

**KEEP IT SIMPLE:**

**The Ninth Circuit Decides a Matter of First Impression Concerning the Content of Employer Standalone Disclosures Regarding Consumer Reports Under the FCRA**

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The Fair Credit Reporting Act (FCRA) protects the privacy rights of consumers by requiring employers who obtain a consumer report about an applicant to provide the applicant with a disclosure stating that it intends to obtain that report. Under the FCRA, this disclosure must stand alone and be “clear and conspicuous” about the employer’s intentions.<sup>1</sup> In Walker v. Fred Meyer, Inc.,<sup>2</sup> the court addressed what this standalone disclosure may contain under the FCRA and whether a job applicant’s right to dispute a consumer report under the FCRA includes an opportunity to discuss the report with the employer.<sup>3</sup>

**Case Background**

Plaintiff Daniel Walker (Walker) brought this putative class action after defendant Fred Meyer, Inc. (Fred Meyer) declined to move forward with Walker’s employment due to the consumer report it had obtained on Walker. Walker alleged that Fred Meyer intentionally violated the FCRA by providing him with an ambiguous consumer report disclosure containing extraneous

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<sup>1</sup> The pertinent portion of the FCRA, § 1681(b)(2)(A)(i) provides:

(2) Disclosure to consumer.

(A) In general. Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless—

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes.

<sup>2</sup> No. 18-35592, 2020 U.S. App. LEXIS 8809 (9th Cir. Mar. 20, 2020).

<sup>3</sup> Under the FCRA, before an employer can take an adverse action against a job applicant based on a consumer report, the employer must provide the applicant with a copy of the report and a description of the applicant’s rights afforded by the Bureau of Consumer Financial Protection. 15 U.S.C. § 1681b(b)(3). The FCRA affords an applicant the right to dispute incorrect information in a consumer report. Id. at § 1681b(b)(3)(B)(i)(IV).

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information and failing to notify him in the pre-adverse action notice that he could discuss the consumer report with Fred Meyer directly. Fred Meyer filed a motion to dismiss Walker's claims arguing that its consumer report disclosure to Walker comported with the requirements of the FCRA and that the FCRA does not require a pre-adverse action notice to provide information about contacting an employer directly about a consumer report. The district court granted the motion to dismiss.

On appeal, a three-judge panel of the court reversed the district court's dismissal of Walker's claim regarding the content of Fred Meyer's standalone disclosure and remanded back to the district court whether the language in Fred Meyer's disclosure comported with the FCRA's "clear and conspicuous" requirement. The court also affirmed the district court's dismissal of Walker's claim that the right to dispute an inaccurate consumer report also requires an employer to provide a job applicant with an opportunity to discuss the report with the employer.

### **Permissible Content for Standalone Disclosure**

The court held that extraneous information about inspection of a consumer report that goes beyond a plain statement "that a consumer report may be obtained for employment purposes" and some concise explanation of that phrase is not permissible under the FCRA. This concise explanation can include what the consumer report entails, how the report will be obtained, and the purposes for which the report can be used. A disclosure stating that information about "character, general reputation, personal characteristics, and mode of living" will be included in a consumer report is permissible.<sup>4</sup> In addition, information in a disclosure regarding use of the consumer report for employment purposes, including "hiring, contract, assignment, promotion, reassignment, and termination" is also acceptable. Mentioning investigative consumer reports, as Fred Meyer did here, in addition to consumer reports, is also fine because they are a type of consumer report.

However, the court found that Fred Meyer's disclosure failed to adhere to FCRA requirements where it included information about Walker's right to obtain and review information about him gathered by the consumer reporting agency. The court instructed that, while this extraneous information was made in good faith, it is not permissible because it diverts an applicant's attention from notice about his privacy rights and instead draws his attention to a right to inspect. Such information cannot be part of the standalone disclosure required under the FCRA but can be provided in a separate document. For this reason, the court reversed the district court's ruling on Walker's claims under the FCRA's standalone requirement.<sup>5</sup>

The court refused to decide whether portions of Fred Meyer's disclosure were "clear and conspicuous," as required under the same section of the FCRA, noting that the district court had not analyzed the issue under the Ninth Circuit Court of Appeals's more recent guidance in

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<sup>4</sup> Indeed, this language tracks the language of the FCRA.

<sup>5</sup> 15 U.S.C. § 1681b(b)(2)(A).

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Gilberg v. California Check Cashing Stores, LLC.<sup>6</sup> Gilberg was decided after the lower court's decision in the instant case. Given the timing of the Gilberg ruling, the court noted that the parties had not fully briefed this issue either. In Gilberg, the Ninth Circuit addressed what "clear and conspicuous" means in the context of an FCRA consumer report disclosure. Based on this precedent, the court instructed that "clear" means "reasonably understandable" and "conspicuous" means "readily noticeable to the consumer." The court remanded this issue back to the district court.

### **Applicant's Right to Contact Employer to Discuss Consumer Report**

Walker also contended that Fred Meyer's pre-adverse action notice failed to comport with the requirements of the FCRA because it did not advise him about a right to contact Fred Meyer about the information contained in the consumer report. Affirming the district court's decision granting dismissal of Walker's related claim, the court recognized that the FCRA does provide job applicants with the right to dispute inaccuracies in a consumer report. However, the court ruled that this right does not include a right to contact the employer directly about the report prior to an adverse action.

In reversing the district court's dismissal of Walker's standalone disclosure claims, the Ninth Circuit highlights the need for employers to keep FCRA disclosures simple and confined to the exact requirements of the law. Failure to do so can result in costly and protracted class action litigation.

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<sup>6</sup> 913 F.3d 1169 (9th Cir. 2019).

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