

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Financial Practices

April 5, 1999

Re:

Sexual Harassment Investigations and the Fair Credit Reporting Act; Sections 603(e), 603(f), 603(k)(1)(B)(ii), and 604(b)(3)(A) of the Fair Credit Reporting Act.

Dear Ms. Vail:

This is in response to your letter posing two questions concerning the application of the Fair Credit Reporting Act (FCRA) to sexual harassment investigations. You note, by way of context for your inquiries, that the Civil Rights Act of 1964 (Title VII) prohibits discrimination in employment on the basis of race, color, religion, sex or national origin, and that under Title VII an employer has specific obligations, including the obligation to investigate allegations of sexual harassment in the workplace. If harassment is found to have occurred, appropriate corrective or disciplinary action may be taken. We agree with your assessment that such action could reasonably be defined as an adverse employment decision under Section 603(k)(1)(B)(ii) of the FCRA. That section provides that "adverse action" means "a denial of employment or any other decision for employment purposes that adversely affects any current . . . employee."

1. Application of Section 603(f) or 606 to outside organizations that regularly engage in assisting employers with investigations for a fee if the scope of their investigation does not exceed the employer's workforce or company documents. (Would investigatory information compiled solely from employees and documents within the workplace be defined as a consumer report or investigative consumer report?)

The relevant inquiry here is not whether the scope of the investigation goes beyond the employer's workforce or internal documents. Section 603(f) of the FCRA defines a consumer reporting agency (CRA) as any person which, for monetary fees, "assembles or evaluates" credit information or other information on consumers for the purpose of regularly furnishing "consumer reports" to third parties using any means or facility of interstate commerce. A "consumer report" is, in turn, defined in Section 603(d)(1) as a report containing information bearing on an individual's "character, general reputation, personal characteristics, or mode of living" that is used or expected to be used for the purpose of serving as a factor in establishing the consumer's eligibility for, among other things, employment. From the information in your letter, it seems reasonably clear that the outside organizations utilized by employers to assist in their investigations of harassment claims "assemble or evaluate" information. See the fuller discussion of this issue under point one in the enclosed staff opinion letter ([LeBlanc](#), 6/9/98).

Thus, once an employer turns to an outside organization for assistance in investigation of

harassment claims in the manner outlined in your letter, the assisting entity is a CRA because it furnishes "consumer reports" to a "third party" (the employer). For purposes of determining whether the entity is a CRA, the FCRA does not distinguish whether the information on consumers is obtained from "internal" records or from outside the employer's workplace. The source and scope of information *does* enter into a determination of whether the information is a "consumer report" or an "investigative consumer report."

An "investigative consumer report" is defined in Section 603(e) of the FCRA as "a consumer report . . . 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." I have enclosed a staff letter ([Hinkle](#), 7/9/98) that discusses the considerations involved in analyzing the application of this section. From the limited facts outlined in your letter, it would appear that the reports prepared by outside organizations performing harassment investigations for employers are most likely "investigative consumer reports" within the meaning of the FCRA. As your letter recognizes, employers who utilize consumer reports or investigative consumer reports have certain obligations under the FCRA to notify employees and/or supply a copy of the report to the employee. (See generally [Hawkey](#), 12/18/97; copy attached.)

2. When a consumer or investigative consumer report is released pursuant to Sections 604(b)(3), 615(a) or 606(a)(1)(B) by the employer or consumer reporting agency, to what degree may the information be redacted?

Information cannot be redacted in those instances in which the FCRA requires that the consumer be provided a copy of a consumer report (Section 604(b)(3)(A)). I enclose a copy of a prior staff opinion letter ([Hahn](#), 7/8/98) which explicates this requirement more fully. I also note that the staff has taken the position that an employer who uses investigative consumer reports must comply fully with the provision of the FCRA that apply generally to "consumer reports" (such as Sections 604(b) and 615(a)),⁽¹⁾ as well as the provisions that apply specifically to investigative consumer reports (Section 606). ([Beaudette](#), 6/9/98; copy attached.)

I hope that this information is helpful to you. The views expressed herein are the views of the Commission staff and are advisory in nature. They do not necessarily reflect the views of the Commission or of any particular Commissioner.

Very truly yours,

Christopher W. Keller
Attorney

1. You refer to a staff letter ([Weisberg](#), 6/27/97), that responded affirmatively to an inquiry as to whether an employer would comply with the requirement in Section 604(b)(3) that it make certain disclosures to the consumer "before" taking any adverse action, if it waited five days to take the action. That letter specifically stated that "the facts of any particular employment situation" controls the appropriate waiting period, which would likely be much shorter in the case of an employer who was taking required action to remedy sexual

harassment.