Employers Cornered Between Sexual Harassment and the Fair Credit Reporting Act

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Sexual harassment has been around for nearly twenty years and is still a problem in the workplace today. Society has made significant strides in eliminating harassing behavior. In the last ten years, employees report that harassment is occurring less, employers are taking affirmative steps to prevent and eliminate harassment, and more people understand what constitutes sexual harassment. Roper Starch Worldwide has conducted multiple surveys of employees concerning sexual harassment.[1] According to a recent survey, only four percent of those surveyed noticed a lot of sexual harassment at the workplace, but fifteen percent reported some harassment and twenty-one percent reported not much harassment occurred.[2] These results are slightly better than those reported in 1991. In addition, sixty-four percent were aware of the employer's written policy and grievance procedures for sexual harassment.[3] This figure marks a twenty-four percent gain.[4] Still, three percent of employees are "not too satisfied or were totally dissatisfied . . ." with how their employer is dealing with the issue.[5] Moreover, employees are better able to identify sexual harassment today.[6] While these figures show marked improvement, sexual harassment is still a problem in the workplace. The courts and the legislature must continue to work with employers to eradicate this problem.

This article will address how the Fair Credit Reporting Act (FCRA) frustrates society's efforts to stamp out sexual harassment. The Act puts pressure on employers to conduct effective investigations into complaints of sexual harassment. Yet, the employer is required to gain the permission of the accused before beginning such an investigation, and this allows the accused to significantly impact the manner and effectiveness of the investigation. This article will address the many ways in which the accused can control the logistics of the investigation, including who serves as the investigator, the discovery techniques available, and the availability of evidence. The article will also examine several potential solutions that allow employers to continue efforts to eliminate sexual harassment, including an examination into why courts should reject the Federal Trade Commission's (FTC's)

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interpretation of the FCRA and a proposed amendment to the statute.

Part I will address the Supreme Court cases that have given employers an incentive to conduct fair and impartial investigations into sexual harassment and the reasons employers need such an incentive. Part II will discuss the FCRA and the reasons the statute has created unintended consequences in employment investigations. Part III will discuss possible solutions, including pending legislation that would create an exemption for investigations into illegal conduct in the workplace.

I. SUPREME COURT CASES CREATE AN INCENTIVE TO CONDUCT INVESTIGATIONS

Title VII of the Civil Rights Act of 1964 prohibits any discrimination based upon a variety of protected characteristics.[7] Title VII states that an employer shall not "discriminate against any individual with respect to . . . compensation, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . ."[8] Employers with at least fifteen employees are covered by the Act. Originally, plaintiffs could recover equitable and injunctive relief, including back pay, interest, front pay, and reinstatement.[9] The Civil Rights Act of 1991 amended the possible recovery to include compensatory and punitive damages.[10] However, until 1986, sexual harassment was not included under the Civil Rights Act. Some monumental cases have subsequently reformed the way sexual harassment is treated by courts today.[11] *Meritor Savings Bank v. Vinson*[12] first recognized an action under Title VII for sexual harassment in 1986. The court then found employers vicariously liable for the actions of supervisors in a pair of 1998 cases, *Faragher v. City of Boca Raton*[13] and *Burlington Industries v. Ellerth*.[14]

A. Meritor Savings Bank v. Vinson

The Supreme Court first recognized sexual harassment under Title VII in *Meritor Savings Bank v. Vinson*.[15] The respondent was discharged when she allegedly took excessive sick leave.[16] She responded by claiming that she had been subjected to constant sexual harassment during the course of her employment at the bank.[17] She claimed that she responded to sexual advances by her supervisor out of fear of losing her job.[18] The supervisor then allegedly made repeated requests for sexual favors and, in fact, fondled her in front of employees on several occasions.[19] The activities reached a pinnacle when the supervisor forcibly raped her many times.[20] The bank argued that sexual harassment should not be included within Title VII because sexual harassment is "sufficiently different from other types of discrimination and should receive separate legislative treatment."[21] The court rejected this argument and petitioner's contention that Title VII only applies to discrimination with respect to a

"tangible loss" of an "economic character."[22]

The Court reasoned that Title VII makes reference to discrimination with respect to the "terms, conditions, or privileges of employment."[23] Clearly, one should conclude that the state of the work environment would fall under terms or conditions of employment. In fact, the Court came to the same conclusion when Justice Rehnquist wrote, "the phrase 'terms, conditions, or privileges of employment' evinces a congressional intent' to strike at the entire spectrum of disparate treatment of men and women' in employment."[24] The Court found nothing to show that Congress intended the Act not to cover "purely psychological aspects of the workplace environment."[25]

The court relied heavily upon the interpretations of the Equal Employment Opportunity Commission (EEOC). The EEOC issued sexual harassment guidelines in 1980, which detailed two forms of sexual harassment: quid pro quo and hostile-environment sexual harassment.[26]

According to the EEOC, quid pro quo harassment consists of "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature," provided that "(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual . . . ."[27] The Eleventh Circuit refined this definition in *Henson v. City of Dundee*, stating quid pro quo harassment occurs when a supervisor "relies upon his apparent or actual authority to extort sexual consideration from the employee."[28] In *Henson*, the court enunciated five elements to a quid pro quo claim of sexual harassment: (1) The employee belongs to a protected group; (2) the employee was subject to unwelcome sexual conduct; (3) the conduct was based on sex; (4) the employee's reaction to the harassment affected a term, condition, or privilege of employment; and (5) respondeat superior, or employer liability, applies.[29] The claimant in *Meritor Savings* did not suffer adverse employment action due to sexual harassment. Therefore, the Court considered plaintiff's claim as one based on a "hostile work environment."

The Supreme Court held in *Meritor Savings*, that an employee may recover for sexual harassment by showing that the unwelcome and discriminatory behavior was severe or pervasive enough to alter the conditions of employment and create an abusive working environment.[30] The Court has since established a "totality of circumstances analysis."[31] In evaluating whether a hostile work environment exists, one must consider the "frequency of the discriminatory behavior, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it interferes with the employee's work performance."[32] The victim's psychological well-being should also be considered. Simple teasing, offhand comments, and isolated incidents will not be actionable unless they are extremely serious.[33] In order to be actionable, the conduct must be both subjectively and objectively hostile and abusive.[34]

If the work environment does not offend the victim, the conduct is not subjectively hostile and, therefore, no cause of action exists.[35] Likewise, the environment must be so hostile and abusive that an ordinary person would be offended.[36] The behavior must not only be offensive to the victim, but the conduct must also be so offensive that it would shock an ordinary person.

This ruling was a major win for employees because they are no longer required to show job loss or economic detriment.[37] However, employees are still required to prove that the employer received notice of the harassment.[38] Otherwise, the employer is protected from liability.[39] The Court then created another defense for employers in situations where the victim has suffered no tangible job consequences.[40]

B. Faragher v. City of Boca Raton and Burlington Industries v. Ellerth

In 1998, the Supreme Court decided two more sexual harassment cases.[41] The cases contemplated whether the employer should be held vicariously liable for discrimination or harassment caused by a supervisor.[42] In *Faragher*, the victim was a lifeguard who alleged that three supervisors touched her offensively, made lewd comments and spoke offensively about women. In fact, one of the supervisors stated that he would never promote a woman, while another supervisor exclaimed, "[d]ate me or clean the toilets for a year."[43]

In *Ellerth*, the plaintiff worked as a salesperson where the company manager commented about the plaintiff's breasts and made it clear that he "could make [Ellerth's] life very hard or very easy."[44] Ellerth was later denied a promotion because she was not "loose enough."[45] The supervisor even stated, "I don't have time for you . . . unless you want to tell me what you're wearing."[46] He later commented that if she wore shorter skirts, he would make her job much easier.[47]

The Court enunciated two important holdings. First, an employer is strictly liable for the harassing behavior of a supervisor if tangible employment action was taken.[48] Tangible employment action is defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[49] When action is taken and harassment is shown, the employer is precluded from avoiding liability. However, this is not the case when the plaintiff does not suffer tangible employment action

If an employee is harassed, but suffers no significant change in the employment status, the employer may assert an affirmative defense.[50] The defense requires the employer to prove two elements: (1) The employer exercised reasonable care to prevent and correct the harassing behavior; and (2) the employee failed to take advantage of the employer's measures aimed at preventing or correcting the situation.[51]

The court made a strong statement in the right direction by providing

employers with an incentive to combat sexual harassment. "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms,"[52] and Congress intended to promote conciliation rather than litigation.[53] The Supreme Court noted in *Ellerth* that encouraging employees to report incidents of harassment before they become pervasive or severe will work to deter sexual harassment.[54] When no tangible employment action has been taken, employers will have a reason to conduct effective investigations and take appropriate steps to eradicate sexual harassment. Employers will draft strong anti-harassment guidelines. They will make reporting easier and more effective for aggrieved employees. Employees will become better educated on what to look for and how to behave at work. As long as the employer has the opportunity to avoid all liability, the employer will take the necessary steps to prevent and correct harassing behavior.

The benefits are not as evident when tangible employment action has been taken against the victim. The employer will be held strictly liable for the supervisor's conduct.[55] However, the victim may be entitled to punitive damages and the employer may be able to limit these damages[56] by taking appropriate steps to cooperate with the victim, taking remedial action against the accused, and implementing measures to prevent future occurrences. By taking affirmative steps to address the problem, other employees subject to harassment may come forward so that the problem can be fully addressed.[57] Sexual harassment will not be eliminated without the help of employers. Employers would have very little reason to conduct thorough investigations if they were to be held strictly liable in all circumstances. The Court has given employers an incentive to partner up in the fight against sexual harassment. Unfortunately, Congress erected a roadblock when the Fair Credit Reporting Act was amended in 1996.

II. THE FAIR CREDIT REPORTING ACT WAS DESIGNED TO PROTECT CONSUMERS

The FCRA[58] was designed to protect the privacy of individuals in regards to credit, insurance, and employment.[59] The Act states, in part:

> Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers . . . [and] it is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information . . . .[60]

It was supposed to protect the confidentiality, accuracy, and currency of information in

credit reports, which notoriously contain false information.[61] Senator Proxmire, sponsor of the bill, described the three goals of the Act as follows:

> *Confidentiality*. [Credit] information is furnished for a specific purpose, namely, in support of the application for credit. Without the consumer's knowledge or acquiescence this information should not be supplied to a noncreditor . . . . There have also been many stories telling of the ease with which an unauthorized person can get a look at an individual's file.
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> *Accuracy*. There are many varieties of inaccurate information . . . . One is the case of mistaken identity, where two individuals with the same names are confused, and the deserving individual is denied credit because of something done by the other person . . . . A second type of inaccuracy, or more precisely, incompleteness, has to do with so-called derogatory items from public records. Credit bureaus seem very anxious to record the fact that a person has been sued for nonpayment, but they are in many cases not so diligent in noting the disposition of the case. For example, if a consumer refuses to pay because he cannot get satisfaction from a merchant with respect to a shoddy piece of merchandise, the merchant may sue him for nonpayment, and this fact is recorded by the credit bureau. However, if the suit is subsequently decided in favor of the consumer, this would not be recorded and the consumer's credit rating would be unjustly jeopardized.
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> *Currency of information*. The bill further provides that there be in effect procedures of information for evaluating and for keeping the information in an individual's credit file up to date . . . . However, there is a further element here: that irrelevant and outdated information be discarded from the file.[62]

Imagine applying for a car loan only to find that you have been denied because your credit report contains a clerical error alleging that you filed for bankruptcy. The problem is that you never filed for bankruptcy. The consumer is left trying to explain to a lending institution that the report is wrong. In the meantime, the consumer must endure a long, tedious process to repair his or her credit.[63] For example, an employee in Washington, D.C. was fired when Equifax (consumer reporting agency) informed his employer that he had been convicted of cocaine possession.[64] In fact, he was never convicted of cocaine possession.[65] Equifax's report was erroneous and confused the employee with another individual with a similar name.[66] It took the employee two years to get his job back.[67] The Act was supposed to alleviate the surprise of being denied credit, insurance or employment based on a credit report that contained false

information.

In order to understand how the FCRA applies to sexual harassment investigations, it is important to understand specifically how the Act applies to employers.

A. Application of Fair Credit Reporting Act to Sexual Harassment Investigations

Users of consumer reports must make certain disclosures,[68] and credit reporting agencies must correct inaccurate or misleading information.[69] The FCRA protects the targets of the consumer reports, the consumers themselves.[70] A consumer reporting agency is any "person which, for money . . . regularly engages 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 . . . ."[71] However, the collection and distribution of information does not have to be in exchange for money. A person who distributes such information without compensation can also be subject to the statute.[72] The statute goes on to define a consumer report as:

> [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"[73] credit,[74] insurance,[75] employment purposes,[76] or any other purpose authorized under the FCRA.[77]

The FCRA requires employers to make two disclosures before requesting a consumer report.[78] First, the employer must clearly and conspicuously disclose to the consumer that a report may be obtained for employment purposes[79] and must also obtain, in writing, the consumer's authorization to obtain the report.[80] The disclosure can be made at any time prior to requesting the report, but the disclosure must be made in writing and on a document only containing the disclosure.[81] Second, if the employer chooses to use the consumer report, in whole or in part, to take adverse employment action against the consumer, the employer must provide the consumer with an unedited copy of the report.[82] The consumer must also receive a description of his or her rights under the FCRA.[83]

The FCRA also makes a distinction between an ordinary consumer report and an investigative consumer report.[84] An investigative consumer report is defined as:

> [A] consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or

> mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.[85]

If the employer requests a simple credit report from a credit bureau, the employer is bound by the rules referring to consumer reports. However, if an employer chooses to hire an investigator to conduct interviews on a particular employee or applicant, the employer is requesting an investigative consumer report and is bound by two requirements. First, the employer must "clearly and accurately disclose to the consumer that an investigative consumer report . . . may be made . . . ."[86] The disclosure must also be made in writing and delivered to the consumer no later than three days after the report is requested.[87] It must also notify the consumer of his or her rights to learn of the nature and scope of the investigation.[88] If such a request is made, the employer has five days to comply.[89] Investigative consumer reports are commonly used by employers and can serve as a valuable tool in correcting and preventing illegal workplace conduct.

The FCRA was designed to give consumers an opportunity to discover mistakes on their credit report.[90] Previously, users of credit reports had no reason to disclose the existence of a report and, even when discovered, the user had no responsibility to discuss a report.[91] Even worse, when erroneous information was included in a report, credit agencies were not required to erase such information from the report.[92] For the most part, credit reports were exclusively used for banking purposes. Some employers used the reports to evaluate potential employees.[93] But, it did not dawn on anyone that the definition of "employment purposes"[94] could encompass using credit reports for post-hiring reasons.

In 1999, Judy Vail, an attorney in Washington, wrote a letter to the Federal Trade Commission (FTC) inquiring whether the FCRA applies to sexual harassment investigations.[95] Specifically, the letter asked if hiring an outside organization to investigate sexual harassment fell under the Act's definition of "consumer reporting agency."[96] Chris Keller, an attorney for the FTC, wrote in response what has come to be known as the "Vail Letter," answering in the affirmative. According to his letter, "it seems reasonably clear that the outside organizations utilized by employers to assist in their investigations of harassment claims 'assemble or evaluate' information."[97]

According to the FTC, the FCRA applies to any investigator who regularly conducts employment investigations reporting on the character or reputation of employees. Applying this interpretation, a law firm that is regularly hired by an

employer to conduct an investigation into sexual harassment is a consumer reporting agency.[98] However, it is still unclear whether the FCRA covers general counsel that only occasionally compile, analyze, and evaluate information on employees and applicants.[99]

III. THE ACT WAS NOT DESIGNED TO DISCOURAGE THIRD-PARTY INVESTIGATIONS

While the Fair Credit Reporting Act was designed to protect the confidentiality, accuracy, and currency of information in consumer reports,[100] the Act has also erected hurdles to conducting effective investigations into illegal workplace activity, particularly sexual harassment. The Supreme Court created an incentive for employers to act to prevent and combat harassing behavior by providing an affirmative defense against institutional sexual harassment.[101] The FCRA dulls the Court's decision by giving the accused power to control the investigation.[102] The Act is also prone to scaring potential witnesses from coming forward and creating further discrimination.[103]

A. The Accused has the Power to Control the Investigation

When the employer is forced to get the permission of the accused before allowing an outside investigator to investigate, the accused is given almost complete control of the investigation. The accused has the chance to delay the investigation. For instance, if the employer is not trained or educated in conducting investigations, the employer is not likely to start the investigation without receiving counseling. Therefore, the accused will likely stall by way of withholding authorization for the investigation. As a consequence, if the employer fails to begin an investigation within a reasonable amount of time, the employer may be liable to the victim.[104] Nevertheless, giving the accused more time provides more opportunity to destroy or alter evidence or coerce witnesses. The employer's other option may be to terminate the accused at that point, but the employer may face liability to the accused. Employers should be aware that claims of defamation, wrongful termination, breach of contract, and even intentional infliction of emotional distress can result. For example, if the employer publishes a newsletter informing all employees that the accused has been fired and the accused is later determined to be innocent, the accused may choose to file a defamation claim.[105]

Some courts have provided employers in this situation with a qualified privilege.[106] Other courts have found the employer liable to the accused.[107] For instance, the Honolulu Star Bulletin reported that a manager who was fired after being accused of sexual harassment received a $2 million judgment against the employer.[108] The employer stated, "If this decision is allowed to stand, Hawaii employers receiving

complaints of harassment will have to choose whether they want to risk liability for ignoring the complaint or risk liability for doing what the sexual harassment law says they must do."[109]

What happens if the accused refuses to give permission to investigate? Can the employer terminate the accused? The accused is currently able to dictate the ebb and flow of the investigation because if the employer chooses not to terminate the accused, for fear of liability to the accused, the employer must begin an internal investigation. This article addresses the problems inherent in internal investigations in a later section.

B. Potential Victims and Witnesses are Unlikely to Come Forward

Another problem with the FCRA is that the accused is entitled to an unredacted copy of the investigative report. If co-workers and other witnesses know that their names will be included in the report and turned over to the accused, those individuals are less likely to come forward and cooperate in the investigation. Victims and witnesses are terrified of potential retaliation from the accused.[110] One solution that has been proposed is to ask the outside agency to withhold the names of potential witnesses.[111] That way, neither the employer nor the accused knows who was involved in the investigation. There are problems with this approach. Suppose the employer wants to conduct follow-up interviews or ask further questions of witnesses? The employer would not know whom to approach. Second, it would be unwise for an employer to take adverse action without knowing all the facts and circumstances.[112]

C. Leads to Further Discrimination Claims

Another problem that arises from complying with the current requirements of the FCRA is that further discrimination claims are likely to develop.[113] For example, if the accused is provided with a copy of the investigative report and the report includes the names of witnesses and victims, the accused is likely to subject those people to further abuse and discrimination. Eddy McClain, of the National Council of Investigation and Security Services, stated it best: "[I]f the investigation of the accused produces witness statements which confirm the need for discipline, providing these statements to the accused . . . is tantamount to providing a hit list for retaliation."[114]

IV. EMPLOYERS MUST FIND A WAY TO CONDUCT EFFECTIVE INVESTIGATIONS

Now, the Act is seriously impeding the effectiveness of employers to investigate and eventually eliminate sexual harassment in the workplace. Employers face possible liability to the accused if they attempt to investigate claims of sexual harassment.

When Congress enacted the Amendments in 1996, it could not have foreseen that employers would have a disincentive to conduct effective investigations.[115] As a result, several ideas have been presented. First, one critic suggests that courts should simply reject the FTC's interpretation of the FCRA and find that sexual harassment investigations are not covered. Another solution is to amend the statute. Representative Pete Sessions (R. Tex.) has introduced a bill into Congress that would exempt from the FCRA outside investigations of illegal conduct during employment. The FTC has suggested that employers should consider pre-employment waivers, but problems exist with the enforceability of such waivers. Still others believe that the solution lies within each business where investigations can be conducted internally and law firms can be hired to train human resource personnel before an incident arises. Again, many of these solutions pose significant problems.

A. Courts Should Reject the FTC's Interpretation

The scope of the FCRA is extremely broad. For instance, the definition of consumer report includes those reports that weigh on a consumer's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living."[116] What does not fall under the category of character, general reputation or personal characteristics? Secondly, the definition of consumer reporting agency is equally as broad. Any person or organization that collects general information about an individual would seem to qualify as a consumer reporting agency.[117] Therefore, it would not be surprising for the FTC to interpret the plain meaning of the statute to include sexual harassment investigations conducted by organizations, such as law firms. However, this plain meaning interpretation of the statute is contrary to public policy.

Law firms are hired to give legal advice. It is true that such advice may have a bearing on an employer's employment conduct, but the central purpose behind the advice is legal. The employer is merely trying to comply with the sexual harassment laws. Compliance efforts may result in the discipline or termination of disruptive and harassing employees, but the reasoning behind the actions is to comply with the law.

A person could also argue that consumer reports are obtained in preparation of litigation. After a complaint has been made, an employer faces at least two potential lawsuits. The accuser will have an action against the employer if the employer does nothing to combat the harassment while the accused may have an action if the employer arbitrarily takes adverse action without sufficient grounds. Therefore, it is necessary for an employer to communicate with an attorney to learn what will minimize the employer's liability. The FCRA requires that an employer provide the employee with a copy of the consumer report or the nature and scope of an investigative consumer report.[118] In *Robinson v. Time-Warner*, the Southern District of

New York held that the attorney work product doctrine applied when the employer's attorney conducted an investigation and prepared a report of findings.[119] The court found that the report "was prepared in order to provide legal advice to the company, and not for the purpose of evaluating Robinson and taking 'adverse action' against him."[120] Therefore, the report was privileged.[121] Courts should declare that employers obtain investigative consumer reports to obtain legal advice, not employment advice, and this should not be covered by the FCRA.

B. Congress Should Exempt Investigations Of Illegal Workplace Conduct

A popular solution with critics of the FCRA has been to create an exemption for investigations of illegal conduct in the workplace.[122] A bill (H.R. 1543) has been introduced in the House of Representatives by Representative Sessions.[123] This legislation would remove the requirement that prior notification of an investigation be given to the accused. Instead, the accused would be given a comprehensive summary rather than an unedited copy of the consumer report. The summary would contain the "nature and substance of the communication upon which the adverse action is based." Rep. Sessions summarizes the end result, that "[t]his will allow employers to conduct investigations for the preservation of workplace safety and will ensure that employees who are suffering harassment will be able to seek prompt, thorough, impartial, confidential and competent investigation of those abuses."[124] Employers would be able to avoid chasing off potential witnesses and victims because the employer would be allowed to complete the investigation before the accused learns of the problem.[125] Furthermore, the accused will not have the opportunity to cover his/her tracks.[126]

The FTC has welcomed legislation that would correct the unanticipated consequences of the FCRA. The agency has recognized that "the 1996 amendments to the Fair Credit Reporting Act have resulted in unanticipated conflicts between the aims of the Act and the public policy favoring prompt, objective investigations of workplace misconduct."[127] The proposed amendments would give the accused notice only after the investigation had been completed, but would still provide the accused an opportunity to explain his or her side of the story before adverse action is taken.[128]

C. Waivers Defeat the Purpose of the FCRA

Some people, including the FTC, have suggested that employers should use pre-employment waivers or simultaneously provide all employees with notice of an investigation.[129] The FCRA provides no guideline on when that notice must be given. The only requirement is that the notice be given before the report is procured. Some states have their own statute, which puts a limit on the amount of time between the

notice and the actual beginning of the investigation.[130] Irrespective of state law, notice could be given months or years in advance and the employee would have no idea when an investigation is being conducted. The FTC has also encouraged giving notice and obtaining an authorization from all current employees at one time.[131] The purpose of the FCRA is to protect consumers, but the agency charged with protecting the consumers has suggested that employers evade the entire purpose of the statute.[132]

There are several problems with this idea. First, employers operating under a collective bargaining agreement will be forced to renegotiate that agreement to allow such blanket authorizations. It is hard to believe that a good union negotiator would agree to provide the employer with unfettered power to investigate anything. Second, many employees will refrain from signing the authorization because of principle. What option is the employer left with if employees refuse to sign? Third, requiring all employees to sign will still alert those employees who know they are acting inappropriately. Many employees will become paranoid at this point, thinking the investigation will be into their behavior. As such, they may begin destroying evidence or covering their tracks. Finally, what is the use in forcing all employees to consent to authorization when they are hired? It would be extremely laborious and it would go against the spirit of the Act. Employees would be required to give the employer permission to investigate all forms of illegal workplace conduct as a condition of employment.

D. Internal Investigations Create the Appearance of Bias

The first thing to note is that the FCRA does not apply to internal investigations. Nevertheless, the use of internal investigators creates four concerns.[133] First, small employers are usually too small to possess a personnel or human resources division.[134] Second, complaints may involve upper levels of management.[135] Third, some situations require surprise surveillance.[136] Fourth, some investigations require more credibility, which is only gained through the use of an outside, independent investigator.[137]

The FCRA discriminates against small employers. In order to conduct an effective investigation, the employer must be knowledgeable in the laws of sexual harassment, have experience and training in conducting interviews and investigations, and be neutral. Even if the employer has someone on staff trained in human resource management, a small employer would probably conduct only a couple of investigations per year. Why not turn the investigation over to an organization that conducts hundreds or thousands of investigations every year?[138]

Employers must also beware of using in-house investigators if upper management is accused of sexual harassment.[139] Someone neutral and able to separate himself or herself from the parties must conduct the investigation. An employee who

reports to upper management would not be such a person. The investigation might also appear biased because an internal investigator's continued employment might depend on the company not securing a large judgment. Therefore, the investigator may choose to overlook evidence. In any event, employers often turn to outside investigators because they are independent and neutral.

Some investigations also require surprise surveillance.[140] Suppose an employee is skimming money from the daily deposits. If an internal employee is conducting the investigation, the chances of the accused finding out about surprise visits or secret cameras increases. An outside investigator would likely have the ability to keep terms of the investigation confidential and secret, thus protecting the integrity of the search.

E. Training Fails to Eliminate the Bias of Internal Investigations

Another idea that comes to mind is hiring a law firm or private investigative agency to train the appropriate employees before a situation arises. This way, the FCRA would not apply because the employer would be conducting the investigation. However, there are still problems with this idea. The same problems inherent in using internal investigators must still be resolved.[141] If upper management is accused of sexual harassment, an internal investigator may be too close to the situation to remain objective, or at the very least, appear objective.[142] Additionally, the best way to get a feel for investigations is to conduct many inquiries. An employer is still unlikely to conduct investigations very often and the investigators will likely have exposure to a small number of situations. Even if an investigator, before the fact, trains the employer, a court may find that the FCRA applies if an outside investigator is consulted during the course of the investigation. Therefore, hiring a law firm or investigative agency to consult before the fact will solve some problems, but the employer will still be inexperienced and possibly liable to the accused.

V. CONCLUSION

It seems apparent that the Fair Credit Reporting Act has frustrated society's public policy of promoting employer participation in stamping out sexual harassment. The Act has created unanticipated and unintended consequences.[143] Employers are no longer sure of their responsibilities. Does the employer do everything possible to investigate the allegation and ignore the FTC's interpretation of the FCRA? Or, does the employer stand back and give the accused too much protection while opening the employer up to potential liability to the victim? Employers and attorneys are unsure where the law stands. The FTC's Vail Letter is not law. It is merely persuasive authority and the courts should reject the FTC's interpretation.[144] Courts should consider the intent of the statute and society's desire to eradicate sexual harassment.

Another easy solution is to amend the statute.[145] The best opportunity to attack sexual harassment will come when the FCRA is finally amended to exempt investigations into illegal workplace conduct. Anything short of this will continue to frustrate employer's efforts. Representative Sessions' amendments protect employers, but still provide the accused with a summary of the nature of the investigative report.[146] Consequently, the accused will continue to have an opportunity to confront the employer regarding false or misleading information.

The Fair Credit Reporting Act was not designed to throw curveballs into sexual harassment investigations. In fact, the FCRA does not ensure that employees will be protected from false or expired information. Who is to say that an internal investigation will not produce the same inconsistencies? As written, the Act does more harm than good and must be amended.

Notes

1. Ninety-one percent of those surveyed thought it was harassment if a boss makes clear to an employee that she must go to bed with him in order to get a raise or promotion. Fifty-three percent found harassment where a male employee tells a female co-worker about his own sexual practices and preferences. Finally, thirty-one percent felt that an offensive e-mail that is passed around the office constitutes sexual harassment. Karlyn Bowman, *Sexual Harassment in the Workplace: A Minor Problem*, ROLL CALL, Mar. 25, 1999.
2. *Id*.
3. *Id*.
4. *Id*.
5. Bowman, *supra* note 2.
6. *See id.*
7. 42 U.S.C. § 2000e-2(a)(1) (1994).
8. *Id*.
9. *See* § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (1994).
10. *See* § 102(b)(3) of the Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3) (1994).
11. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).
12. 477 U.S. 57 (1986).
13. 524 U.S. 775 (1998).
14. 524 U.S. 742 (1998).
15. 477 U.S. 57 (1986).
16. *Id*. at 60.
17. *Id*.
18. *Id*.
19. See id.

20. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986).
21. *Id*. at 63-64.
22. *Id*. at 64.
23. *Id*. *See also* 42 U.S.C. 2000e *et seq*.
24. Meritor Sav. Bank , 477 U.S. at 64. *See also* Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978).
25. Meritor Sav. Bank, 477 U.S. at 64.
26. FRANCIS ACHAMPONG, WORKPLACE SEXUAL HARASSMENT LAW: PRINCIPLES, LANDMARK DEVELOPMENTS, AND FRAMEWORK FOR EFFECTIVE RISK MANAGEMENT 17 (Quorum Books 1999). *See also* Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (2002).
27. 29 C.F.R. § 1604.11(a) (2002).
28. Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982).
29. *See* *id*. at 903-04. *See also* ACHAMPONG, *supra* note 26, at 18.
30. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-68 (1986).
31. *See* 29 C.F.R. § 1604.11 (2002); *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).
32. *See* Emily E. Rushing, *So Much for Equality in the Workplace: The Ever-Changing Standards for Sexual Harassment Claims Under Title VII*, 45 ST. LOUIS U. L.J. 1389, 1398 (2001).
33. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998).
34. *Harris*, 510 U.S. at 21-22.
35. *See id.*
36. *See id*. at 20.
37. *See* Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (expanding sexual harassment beyond those situations in which the employee suffered a tangible job detriment).
38. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 71 (1986).
39. *See id.*
40. *See generally* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).
41. *See generally*, *Faragher*, 524 U.S. at 775; *Ellerth*, 524 U.S. at 742.
42. See generally, *Faragher*, 524 U.S. at 775; *Ellerth*, 524 U.S. at 742.
43. *Faragher*, 524 U.S. at 780.
44. *Ellerth*, 524 U.S. at 748.
45. *Id*.
46. *Id*.
47. *See id.*
48. *Id*. at 765; Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).
49. *Ellerth*, 524 U.S. at 761. *See also,* Crady v. Liberty Nat. Bank & Trust Co. of Ind., 993 F.2d 132, 136 (7th Cir. 1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly diminished material responsibilities . . . ."); Durham Life Ins. Co. v. Evans, 166 F.3d 139, 152-53 (3d Cir. 1999) (assigning insurance salesperson inactive files was sufficient to create a cause of action because it had a negative impact on earnings). *But see*, Reinhold v. Commonwealth of Virginia, 151 F.3d 172 (4th Cir. 1998) (employee suffered no tangible employment action when the harassing supervisor increased her workload, gave her undesirable projects, and forced her to discipline a co-worker); Flaherty v. Gas Research Inst., 31

F.3d 451, 457 (7th Cir. 1994) ("bruised ego" is insufficient); Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 886-87 (6th Cir. 1996) (demotion is insufficient where no change in pay, benefits, duties, or prestige); and Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994) (reassignment to more inconvenient job insufficient).

50. Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 742, 807 (1998).
51. *Ellerth,* at 765.
52. *See id*. at 764. *Cf.* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (the primary objective of Title VII is to avoid harm).
53. *See* EEOC v. Shell Oil Co., 466 U.S. 54, 78 (1984).
54. *Ellerth*, 524 U.S. at 764. *See generally*, 29 C.F.R. § 1604.11(f) (2002) (advising employers to "take all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise and how to raise the issue of harassment."); ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, Equal Employment Opportunity Commission (June 18, 1999) (employers are advised to establish a complaint procedure "designed to encourage victims of harassment to come forward" without requiring a victim to complain first to the offending supervisor), available at http://www.eeoc.gov/docs/harassment.html [hereinafter Enforcement Guidance].
55. *Ellerth*, 524 U.S. at 748.
56. *See generally* Christine Woolsey, *Employers Review Harassment Policies*, 27 BUSINESS INS., Nov. 15, 1993, at 1, 4 (the average sexual harassment liability in 1994 was $600,000); Sameera Khan, *Reducing Harassment Exposure*, 28 BUSINESS INS., July 4, 1994, at 3, 56 (the rise in average liability is attributable to the Civil Rights Act of 1991).
57. *See* Enforcement Guidance, *supra* note 55, at n. 59 (citing Louis F. Fitzgerald & Suzanne Swan, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. OF SOCIAL ISSUES 117, 121-22 (1995) (citing the number one reason employees don't come forward with sexual harassment complaints as fear of retaliation).
58. Fair Credit Reporting Act (FCRA) 15 U.S.C. § 1681 (West 2002).
59. Fair Credit Reporting Amendments Act of 1999: Hearing on H.R. 3408 Before the House Comm. on Banking and Fin. Servs. Subcomm. on Fin. Inst. and Consumer Credit, 106th Cong. (May 4, 2000) (statement of Debra Valentine, General Counsel of the Fed. Trade Comm'n) [hereinafter Hearings].
60. 15 U.S.C. § 1681 (West 2002).
61. *See* WILLARD P. OGBURN, FAIR CREDIT REPORTING ACT, National Consumer Law Center 32-33, § 1.4.2 (4th ed. 1998) (quoting 114 Cong. Rec. 24903 (Aug. 2, 1968)).
62. *Id*.
63. *See generally id.* at 204-05, § 9.3.1-9.3.2 (4th ed. 1998), noting that the consumer should contact the creditor to explain the mistaken information as well as the credit bureau that reported the information. However, if only the creditor corrects the information, the credit bureau will continue to report inaccurate information. In a study where creditors and credit bureaus were contacted regarding inaccurate information sixteen percent of the complaints involved creditors who continued to supply the inaccurate information and eleven percent of the cases involved creditors who fixed the information, but the credit bureau refused to make the correction. *See also*, U.S. Public Interest Research Group, *Credit Bureaus: Public Enemy #1 at the FTC*, October 1993; FTC v. TRW*,* Inc., 784 F. Supp. 361 (N.D. Tex. 1991) (TRW has since agreed to accept a consumer's

story with documentation unless the company has a good-faith belief that the documentation is not authentic).

64. Hearings, *supra* note 60 (statement of Margot Saunders, Managing Attorney of the National Consumer Law Center).
65. *Id*.
66. *Id*.
67. *Id*.
68. 15 U.S.C. § 1681m(a)-(b) (2002).
69. 15 U.S.C. § 1681e(b) (2002).
70. *Id*.
71. *Id*. at § 1681a(f).
72. *See id*. (including individuals assembling, evaluating and distributing information on a nonprofit basis).
73. *Id*. at § 1681a(d)(1).
74. *Id.* at § 1681a(d)(1)(A) (limiting purpose of the credit to primarily personal, family, or household purposes).
75. *Id*. (limiting purpose of the insurance to primarily personal, family, or household purposes).
76. *Id*. at § 1681a(d)(1)(B).
77. *Id*. at § 1681a(d)(1)(C). *See generally* 15 U.S.C. § 1681b (2002) (requiring that the consumer reporting agency believe that the report will be used for permissible purposes).
78. *See id*. at § 1681b(b)(2-3).
79. 15 U.S.C. § 1681b(b)(2)(A)(i).
80. *Id*. at § 1681b(b)(2)(A)(ii).
81. *Id*. at § 1681b(b)(2)(A)(i).
82. *Id*. at § 1681b(b)(3)(A)(i).
83. *See id*. at § 1681b(b)(3)(A)(ii) (1999).
84. *See id.* at § 1681a.
85. *Id*. at § 1681a(e).
86. *Id*. at § 1681d(a)(1).
87. *Id*. at § 1681d(a)(1)(A).
88. *Id*. at § 1681d(b).
89. *Id*.
90. *See generally* Amy Payne, *Protecting the Accused in Sexual Harassment Investigations: Is the Fair Credit Reporting Act an Answer?*, 87 VA. L. REV. 381, 399 (2001) (describing the history of problems regarding credit reports).
91. See George S. King, Jr., Comment, The Impact of the Fair Credit Reporting Act, 50 N.C. L. REV. 852, 858 (1972).
92. Payne, *supra* note 91, at 399-400.
93. King, *supra* note 92, at 854.
94. *See* 15 U.S.C. § 1681a(h) (2002) (defining employment purposes as "used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee").
95. *See* Letter from Christopher W. Keller, Federal Trade Commission Attorney, to Judy A. Vail, Attorney, (Apr. 5 1999) *available at* www.ftc.gov/os/statutes/fcra/vail.htm [hereinafter Vail letter].
96. *See id*.
97. *Id*.

98. *See id.*
99. *See* Robinson v. Time Warner, Inc., 187 F.R.D. 144 (S.D. N.Y. 1999).
100. *See* Ogburn, *supra* note 61.
101. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).
102. *See* Payne, *supra* note 90, at 409-13.
103. *See* Hearings, *supra* note 59, (statement of Eddy McClain, on behalf of the National Council of Investigation and Security Services).
104. *See, e.g.,* Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 715 (2d Cir. 1996) (employer's response was prompt where it began investigation on the same day as the complaint, conducted interviews within two days, and fired the harasser ten days later); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (employer's response to complaints was inadequate, despite eventual discharge of harasser, where it took little action until after plaintiff filed charge with state agency), *cert. denied*, 513 U.S. 1082 (1995); Saxton v. AT&T, 10 F.3d 526, 535 (7th Cir. 1993) (investigation prompt where it was begun one day after complaint and a detailed report was completed two weeks later); Nash v. Electrospace Systems, Inc., 9 F.3d 401, 404 (5th Cir. 1993) (prompt investigation completed within one week); Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317, 319 (7th Cir. 1992) (adequate investigation completed within four days).
105. *See* Garziano v. E.I. DuPont de Nemours & Co., 818 F.2d 380 (5th Cir. 1987) (employer accused of defamation after publishing investigation findings in company bulletin).
106. *See id*. *See also*, Stockley v. AT&T, 687 F. Supp. 764 (E.D.N.Y. 1988) (finding qualified privilege for employer's statements made in the course of a sexual harassment investigation); Duffy v. Leading Edge Prod., 44 F.3d 308, 312 (5th Cir. 1995) (finding accusations of sexual harassment by employer are protected by qualified privilege).
107. Judi A. Vail, *Violence-Theft-Harassment and the Fair Credit Reporting Act*, WASHINGTON STATE BAR ASSOC. (Nov. 1998), available at http://www.wsba.org/barnews/archives98/faircred.html (citing Kestenbaum v. Pennzoil Co., 766 P.2d 280 (1988), *cert. denied*, 490 U.S. 1109 (1989)). *But see* Duffy, 44 F.3d at 308 (employer not liable despite making "hasty or ultimately mistaken . . . decision").
108. *Hearing*, *supra* note 59, (statement of Eddy McClain, on behalf of the National Council of Investigation and Security Services).
109. *Id*.
110. *See* Hearings, *supra* note 60, (statement of Ida Castro, Chairwoman of the Equal Employment Opportunity Commission). *See also, id.* (statement of Debra Valentine, General Counsel of the Federal Trade Commission).
111. *See* Kirsten Handelman, Note, *The 21st Century Employer's Catch-22: Cotran v. Rollins Hudig Hall International, Inc. and the Consequences of the Fair Credit Reporting Act*, 35 U.S.F. L. REV. 439, 467-68 (Winter 2001) (citing Letter from David Medine, Assoc. Dir., Division of Financial Practices, Federal Trade Commission, to Susan R. Meisinger, Society for Human Resource Management (Aug. 31, 1999), available at http://www.ftc.gov/os/statutes/fcra/meisinger.htm).
112. *See id.*
113. *See* Hearings, *supra* note 59, (statement of Eddy McClain, on behalf of the National Council of Investigation and Security Services).
114. *Id*.
115. *See* Hearings, *supra* note 59, (testimony of Debra Valentine, General Counsel of the Federal Trade

Commission).
116. *See* Payne, *supra* note 90, at 405-06.
117. *See id.*
118. *See generally* 15 U.S.C. § 1681b-d (1999).
119. 187 F.R.D. 144, 147-48 (S.D.N.Y. 1999).
120. *See id*. at 148 n.2; *see also,* Handelman, *supra* note 111, at 463-64.
121. *See* Robinson v. Time Warner, Inc., 187 F.R.D. 144, 146 (S.D. N.Y. 1999).
122. Civil Rights and Employee Investigation Clarification Act, H.R. 1543, 107th Cong. (2001).
123. *Id*.
124. *Id*.
125. *Id*.
126. *Id*.
127. Letter from Federal Trade Commission, to Congressman Pete Sessions, (Mar. 31, 2000) (addressing Fair Credit Reporting Amendments Act of 1999, H.R. 3408), *available at* http://www.ftc.gov/os/2000/03/sessionletterrehr3408.htm.
128. *Id*.
129. *Id*.
130. *See* ME. REV. STAT. ANN. tit. 10, § 1314(1) (West 2002) (requiring employers to provide notice three days prior to the start of an investigation).
131. Letter from David Medine, Assoc. Dir., Division of Financial Practices, Federal Trade Commission, to Susan R. Meisinger, Society for Human Resource Management (Aug. 31, 1999), *available at* http://www.ftc.gov/os/statutes/fcra/meisinger.htm
132. *See* Handelman, *supra* note 111, at 466-68.
133. Hearings*, supra* note 59, (statement of Richard Seymour of the Lawyers' Committee for Civil Rights Under Law).
134. *Id*.
135. *Id*.
136. *Id*.
137. *Id*.
138. *See* Hearings*, supra* note 59, (statement of Stephen Bokat, Senior Vice President and General Counsel of the U.S. Chamber of Commerce).
139. Kim S. Ruark, Notes & Comments, *Damned if You Do, Damned if You Don't? Employers' Challenges in Conducting Sexual Harassment Investigations*, 17 GA. ST. U. L. REV. 575, 583 (2000).
140. *See id.*
141. *See id.*
142. *See id.*
143. Hearings*, supra* note 59, (statement of Eddy McClain, on behalf of the National Council of Investigation and Security Services).
144. *See* Payne, *supra* note 90, at 409.
145. *See* Letter from Federal Trade Commission, to Congressman Pete Sessions, (Mar. 31, 2000) (letter addresses Fair Credit Reporting Amendments Act of 1999, H.R. 3408) *available at* http://www.ftc.gov/os/2000/03/sessionletterrehr3408.htm.
146. *See id*. *See also* Hearings*, supra* note 59, (statement of Eddy McClain, on behalf of the National Council of Investigation and Security Services).