Complete Exclusion from FCRA Requirements*

H.R. 3408, introduced in November, 1999, is an FCRA amendment that would exclude from the definition of "consumer report"¹⁹² all CRA reports on illegal workplace conduct and any other reports prepared in connection with, or in anticipation of, litigation.¹⁹³ In effect, this amendment creates a blanket exemption from the FCRA for these investigations.¹⁹⁴ The bill also requires modified disclosure when an employer takes adverse action against an employee on the basis of a CRA report, requiring the employer to tell the employee the "nature and substance" of the report.¹⁹⁵

This bill would seem to resolve the apparent conflict between the FCRA and Title VII investigations by making the FCRA wholly inapplicable to harassment investigations.¹⁹⁶ The blanket exclusion, however, conflicts with the provision that would purport to require disclosure in some instances.¹⁹⁷ As the FTC has noticed, it is unclear how this disclosure provision would be enforced given that the amendment wholly excludes these reports from the FCRA, and such reports would not be subject to the FCRA, as amended.¹⁹⁸

The FTC further criticized the approach taken by H.R. 3408 because it would "eliminate a significant number of long-standing privacy and procedural protections that the FCRA traditionally has afforded to employees that are the target of such investigations."¹⁹⁹ This concern is ironic considering that the FTC's own proposal and H.R. 4373 would exclude these investigations from all the same substantive notice and disclosure requirements.²⁰⁰ By making the FCRA inapplicable, this bill eliminates an employer's incentive to terminate immediately an employee to avoid FCRA liability. Should Congress choose to provide statutory protection, similar to the protection of the FCRA or Title VII's prohibition of retaliation, to

192. FCRA § 603(d), 15 U.S.C. § 1681a (1994); see discussion on this definition *supra* at notes 79-81 and accompanying text.

193. See H.R. 3408, 106th Cong. (1999).

194. See 145 Cong. Rec. E2421-02 (statement of Hon. Sessions).

195. See H.R. 3408, 106th Cong. (1999).

196. See *FTC Testimony*, *supra* note 133.

197. See H.R. 3408, 106th Cong. (1999). The way the bill is drafted, the modified disclosure requirement is only implicated when a CRA prepares a report in connection with an investigation into illegal conduct, but not when the report is prepared in connection with, or in anticipation of, litigation. See *id.*

198. See *FTC Testimony*, *supra* note 133, at n.18.

199. *Id.* at 3.

200. See *supra* text accompanying notes 184-87.

employees accused of harassment or terminated based on a false or unsubstantiated complaint, it should do so outside the cumbersome confines of the Act.

C. *Judicial Interpretation*

Even without a congressional amendment, the FCRA's language, supplemented by evidence of legislative intent, allows a court to resolve the conflict by interpreting the FCRA as excluding an outside agency investigation and resultant report.²⁰¹ Many, if not most, outside agencies will not meet the definition of CRA because they do not "regularly engage[] in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports [to employers]."²⁰² Rather, these agencies provide legal advice in response to legal issues.²⁰³ The resultant report and "[it's] impact on individual employees is a by-product of their specialized advice."²⁰⁴ Moreover, outside agencies, arguably, do not prepare "consumer reports" as defined by the FCRA,²⁰⁵ because the employer requests the report, not to investigate the employee's credit worthiness, character or reputation, but rather to determine and reduce potential employer liability for sexual harassment.²⁰⁶

Courts, when faced with a conflict between the FCRA and Title VII, should construe the FCRA definitional requirements narrowly so as not to discourage an employer's use of independent investigators. A broad reading may lead to a result inconsistent with the Supreme Court's opinions in *Burlington Industries Inc. v. Ellerth*²⁰⁷ and *Faragher v. City of Boca Raton*.²⁰⁸

CONCLUSION

The FTC's very broad interpretation of the FCRA may support their opinion that workplace harassment investigations, conducted by outside agencies at an employer's request, are within the scope of the Act. These investigations, however, are not within the spirit of the statute, nor consistent with its purpose. The FCRA would frustrate an

201. See *supra* note 72 and accompanying text.

202. FCRA § 603(f), 15 U.S.C. § 1681a (1994); see *Hearing on the Fair Credit Reporting Act Before the Subcomm. on Fin. Inst. and Consumer Credit (May 4, 2000)* (written testimony of Mark S. Dichter) available at <http://www.house.gov/banking/5400dic.htm> [hereinafter *Mark S. Dichter Testimony*].

203. See *supra* Part II.A.

204. *Mark S. Dichter Testimony, supra* note 202.

205. FCRA § 603(d), 15 U.S.C. § 1681a (1994); see *supra* notes 79-81 and accompanying text.

206. See *supra* Part II.A.

207. 524 U.S. 742 (1998).

208. 524 U.S. 775 (1998).

employer's ability to prevent and correct workplace discrimination in violation of Title VII.

The two FCRA amendments currently proposed in the House of Representatives exempt workplace investigations and resultant reports from most of the Act's substantive notice and disclosure requirements, but still require employers and CRAs to comply with some lesser protections. The few consumer protections the amendments would require of employers are not sufficiently tailored to the context of workplace harassment investigations. The effect of either amendment would be to foster a piecemeal attempt of providing statutory protection for an employee terminated or demoted on the basis of a false or unsubstantiated harassment complaint against him or her.

A better solution would be for Congress to exclude from the FCRA all employer investigations that involve, as subjects or witnesses, any employee currently employed by the employer. In the employment context, the FCRA should be limited to protecting only prospective employees from the employer's use of inaccurate, disputed, or obsolete information when making a hiring decision. If Congress does wish to extend some type of statutory protection to an employee wrongfully terminated or demoted, it should do so outside the confines of the Act.

Notes & Observations