**DISTRICT OF COLUMBIA**
**COMMISSION ON HUMAN RIGHTS**

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| COMPLAINANT,<br>**Complainant,**<br><br>**v.**<br><br>**KISMAT 5 GROUP, LLC dba FIVE GUYS,**<br>**Respondent.** | **Docket No.: 15-674-P (N-FCRSA)** |

## FINAL ORDER

This case arises from a complaint filed on April 7, 2015, alleging that Respondent Kismat 5 Group, LLC, doing business as Five Guys, violated the Fair Criminal Record Screening Act of 2014 (FCRSA), D.C. Code § 32-1341 (2014), for which the Office of Human Rights (OHR) found probable cause in a Letter of Determination dated September 28, 2017. On November 7, 2017, this case was certified to the Commission on Human Rights (Commission) for a public hearing and assigned to former Chief Judge Simmons who has since retired. The case was subsequently transferred to the undersigned Chief Administrative Law Judge Erika Pierson. After multiple attempts to contact and engage the Complainant in this case to no avail, it is the recommendation of the Chief Administrative Law Judge that this case be dismissed with prejudice.

## I. Findings of Fact

1. On April 7, 2015, Complainant [redacted] filed a complaint with OHR alleging that Respondent Kismat Five Group, LLC, a franchisee, doing business as Five Guys, located at 1100 New Jersey Avenue, SE, violated the FCRSA by asking an impermissible question about her criminal background on an application for employment.

2. At the time the complaint in this case was filed with OHR, the store in question was owned by Respondent Kismat 5 Group, LLC.

3. Respondent did not participate in the investigation before OHR. On April 24, 2017, franchisor Five Guys, LLC, had acquired the store. Recertification and Mot. For Entry of Default Judgment ("OHR Mot. Default"). By the time the case was certified to the Commission for a hearing in November 2017, Respondent Kismat 5 Group no longer owned the store.

4. On December 13, 2017, Judge Simmons remanded the case back to OHR because, despite numerous efforts, he was unable to reach Respondent.

5. On October 4, 2018, the case was recertified to the Commission and Stacey Biney, Esq., attorney for OHR, filed a motion confirming that Kismat 5 Group remained a legal entity in the District of Columbia and requesting Respondent be defaulted. "OHR Mot. Default".

6. OHR had confirmed with the D.C. Department of Consumer and Regulatory Affairs (DCRA) that, as of October 4, 2018, although Kismat 5 Group, LLC, no longer owned the store in question, it remained an active business entity in the District of Columbia. *Id.* at Exhibit 1.

7. DCRA records in October 2018 listed Beautha Fuller as the "Governor" for Kismat 5 Group, LLC, and Kandra James as the registered agent. OHR Mot. Default, Exhibits 1 and 2.

8. Ms. Biney sent Respondent a copy of her motion by certified mail, return receipt requested, to Beautha Fuller at [redacted]. The U.S. Postal Service return receipt (green card) reflects that is was delivered to and signed for by "B. Fuller" on October 13, 2018. *See* Kismat Return Receipt.

9. On November 6, 2018, Judge Simmons issued an Order scheduling a telephone status conference for November 16, 2018. Judge Simmons requested the parties respond, no later than November 9, 2018, to whether they would participate in a telephone status conference. That Order was sent by U.S. mail and email to Beautha Fuller, by U.S. mail to Kandra James, the registered agent, and by email [redacted] and U.S. Mail to Complainant [redacted]. None of the mail or emails were returned as undeliverable. No one responded to the Order on behalf of Respondent or Complainant and therefore, Judge Simmons cancelled the status conference. *See* Simmons Email dated 11/16/18.

10. In December 2019, the case was reassigned to Chief Judge Pierson who conducted an updated search of the DCRA records for Kismat 5 Group, LLC, which revealed that as of September 12, 2019, the company is dissolved and its status as a Limited Liability Corporation (LLC) is revoked. [1] *See* Attachment to 2/7/20, Order.

[1] https://corponline.dcra.dc.gov

11. On January 30, 2020, I emailed the parties asking their availability for a status conference on February 25, 2020. *See* Email dated 1/21/20. Only OHR Attorney Charles Abbott responded to the email.

12. On February 7, 2020, I issued an Order on OHR's motion for a default setting forth the options for proceeding with a default and scheduling a telephone status conference for February 25, 2020, at 10:00 a.m. The Order was sent by U.S. mail and email to all parties. None of the mail or emails were returned as undeliverable. The Order warned Complainant [redacted] that if she did not participate in the status conference, her case would be dismissed.

13. Only OHR attorney Charles Abbott appeared for the telephone status conference on February 25, 2020. Mr. Abbott was given 30 days to attempt to locate and engage Complainant [redacted] and to determine how OHR, who represents the complaint, wants to proceed if Complainant does not participate.

14. On April 7, 2020, OHR filed correspondence that despite several attempts to reach Complainant [redacted], she has failed to respond. *See* Abbott Email dated 4/2/20. Attached to OHR's email were three emails sent to Complainant after the status conference, sent to the same email address the Commission has been using. On February 25, 2020, Complainant replied to Mr. Abbott's email stating only "I did respond on 2/5." *See* OHR Email 2. On March 8, 2020, Mr. Abbott sent Complainant [redacted] another email again asking for a current phone number, her position on the case, and warned her the case would be dismissed if she did not respond. Complainant [redacted] did not respond.

## II. Discussion and Recommendation

The FCRSA, popularly known as "Ban the Box," prohibits District employers with eleven (11) or more employees from inquiring about a job applicant's arrest record, charges, or convictions prior to a conditional offer of employment, subject to certain exceptions. D.C. Code § 32-1342(a)-(c) (2014). Filing a complaint with the D.C. Office of Human Rights is the "exclusive remedy" for violations of the FCRSA suffered by the complainant. D.C. Code § 32-1343. Complainant filed her complaint on September 28, 2017. Pursuant to the Office of Human Rights' procedural rules, the case was certified to the Commission on Human Rights for a public hearing in November 2017.

The Commission's procedural rules provide that "The Hearing Tribunal may order the dismissal of any certified complaint at any time after receipt by the Commission, upon the motion of a party, upon the recommendation of the hearing examiner or the designee of the Chairperson, or *sua sponte*." 4 DCMR § 426.1. The Commission rules further provide that a Hearing Tribunal may dismiss the complaint without a hearing upon the hearing examiner's recommendation, when the Office or complainant fail to appear in person or through a representative, following "(a) Duly served notice to the Office and the complainant of the conference or hearing; or (b) Failure to locate the complainant after reasonable, recorded efforts to do so." 4 DCMR § 426.3.

In this case, Complainant [redacted] was duly served with notices for status conferences scheduled for November 16, 2018, and February 25, 2020. It is well established that in order to satisfy due process, "notice must be accomplished by a method reasonably calculated to afford the party an opportunity to be heard." *Kidd Int'l Home Care, Inc. v. Prince*, 917 A.2d 1083, 1086 (D.C. 2007) *citing Carroll v. District of Columbia Dep't of Employment Servs.*, 487 A.2d 622, 623 (D.C.1985) (per curiam). Notice is "constitutionally sufficient if it was reasonably calculated to

reach the intended recipient when sent." *Jones v. Flowers,* 547 U.S. 220 (2006). There exists a presumption that a letter properly addressed, stamped, and mailed, and not returned to the sender, has been delivered to the addressee. *Toomey v. District of Columbia,* 315 A.2d 565, 567 (D.C. 1974). In this case, both scheduling orders were sent to Complainant [redacted] by email and postal service. Neither mailings nor emails sent to Complainant [redacted] last known addresses were returned as undeliverable. Complainant responded only to Mr. Abbott's February 25, 2020, email, which confirms that all emails have been sent to the correct email address. As such, it appears that Complainant has abandoned her claim.

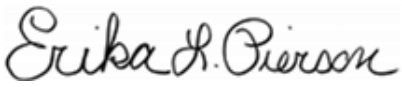
Although the Office of Human Rights *could* pursue the complaint in the Complainant's absence, the Office does not bear the burden of proof in this case. The D.C. Administrative Procedures Act provides that "In contested cases . . . the proponent of a rule or order shall have the burden of proof." D.C. Official Code § 2-509(b). Accordingly, it is my recommendation that the Commission dismiss this case. The Commission's procedural rules are silent as to whether such a dismissal is with or without prejudice. Therefore, D.C. Superior Court's Civil Rule 41 provides guidance: "An order dismissing a claim for failure to prosecute must specify that the dismissal is without prejudice, unless the court determines that the delay in prosecution of the claim has resulted in prejudice to an opposing party." D.C. Super. Ct. R. Civ. P. 41. The District of Columbia Court of Appeals has held that the trial court's discretion to dismiss a case with prejudice under Rule 41(b), must be exercised carefully and

> . . . at least as a general proposition, dismissal with prejudice is an appropriate sanction only upon clear evidence of deliberate delay or upon a showing of contumacious conduct by the plaintiff. When the conduct calling for sanctions consists of delay, other relevant factors include the length of the delay and the resulting prejudice, if any, to the defendant.

*Lofton v. Kator & Scott*, 802 A.2d 955, 958 (D.C. 2002) *citing Wolfe v. Fine*, 618 A.2d 169, 173 (1972).

The Court of Appeals has further held "We are mindful that cases which linger for no good reason impose a burden upon court staff and judges and adversely impact resolution of other cases on the calendar." *Lofton v. Kator & Scott*, 802 A.2d at 958 *citing Dobbs v. Providence Hosp.*, 736 A.2d 216, 221 (D.C.1999) ("[A]t issue is not solely prejudice to the immediate parties but also to other participants in the court system as a whole.... [E]ven where little or no prejudice results to a particular defendant, dismissal may in appropriate circumstances be justified." (internal citations and quotation marks omitted)).

This case has been dormant at the Commission for more than two years with no communication from Complainant [redacted] despite efforts of the Commission and OHR to engage her. At the same time, given Respondent's lack of participation in the process and the dissolution of the corporate entity, there is no prejudice to Respondent in dismissing the case without prejudice, but, as discussed in the February 7, 2020, Order, it would most likely be an exercise in futility to permit Respondent to refile her complaint at a future date.[2] Accordingly, I recommend the Commission dismiss this case with prejudice.



June 25, 2020

Erika L. Pierson
Chief Administrative Law Judge

[2] The February 7, 2020, Order discussed that the only remedy available under the FCRSA is the payment of a civil fine, half of which is paid to Complainant and half to D.C. Government. D.C. Code § 32-1344. The amount of that fine depends on the number of employees, information which is likely not available. As a limited liability corporation, Kismat 5 Group's governors or members have no personal liability for claims made against the LLC. D.C. Code § 29-304.22. Any order entered against the revoked LLC is not likely to result in any recovery as it is no longer doing business. An Order would also have not future preclusive affect.

**Approved and Adopted by the following Tribunal of Commissioners on July 10, 2020:**

*Adam Maier*

Commissioner Adam Maier

John Robinson

Commissioner John Robinson

*Karen Mulhauser*

Commissioner Karen Mulhauser