

Testimony

of

Eddy McClain

Chairman, Krout & Schneider, Inc.

on behalf of the

**National Council of Investigation and Security Services
(NCISS)**

before the

Subcommittee on Financial Institutions and Consumer Credit

of the

U.S. House of Representatives

June 17, 2003

My name is Eddy McClain, Chairman of Krout and Schneider, Inc., a 76-year-old private investigative firm in California. I've been a licensed private investigator for 47 years. I am appearing today on behalf of the National Council of Investigation and Security Services (NCISS) representing both investigative and protective service companies and their State associations throughout the United States. I previously served as Chairman and President of NCISS and am currently a member of the Board of Directors.

We appreciate the opportunity afforded us today to discuss how the Fair Credit Reporting Act impedes the ability of employers to provide a safe and secure workplace. We regret that we did not participate the last time Congress considered the FCRA. The 1996 amendments to the Act, as interpreted by the Federal Trade Commission, restrict employers from obtaining independent investigations of employee misconduct.

We believe the FCRA was intended to provide consumers a remedy when their credit records contained errors that affected their ability to obtain credit. And, to the extent that credit reports might be used as a yardstick in the hiring process, to allow the applicant an opportunity to correct those errors. We do not believe Congress intended to hamper investigations of lawbreaking in the workplace.

As outlined in detail by others on the panel, employers face restrictions on the conduct of preemployment criminal background checks. They are also limited in obtaining frank appraisals in job references because of former employers' fear of liability. Unfortunately, they will sometimes have to confront the possibility of employee misconduct.

The FCRA thwarts investigations of misconduct by third parties in many ways. The most egregious require:

1. Notice to employees, including possible suspects, before any investigator or consultant initiates an investigation.
2. Written authorization from the accused or suspect employee before an investigation is undertaken.
3. Providing a complete, unedited copy of an investigative report prior to taking any adverse action against an employee.

The FCRA stymies the ability of all employers to engage outside experts to investigate employee misconduct and provide a safe workplace. Even many Fortune 100 firms prefer to hire third parties to conduct employee misconduct investigations to avail themselves of the expertise of specialists and to maintain the integrity and objectivity of an impartial review. Indeed, they are encouraged to do so by government agencies. Then Assistant Attorney General James Robinson testified before this Subcommittee previously that

“The Department is very concerned about the possible implications for law enforcement investigations and on corporate compliance and self-reporting programs that the Department and other agencies encourage, and in some cases, even require that arise from applying the FCRA to investigations by outside counsel of specific allegations of wrongdoing in the workplace by an employee.”

The FCRA will continue to frustrate Boards of Directors from retaining independent experts to ferret out corporate malfeasance. When a Board needs to investigate the CEO, President and CFO, who will be able to provide an independent investigation under the FCRA? Can the Board obtain these officers’ consent for such an investigation which could lead eventually to criminal prosecution?

The FTC interprets the FCRA as meaning that any investigator, who regularly conducts employment investigations that report on the character or reputation of an employee, is a Consumer Reporting Agency and subject to the FCRA rules. But most of the requirements of the FCRA do not make sense except in the context of credit reports. They should not apply to investigations that have nothing to do with credit and should not be imposed on employers attempting to maintain safe workplaces. We believe that investigators of workplace misconduct should not be designated as Consumer Reporting Agencies and their reports should not be classified as Consumer Reports.

Section 611 is an example of a provision that was designed to correct credit report errors. It requires a re-investigation at any time that a consumer disputes anything in a consumer's file at a Consumer Reporting Agency and requests a re-investigation. That may make sense for a disputed invoice in a credit file, but employee misconduct investigations often involve hundreds of hours of investigation and interviews of witnesses who may become less cooperative when they learn their statements were released to the suspect. This section would require an investigator to go over the same ground and conduct new interviews at no charge within 30 days from the time of the request.

The FTC has said that no portion of a completed Consumer Report may be redacted. Therefore, information that is not relevant to the accused, but is relevant to the safety and privacy of others, would also have to be revealed. While Section 609 of the Act says it is not necessary to divulge sources of information acquired solely to prepare an Investigative Consumer Report, it is in conflict with Section 604 (b)(3)(A) that says the employee must receive a copy of the report.

Moreover, even absent the name of a witness, the content and circumstances described in a statement frequently will reveal the identity of a witness.

Harassment and Discrimination

The 1996 amendments to the FCRA have set back progress on sexual harassment and discrimination substantially. The Act provides no explanation or suggestion of what an employer should do if an accused person refuses to give his/her permission to be investigated . Investigation of harassment and civil rights cases call for the most tactful and professional investigative techniques. Tempers are often at a fever pitch. The EEOC has recognized that they are best done by experienced third parties—yet the FCRA discourages employers from retaining them.

Violence

These requirements exacerbate investigations of employee violence even more. When an employee appears to exhibit the symptoms of a deranged individual and is suspected of having the wherewithal to carry out threats to fellow workers or supervisors, the last thing the employer wants to do is ask the employee for permission to investigate her or him. Even in cases where permission was obtained at the time of hire, handing the employee a report containing the details of evidence against him before terminating or suspending his employment is like lighting a fuse. Employers are damned if they do and damned if they don't comply with the FCRA.

My firm is often hired to assist employers in dealing with potentially violent employees. It is not uncommon for employees exhibiting violent propensities not to have been thoroughly

backgrounded at the time of hire. In addition to surveillance, these investigations usually involve conducting inquiries to include covert neighborhood interviews. Neighbors are often aware of suspicious activity, proclivity towards firearm ownership or even knowledge of explosives. Since the 1996 FCRA amendments, the report of such an investigation would be considered an Investigative Consumer Report and it would be unlawful for the employer to order such an investigation without disclosure and permission. The ramifications of advising such an employee that he is going to be investigated, are obvious.

Theft

Statistics indicate that about one-third of business failures each year in this country are the result of employee theft. When businesses fail, consumer employees lose their jobs. Of all crimes by employees, perhaps investigation of embezzlement requires the most stealth and expertise. Embezzlers are often in the best position to cover their tracks. Yet, before an employer can hire an outside expert to investigate embezzlement, written permission must be obtained. As the Chairman of a House Committee recently remarked, “That defies common sense.”

Drug Use

Illicit drugs continue to be a scourge on American society. Ostensibly, we've been fighting a war on drugs for years yet recent statistics reveal that about seven percent of employees still use drugs in the workplace. This endangers fellow employees and customers, as well as themselves, particularly if they operate forklifts or other hazardous machinery. But the FCRA makes it virtually impossible to ferret out users or drug dealers from the workplace. The FCRA now requires us to obtain certification from the employer that they have received

permission from employees to initiate an investigation. Yet in many instances, we have no idea who the suspects are when we commence an investigation. Since most employers have not obtained the requisite permission in advance, should we wait until we know which ones are dealing drugs to ask for permission to investigate them?

Intellectual Property

Prior to the 1996 amendments, employers were able to hire impartial experts to covertly conduct sensitive investigations that would not be possible today. For example, my firm was engaged to investigate an alleged theft of trade secrets for a Fortune 100 defense contractor. Using a combination of public record information, surveillance and undercover techniques, we were able to determine the facts. A sales/marketing manager and a production chief had conspired with a scientist to form a competing company that was bidding on the same government contracts. Although one conspirator left our client's employ, he was fed information by the other two who remained as moles. Not only were the scientific secrets being disclosed, but bidding information allowed the competitor to slightly undercut their pricing on closed bids. This successful prosecution would have been nearly impossible if our client had to notify the culprits in advance of the investigation.

The need for confidentiality should be obvious in any investigation of misconduct. In fact, Congress determined this to be the case in other statutes of recent vintage. I understand that the Bank Secrecy Act makes it a violation of law to tell a customer if a bank will file a suspicious transaction report. The Act provides at 31USC 5318(g)(2)

“A financial institution, and a director, officer, employee or agent of any financial institution, who voluntarily reports a suspicious transaction pursuant to this section or any other

authority, may not notify any person involved in the transaction that the transaction has been reported.”

If we conduct any interviews -- and even reported conversations with witnesses are considered to be interviews -- then our report is considered to be an Investigative Consumer Report and the employer must advise the accused of the nature and scope of the investigation. And, before taking adverse action against an employee, a complete unedited copy of the report must be provided to the employee no matter how felonious their behavior.

We often conduct undercover investigations by placing an operative in a client's workplace to interact with suspects. These types of investigations are some of the most cost effective ways to obtain conclusive proof of employee criminality. Since the advent of the 1996 amendments, many of our labor lawyer clients have advised their clients not to risk such an investigation even in the face of significant losses or danger to co-workers. The reason is the attorneys do not wish to provide suspects with a copy of the Investigative Consumer Report. Not only does this risk jeopardizing safety, but it could lead some employers to terminate suspect employees for other reasons, which could result in an employee being wrongfully terminated. It is fairer to all parties to know the facts.

Holding employee violators to answer for their misdeeds by imposing discipline is often traumatic and unpleasant for employers. But their other employees have a right and expectation of a safe work environment. Many employees are naturally reluctant to come forward and cooperate with an investigation. And, when they learn that the requirements of the FCRA mandate disclosure of their cooperation, the chances of getting to the truth are greatly minimized.

Many times in my experience, at the conclusion of such an investigation, honest employees have come forward to say, “Thank goodness you did something about this.”

HR 1543

NCISS strongly supports HR 1543, The “Civil Rights and Employee Investigation Clarification Act.” The bipartisan measure would make clear that investigations of employee misconduct are not covered by the FCRA. But it would provide protections for consumers and employees. The bill makes clear that it does not permit access to credit reports. It also would require that after taking adverse action against an employee, an employer must provide a summary containing the nature and substance of the communication upon which the action is based.

But time is of the essence. If Congress does not act quickly to amend the FCRA, invasions of privacy and violations of safety will continue. Witnesses will be coerced and possibly killed or injured and violations of law will go unchallenged because employers without an employee’s authorization are not permitted to hire a discreet, confidential investigation by an impartial expert or use that investigative report properly. Congress must not let stand regulations that further jeopardize the safety and well being of honest employees.

###