J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 9(2) 123-137, 2000-2001

THE UNINTENDED CONSEQUENCES OF OUTSOURCING SEXUAL HARASSMENT INVESTIGATIONS

JAMES F. MORGAN, J.D.

GLENN M. GOMES, PH.D.

JAMES M. OWENS, J.D.

California State University, Chico

ABSTRACT

This article examines the unintended consequences of an organization's decision to outsource investigations of sexual harassment following a claim of wrongdoing. United States Supreme Court decisions have affirmed an employer's "vicarious liability" for failing to take reasonable care to prevent or correct promptly sexually harassing behavior. Organizations not possessing in-house expertise to conduct such investigations will likely seek expert assistance from knowledgeable and experienced attorneys or private investigators from outside the firm. According to a recent ruling by Federal Trade Commission staff, such externally conducted investigations fall under the provisions of the Fair Credit Reporting Act, thus placing additional compliance burdens on firms attempting to rid the workplace of gender-based discrimination. This article reviews these developments, offers advice on managing the investigative process, and suggests ways in which business might lobby for changes in public policy to ease this newest burden.

After sexual harassment took center stage during the 1991 confirmation hearings of Clarence Thomas as associate justice of the United States Supreme Court, the number of harassment charges filed with the Equal Employment Opportunity Commission (EEOC) rose substantially. Concomitantly, lawsuits claiming violations of federal and state sexual harassment laws became commonplace. The growth of harassment filings has increased liability risks for all organizations,

large and small. While federal law caps damages at $50,000 to $300,000, depending on the number of employees in the organization, claims can be litigated in state courts, where total damages may not be limited. Out-of-court settlements and jury-trial awards increasingly reach six or seven figures. Businesses must take a special interest in understanding sexual harassment law and avoiding sexual harassment litigation due to these heightened economic risks [1].

The most recent U.S. Supreme Court decisions on the law of sexual harassment, *Burlington Industries v. Ellerth* [2] and *Faragher v. City of Boca Raton* [3], clarified the principle that employers may shield themselves from liability if they establish, disseminate, and consistently enforce a policy that prohibits sexual harassment [4]. These cases established the need for employers to conduct a "reasonable" investigation when an allegation of sexual harassment arises. In a response to these rulings, the EEOC issued revised enforcement guidelines emphasizing the importance of prompt, thorough, and impartial investigations conducted by well-trained investigators [5].

This article focuses on the importance of conducting investigations and the significant unintended consequences of outsourcing this vital task. Small- and medium-sized businesses, in particular, may find it more cost-effective to seek assistance from unbiased outside investigators who are more knowledgeable and experienced in these matters. Ironically, using outside investigators may force such businesses to comply with the provisions of the Fair Credit Reporting Act (FCRA) [6]. A 1999 letter opinion by the staff of the Federal Trade Commission (FTC) interpreting the 1996 amendments to the FCRA concludes that the newly expanded disclosure, notification, and consent requirements apply to employers who use "consumer reports" (e.g., outside investigations) for making employment decisions [7]. One year later, the FTC officially adopted this position [8]. Until federal courts specifically address this issue, employers who use third parties to help investigate claims of sexual harassment are advised to comply with the FCRA's new disclosure requirements.

The article begins by reviewing the two reasons why investigations into allegations of sexual harassment are necessary. Next, it describes the key characteristics of an effective investigation. The third section examines the recent FTC letter ruling on sexual harassment investigations. Suggestions for dealing with the FTC letter ruling in light of the requirements associated with a thorough and confidential investigation are then discussed. Finally, the authors suggest ways in which business might lobby for changes in public policy to free itself of this new compliance burden.

THE NEED TO INVESTIGATE COMPETENTLY

The decision to investigate claims of sexual harassment is no longer a matter of managerial discretion. Investigations that are haphazardly or superficially conducted, however, are insufficient to shield the firm from legal liability and

economic loss. Firms must now *competently* investigate such claims or risk suffering significant negative consequences. Consider, for example, the implications of the following assessment: "The message from judges and juries across America is clear: faulty investigation of sexual harassment claims can lead to judgments in favor of sexual harassment victims *and* alleged harassers whose terminations are based upon insufficient evidence" [9, p. 17 (emphasis added)]. While the first of these messages (protection of the victim) is obvious to most, the second consideration (about the harasser) may be new to many. Moreover, this paradox forces the employer into an untenable position of having to defend, from two almost diametrically opposing viewpoints, harassment-related claims arising out of one alleged incident. On the one hand, the person *alleging* harassment may have a claim against the employer under Title VII of the Civil Rights Act of 1964 if the allegations are not competently investigated. Conversely, the person being *accused* of harassment may also have a claim for wrongful discharge for exactly the same reason. Unquestionably, the margin of error is narrowing for the employer who must deal with a sexual harassment claim. As a result, employers now have a far greater need to conduct vigorous and effective investigations when allegations of impropriety first arise.

The Victim's Claim

While sexual harassment law continues to evolve, it is undisputed that any claim of sexual harassment must be investigated [10]. The 1998 U.S. Supreme Court decisions in *Burlington Industries* and *Faragher* create an affirmative defense for an employer facing a hostile environment claim of sexual harassment. The EEOC's guidelines prompted by the *Burlington* and *Faragher* decisions deal specifically with vicarious liability of employers for acts of a supervisor. These guidelines state that a claim by an employee or former employee alleging the existence of an unlawful hostile environment in the workplace can be successfully defended where the employer shows that the "employer exercised reasonable care to prevent and correct promptly any harassment" and that the employee unreasonably failed to take advantage of any corrective opportunities provided by the employer. The duty of the employer to exercise "reasonable care" *necessarily* requires the employer to conduct an investigation once management learns of the allegation. Now, failing to investigate competently may very well be regarded as strong evidence that the employer approves, albeit implicitly, of the sexual harassment.

The Alleged Harasser's Claim

A less obvious reason supporting the employer's decision to investigate any harassment claim fully is that those accused of sexual harassment increasingly are suing their former employers for emotional distress, defamation, and wrongful discharge [11]. Two factors are contributing to this trend. First, the proportion of

unsupportable claims filed with the EEOC is climbing. For fiscal year 1995, EEOC personnel concluded in 30.4 percent of the filings that "no reasonable cause" existed for the claim. Three years later, EEOC investigators found 42.3 percent of the claims contained allegations that were not supported [12]. Such a substantial increase over three years should cause employers to be wary of allegations involving sexual harassment. The second factor contributing to the growth of discharge-related claims is that many employers have adopted a "zero tolerance" policy toward those accused of sexual harassment. In a reaction to the fear of liability for violating the law prohibiting sexual harassment, employers may terminate the employee accused of misconduct before any type of "procedural due process" is provided the alleged perpetrator.

Regrettably, the development of a formula that would assist employers in defending lawsuits by individuals who are terminated for creating a hostile work environment, and who later claim the allegations against them are false, is still in its infancy. One court, however, has provided a modicum of assistance to management: The California Supreme Court held in 1998 that terminating an employee for sexually harassing a co-employee is not wrongful under state law if the investigation into the veracity of the allegations occurred in *good faith* and *the investigation generated reasonable grounds* to believe that sexual harassment did occur, even if the plaintiff in the original sexual harassment suit was unsuccessful [13]. While the exact parameters of the employer's defense remain unknown, it is clear that any such defense likely will be premised on the fact that the employer undertook an investigation that was both reasonable and competent.

REASONABLE AND COMPETENT INVESTIGATIONS

The quality of an investigation into allegations of sexual harassment will likely vary according to the size of the business. For example, the level of sophistication demanded of a family-owned electronics store to investigate a claim likely will be nowhere near that demanded of IBM. However, the EEOC guidelines are emphatic that any complaint, regardless of the manner in which the employer learns of possible impropriety, must be investigated. Legal issues associated with conducting a reasonable investigation are best considered over three timeframes: preinvestigation, actual investigation, and postinvestigation.

Preinvestigation Issues

Management should carefully consider four factors before deciding to go forward with a factfinding investigation. First, organizations should establish and publicize effective procedures aimed at properly servicing the concerns of someone who believes s/he is the victim of sexual harassment. Following the EEOC's guidelines, these would include provisions prohibiting retaliation against the person alleging harassment; designating the person or persons who should be

contacted initially; and stating the timeframes within which federal or state claims must be filed.

The second factor management must consider is whether a factfinding investigation is warranted. A complaint filed under the employer's reporting policy most certainly will require an investigation. But employers should also carefully scrutinize informal allegations (e.g., anonymous notes) in which the accuser states serious allegations but asks that nothing be done, or where the alleged harassment has ceased [14].

Third, the determination of when *not* to investigate is equally important. If the alleged harasser confesses to the inappropriate activity without any prodding, there is no need for an investigation, and the employer can move directly to determining corrective action. Or, if after a cursory review of the complaint it is clear that the behavior could not have happened in the manner described by the alleged victim (e.g., the alleged harasser was on vacation during the period where inappropriate behavior was stated to have occurred), there is no need for a more in-depth investigation. Or, if overwhelming evidence is presented that the allegation of sexual harassment was motivated by retribution toward a jilted lover, no further investigation is warranted. To the extent management can deftly determine when not to investigate, exposure for defaming the alleged harasser is minimized.

Finally, it is critical that the determination to investigate be made expeditiously. Courts seem willing to permit the commencement of an investigation within a few days or perhaps a week after a complaint is made by the employee, but waiting weeks after a credible allegation is reported will increase the likelihood of the court finding the investigation was insufficient [9].

The Investigation

Effective investigations should exhibit three attributes: thoroughness, promptness, and impartiality. Thorough investigations involve interviewing the complainant, the alleged harasser, and relevant witnesses. The focus of the inquiry relates exclusively to the question of whether the alleged harasser had created a "hostile work environment." Investigators must distinguish statements of fact from mere conjecture. Every conceivable dimension of the allegations and the denials made by the accused harasser must be investigated. Finally, the investigator must make determinations regarding the credibility of the parties and witnesses. This requires the interviewer to make difficult judgments regarding demeanor (e.g., eye contact) and motivation (e.g., witness recently turned down for a promotion by accused harasser).

The duration of the inquiry should be as short as possible. Claims of impropriety from more than a single person toward one individual (or other circumstances) may cause the investigation to stretch out. Nevertheless, courts have ruled that

reasonable investigations are normally completed within a few days to a couple of weeks [9].

Perhaps the most important component of an effective investigation is impartiality. The most reliable way of achieving actual and perceived impartiality is to use an investigator who is independent of the organization. While a person from the organization's human resources department or a member of management from another division is sometimes sought to conduct the investigation, only very large organizations can afford to create a cadre of proficient investigators who will be perceived by all parties as truly impartial. Additionally, investigators may find that what originally was perceived as being a small problem is actually much larger [15]. An outside investigator is often more likely to let the facts control the direction of the inquiry. Not surprisingly, the demand for outside professionals is increasing as a result of the 1998 U.S. Supreme Court rulings and the revised EEOC guidelines [16].

In addition to these three absolute attributes of an effective investigation, the employer must also consider the degree to which the investigation will be confidential. While the investigation may be less painful to parties and witnesses if management seeks to guarantee the confidentiality of harassment allegations, in practice protecting absolute confidentiality may not be possible. Instead, those conducting the inquiry and making decisions based on the investigation should merely state that they will make reasonable efforts to keep all aspects of the matter confidential.

Postinvestigation Issues

Upon concluding the inquiry, the investigator normally prepares a written report. A well-written report should include the interviewer's perceptions of the individuals examined and make a determination as to whether the allegations in the complaint are true. While management is free to reach a contrary decision, such action should take place only when the reasons for disagreeing with the investigator's determination are factually significant.

When it is determined that harassment has occurred, immediate and corrective actions, including terminating the harasser, must be undertaken. Conversely, an investigation that fails to find support for the allegations does not immediately provide solace for everyone in the workplace. Even if management is successful in keeping the matter confidential, the complainant might continue to believe the alleged harasser is a "bad person," and the accused person may believe s/he has been wronged. Therefore, when the investigation reveals that no sexual harassment occurred, good judgment often leads management to conclude that the individuals involved should be counseled on the subject of sexual harassment and, perhaps, separated [17].

Prior to 1999, employers investigating claims of sexual harassment had no reason to consider anything other than the guidelines issued by the EEOC and

court decisions. However, an examination of all three phases of the investigative process reveals considerable legal liabilities, especially if the investigation is conducted by internal personnel [18]. To minimize risk, employers are strongly advised to employ outside investigators. Until recently, employers contracting with knowledgeable outside investigators could operate with confidence that a "reasonable and competent" investigation would forestall legal liability under both sexual harassment and wrongful discharge laws. But a 1999 development has created a need for employers to rethink the use of outside investigators. These employers may be shocked to discover that their well-intentioned actions now subject them to selected requirements of the Fair Credit Reporting Act.

THE FAIR CREDIT REPORTING ACT AND SEXUAL HARASSMENT INVESTIGATIONS

In response to consumer complaints about inaccuracies in, and the improper use of, credit records, Congress enacted the Fair Credit Reporting Act (FCRA) in 1970 [6]. The intent of Congress was to require the credit reporting industry to adopt reasonable procedures for meeting the business community's need for accurate information in a manner that was fair, impartial, and respectful of the consumer's right to privacy. The FCRA regulates the compilation, distribution, and use of information by reporting agencies, financial institutions, employers, and others. For three decades, employers have complied with FCRA rules governing the use of credit or background checks on job applicants. And certain disclosures have been required if such information was used by employers as the basis of an adverse employment action. Now, the reach of the FCRA is intruding into the realm of workplace investigations of harassment.

Key Definitions and Basic Provisions

A number of definitions form the basis of the FCRA's regulatory framework [6, § 1681a], and some are essential to understanding the linkage between the FCRA and sexual harassment investigations. For example, a *consumer* is defined simply as "any individual." This includes, of course, employees. Two kinds of reports may be compiled. A *consumer report* contains information bearing on, among other things, an individual's "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 . . . employment purposes" [6, § 1681a]. Many employers are already familiar with this type of report. A second kind of report, an *investigative consumer report,* is a consumer report where the information is obtained through personal interviews [6, § 1681a]. It is reasonable to assume that most reports compiled in sexual harassment investigations will be of this type.

A report becomes a consumer report or an investigative consumer report only if it is prepared by a *consumer reporting agency,* defined as "any person which, for monetary fees, dues, or on a cooperative non-profit 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" [6, § 1681a], but the word "regularly" remains undefined. The phrase *employment purposes* means "for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee" [6, § 1681a]. The term *adverse action* is defined as "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee" [6, § 1681a].

Under the FCRA, any consumer reporting agency may furnish a consumer report to a person it has reason to believe intends to use the information for employment purposes, provided that the information will not be used in violation of any applicable federal or state equal employment opportunity law or regulation. The FCRA specifies what information may be included in the report and what information must be excluded. Consumer reporting agencies are obliged to follow reasonable procedures to assure the maximum possible accuracy of the information concerning the individual to whom the report relates. The FCRA precludes the consumer from bringing an action alleging defamation, invasion of privacy, or negligence when adverse action has been taken based on the report, except when false information was furnished with malice or willful intent to injure the consumer. Nevertheless, an employer's negligence in failing to comply with FCRA requirements may lead to liability for actual damages, as well as court costs and attorney's fees. Willful noncompliance may also lead to the awarding of punitive damages. The Federal Trade Commission is responsible for exercising procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance.

The 1996 Amendments to the FCRA

When Congress amended the FCRA, it significantly expanded the FCRA's disclosure requirements and imposed new consent requirements on employers who used consumer reports for employment purposes. These amendments sought to provide current and prospective employees with an opportunity to refute incorrect information that had been furnished about them. While well-intentioned, it is precisely these new consent and disclosure requirements that now create substantial compliance dilemmas for managers attempting to investigate sexual harassment in the workplace in a manner consistent with both FCRA rules and EEOC guidelines.

The surprising revelation that the FCRA may include under its provisions sexual harassment investigations first came to light in April 1999. An informal opinion letter issued by the FTC staff in response to a question posed by a

Washington state attorney found that "outside organizations utilized by employers to assist in their investigations of harassment claims 'assemble or evaluate' information." It was the FTC's staff opinion that these outside investigators would be considered consumer reporting agencies involved in producing investigative consumer reports [7]. Whether this extension of the FCRA to investigations of sexual harassment or other forms of employee misconduct was intended or anticipated by Congress is debatable, but we strongly doubt that Congress foresaw this specific result [19]. Of course, the FTC's opinion is merely just that—an opinion—and it does not have the legal weight of a statute or a court ruling. Nevertheless, until Congress or the courts resolve the issue, this opinion has major implications for employers choosing to outsource investigations of sexual harassment. Employers ignore the FTC staff s opinion at their own peril and risk violating the FCRA in the process.

As interpreted by the FTC staff, the 1996 amendments to the FCRA have greatly increased the burdens on businesses using an outside investigator to conduct workplace investigations in two areas. First, employers are now required to provide multiple notices to the person accused of sexual harassment or other workplace misconduct. Second, because the FCRA attempts to provide individuals with an opportunity to correct inaccurate or incomplete information, the investigator's report must be disclosed to the accused if the employer plans to discipline the employee or take any other adverse employment action.

Notices and Disclosures

Employers must be aware of three different disclosures required by the FCRA. The first disclosure requires employers to notify present and prospective employees—and to obtain their consent—that a consumer report may be obtained for employment purposes. Such written notification must be clear and conspicuous, and made before the report is procured. Moreover, the notification must be made in a document that consists solely of the disclosure itself. The employee or job applicant must authorize in writing (which may be made on the disclosure document) the subsequent procurement of the report.

Investigative consumer reports prepared by outside investigators are the subject of two additional disclosure requirements. No investigative consumer report can be procured unless the person who is to be the subject of the investigation receives a clear and accurate disclosure that an inquiry may be made into the subject's character, general reputation, personal characteristics, and mode of living, whichever are applicable. This disclosure must be made in writing and mailed (or otherwise delivered) to the subject no later than three days after the date on which the report was first requested. The disclosure must include a statement informing the subject of the investigation of the right to request additional information regarding the nature and scope of the inquiry, along with a written summary of other applicable rights. In turn, the employer must certify to the investigator that

all disclosures have been made to the subject of the investigation and that the employer will comply with all other applicable FCRA requirements.

If the subject of the investigation does, in fact, choose to make a written request for more complete information about the nature and scope of the investigation, and if such a request is made within a reasonable period of time, the employer must comply with that request. The employer must deliver (by mail or otherwise) a complete and accurate disclosure of the nature and scope of the investigation within five days of having received the employee's request (or within five days from first requesting the investigative report, whichever is later). The FCRA exempts employers from liability for violating these disclosure requirements if the employer is able to show by a preponderance of the evidence that, at the time of the violation, the employer maintained reasonable procedures to assure compliance. Nevertheless, for a business community already overburdened with the reporting and compliance costs of a multitude of governmental regulations, these added disclosure requirements further complicate the delicate task of conducting sexual harassment investigations.

Adverse Action

Prior to using an outside investigator's report to take an adverse employment action against an employee, the employer must provide the employee with an unedited copy of the report received from the investigator and a copy of the employee's rights under the FCRA (an FTC publication entitled "A Summary of Your Rights Under the Fair Credit Reporting Act"). This is a "pre-adverse action disclosure." An informal opinion letter issued by the FTC indicates that there should be a five-day waiting period between the time the employee receives notice of intended adverse action and actually taking action [20]. Such a delay seems prudent and reasonable: It allows the employee sufficient time to contemplate the nature of the problem, and it affords the employee an opportunity to respond to the employer before the employer commits to taking the adverse action.

Once the adverse employment action has been taken, however, the employee must receive notice of such action. This adverse action notice includes the name, address, and telephone number of the outside investigator who compiled the report. Also contained in that notice is a statement that the outside investigator did not make the adverse employment action and is unable to provide the employee with the specific reasons why the adverse action was taken. The employee must also be provided with notice of his or her rights under the FCRA to obtain another (and free) copy of the report from the outside investigator within 60 days, and that the accused has the right to dispute the accuracy or completeness of the information contained therein. The FCRA requires that the consumer reporting agency, upon request from the employee, provide the employee with all information in the employee's files, the sources of such information, and the identification of each

person who procured a report for employment purposes during the two-year period preceding the date on which the request was made.

Individuals have a right to be free from being victimized by workplace wrongdoing, and employers have an affirmative duty to ensure, to an extent that is both reasonable and practicable, that the workplace is safe. Employers must now ponder what steps should be taken to balance the rights of individuals in the workplace.

OUTSOURCING INVESTIGATIONS: PRACTICAL ADVICE

To insulate themselves from the economic risks associated with adverse employment decisions based on faulty or incomplete investigations conducted in-house, employers may choose to use outside investigations. As we have shown, outsourcing sexual harassment investigations immediately places additional compliance burdens on these employers. The FCRA's requirement that sources of information, favorable and unfavorable, be disclosed to the employee under investigation, however, would likely have a chilling effect on the willingness of employees to cooperate in the investigation, for fear of retaliation. Employers may think twice about using outside investigative services, but this would only increase the attendant risks associated with performing in-house investigations conducted by nonspecialists.

An organization using outside professional investigative services must understand completely and implement carefully the provisions of the FCRA, especially in light of the FTC's position. Moreover, willful noncompliance leaves companies vulnerable to punitive damages. To limit liability associated with violating the FCRA, the organization can take the following actions.

Perform an Initial In-House Investigation

To delay the necessity for sharing any information with the alleged harasser, the organization may wish to conduct an in-house investigation, unassisted by outside professionals. The FCRA's disclosure and notification provisions apply only when an outside investigator is used. The organization may wish to forego outside investigations altogether until the FCRA's impact on the implementation of antidiscrimination policies is resolved by Congress or the courts, but this might increase the organization's liability under EEOC guidelines [21].

Use a Surveillance-Only Approach

Outside investigators may be asked to conduct surveillance using direct observation exclusively, perhaps aided by videotape. The surveillance-only tactic overcomes the most burdensome of the FCRA's provisions (which apply only when an outside investigator uses personal interviews to gather information). This

approach is of limited value, however, in determining and assessing the facts (or fictions) of a particular complaint of sexual harassment.

Request Edited Reports

The FCRA prohibits employers from editing a report from an outside investigator after the investigator submits the report. To overcome this constraint, an employer utilizing outside investigators might request that the investigator submit only a redacted report. Even though this may ensure confidentiality, taking an adverse employment action without the ability to "name names" leaves the employer vulnerable to claims of defamation and wrongful discharge.

Revise Notification Procedures

Employers could require that all job applicants sign an authorization for conducting and compiling consumer reports (including investigative reports) for employment purposes. This complies with the FCRA's notification requirements, but does not draw unnecessary attention to any subsequent investigation. For current employees, the organization may have everyone sign a similar blanket authorization. The FTC staff has opined that such one-time disclosures and authorizations are adequate for employers to obtain reports about applicants and current employees [22]. These blanket disclosures and prior written authorizations may cause employees to request access to any investigation obtained on them. The company will need to weigh the investigative benefits against the potential administrative costs associated with this tactic.

Notify the Alleged Harasser

The company employing outside investigative assistance must be prepared to provide the alleged harasser with a copy of any written report provided by the investigator. The report, therefore, needs to be prepared with the understanding that it contain no more information than is necessary for the employer to make a fair and appropriate decision.

NECESSARY CHANGES IN PUBLIC POLICY

Complying with federal and state sexual harassment laws creates a number of challenges for employers. But when legislation pursuing public policy goals unrelated to sexual harassment intrudes upon the ever-more-important investigatory process, serious compliance dilemmas arise [23]. These dilemmas surely become managerial headaches for the vast majority of businesses. Employers have an important vested interest in seeking legislative changes that facilitate the effective and efficient elimination of sexual harassment from the workplace.

Arguably, there is little evidence to conclude that Congress anticipated (or intended) that the provisions of the FCRA would be brought to bear on employers seeking to comply with the EEOC's desire to eliminate sexual harassment from the workplace. Indeed, a strong case can be made that the FTC's interpretation of the FCRA represents an unnecessary intrusion into an employer's good-faith efforts to establish and implement effective processes for investigating complaints of sexual harassment. The disclosures and notifications required by the FCRA, according to the staff opinion, both unfairly and inappropriately burden the employer in its efforts to effectively investigate and resolve one of the most sensitive of workplace complaints. Even the FTC has acknowledged that certain targeted procedural changes are warranted [8, 21].

Firms concerned with the FTC staff's interpretation of the 1996 amendments to the FCRA should aggressively lobby Congress either to seek a complete exemption for organizations using outside investigators or to consider two possible intermediate revisions.

Exemption from FCRA Provisions

The greatest relief to organizations using outside investigators would be simply to exempt workplace investigations from FCRA rules. By doing so, Congress would show its appreciation for the unique dilemma confronting employers. The exemption would be particularly beneficial to the small business community because it is here that the compliance burdens are disproportionately felt.

Targeted FCRA Revisions

If complete exemption is not an option, two intermediate kinds of legislative relief should be sought. For investigations of alleged illegal workplace conduct, the prior consent of the accused should not be required to initiate an investigation. To facilitate investigations and to protect as much as possible the confidentiality of witnesses, employers should also be allowed to edit or redact full investigative consumer reports. This would protect witnesses and other sources of information from possible retaliation or future harassment. Taken together, these simple proposals would effectively eliminate the dilemmas created by the overlapping and competing public policy goals of the EEOC and the FCRA. Implementation of either one, however, would still offer major relief to those organizations who find it necessary to utilize outside investigations in their efforts to comply with the public policy goal of eliminating sexual harassment from the workplace.

CONCLUSION

Outsourcing investigations of sexual harassment now places an onerous set of federal compliance burdens on the organization. The EEOC's directive to conduct reasonable and competent investigations brings the firm under the regulatory hand

of the FTC and the provisions of the FCRA when outside investigators are used. This article reviewed these developments and offered practical advice on managing the investigative process. Only through changes in public policy can the unintended consequences of the decision to outsource investigations be eliminated.

* * *

Dr. James Morgan is a professor of management in the College of Business at California State University, Chico. A specialist in employment law, he received his J.D. from the University of California, Davis.

Dr. Glenn Gomes is a professor of management in the College of Business at California State University, Chico. He received his Ph.D. in business administration from the University of Southern California.

Dr. James Owens is an associate professor of management in the College of Business at California State University, Chico. He received his J.D. from Western State University College of Law. He recently co-authored a textbook on business law.

ENDNOTES

1. See, e.g., Robert K. Robinson, William T. Jackson, Geralyn McClure Franklin, and Diana Hensley, U.S. Sexual Harassment Law: Implications for Small Business, 36 *Journal of Small Business Management* (April 1998), pp. 1-12.
2. *Burlington Industries, Inc. v. Ellerth,* 118 S. Ct. 2257 (1998).
3. *Faragher v. City of Boca Raton,* 118 S. Ct. 2275 (1998).
4. See, e.g., Bernadette Marczely, Litigating Workplace Harassment in the Wake of Ellerth and Faragher, 8 *Journal of Individual Employment Rights* (1999-2000), pp. 95-103; and B. Glenn George, Employer Liability for Sexual Harassment: The Buck Stops Where? 34 *Wake Forest Law Review* (1999), pp. 1-25.
5. Equal Employment Opportunity Commission, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, *EEOC Compliance Manual,* No. 915.002 (June 18, 1999), at www.eeoc.gov/docs/harassment.html.
6. Fair Credit Reporting Act, 15 U. S. C. § 1681, et seq.
7. FTC Staff Opinion (April 5, 1999), reproduced at www.ftc.gov/os/statutes/fcra/vail.htm. Following the "Vail letter," the FTC reiterated its opinion in a letter to Susan Meisinger, of the Society for Human Resource Management, August 31, 1999, reproduced at www.ftc.gov/os/statutes/fcra/meisinger.htm. Congress passed the amendments to the FCRA on September 30, 1996, but these provisions did not become effective until one year later.
8. See letter from Robert Pitofsky, chairman, Federal Trade Commission, to Representative Pete Sessions, United States House of Representatives (March 31, 2000), reproduced at www.ftc.gov/os/2000/03/ltrpitofskysessions.htm.
9. Nancy L. Abell and Marcia Nelson Jackson, Sexual Harassment Investigations—Cues, Clues and How-To's, 12 *The Labor Lawyer* (Spring 1996), pp. 17-56.
10. Gregory C. Parliman and Theresa A. Kelly, The Evolving Case Law of Sexual Harassment, 21 *Employee Relations Law Journal* (Winter 1995), pp. 77-87.
11. Hope A. Comisky, Beware of the Alleged Harasser-Lawsuits by Those Accused of Sexual Harassment, 12 *The Labor Lawyer* (Summer 1996), pp. 277-290.

12. EEOC, Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992-FY 1998, at www.eeoc.gov/stats/harass.html.
13. *Cotran v. Rollins Hudig Hall International,* 17 Cal. 4th 93 (1998).
14. Clifford M. Koen and James D. Morgan, Guidelines for Conducting Effective Sexual Harassment Investigations, 58(6) *Supervision* (1997), pp. 6-10.
15. James D. Vigneau, To Catch a Thief . . . And Other Workplace Investigations, 40(1) *HRMagazine* (1995), pp. 90-95.
16. Illana DeBare, Companies Going Outside for Workplace Investigations; More Complaints of Harassment, Bias Spur Demand, *Arizona Republic* (April 4, 1999), p. D3.
17. Hope A. Comisky, Prompt and Effective Remedial Action? What Must an Employer Do to Avoid Liability for 'Hostile Work Environment' Sexual Harassment? 8 *The Labor Lawyer* (Spring 1992), pp. 181-201.
18. See, e.g., 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 *University of San Francisco Law Review* (Winter 2001), pp. 439-471, particularly the discussion at pp. 456-460.
19. This conclusion has been embraced recently by law review commentators. See, e.g., Meredith J. Fried, Note: Helping Employers Help Themselves: Resolving the Conflict Between the Fair Credit Reporting Act And Title VII, 69 *Fordham Law Review* (October 2000), pp. 209-241; and Kim S. Ruark, Note & Comment: Damned If You Do, Damned If You Don't? Employers' Challenges in Conducting Sexual Harassment Investigations, 17 *Georgia State University Law Review* (Winter 2000), pp. 575-602.
20. FTC Staff Opinion (June 27, 1997), reproduced at www.ftc.gov/os/statutes/fcra/weisberg.htm.
21. On November 16, 1999, 106 H.R. 3408 was introduced to amend the FCRA to exempt certain investigative reports involving employee misconduct from the definition of "consumer report." More recently, on May 3, 2000, 106 H.R. 4373 was introduced to amend the FCRA by disposing of certain notice, consent, and disclosure requirements. Both bills were referred to the Committee on Banking and Financial Services, and their respective texts can be found at thomas.loc.gov. On May 4, 2000, the Subcommittee on Financial Institutions and Consumer Credit held hearings on these issues. The Subcommittee heard testimony from Ida Castro, Chairman, EEOC; Debra Valentine, General Counsel, FTC; and public witnesses. The FTC's prepared remarks in support of H.R. 4373 can be found at www.house.gov/financialservices/5400val.htm.
22. See, e,g., FTC Staff Opinion letter to Susan Meisinger, August 31, 1999, reproduced at www.ftc.gov/os/statutes/fcra/meisinger.htm.
23. See, e.g., Steven C. Bednar, Employment Law Dilemmas: What to Do When the Law Forbids Compliance, 12(1) *BYU Journal of Public Law* (1997), pp. 175-189.

Direct reprint requests to:

Professor G. Gomes
Department of Management
California State University, Chico
Chico, CA 95929