GOVERNMENT OF THE DISTRICT OF COLUMBIA
COMMISSION ON HUMAN RIGHTS

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COMPLAINANT, **Complainant,** **v.** **CHIPOTLE MEXICAN GRILL, INC.,** **Respondent.**	**Docket No.: 15-1034-P (N)** **Brandes S.G. Ash** **Administrative Law Judge**

FINAL DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Complainant maintains that inquiries on Respondent's ("Respondent" or "Chipotle") online job application violated the Fair Criminal Records Screening Act ("FCRSA") by requesting and requiring disclosure of his criminal history before he received a conditional offer of employment. For the reasons set forth more fully below, the Respondent's Motion for Summary Judgment is hereby **GRANTED** and Complainant's claim is dismissed with prejudice.

I. BACKGROUND

Complainant contends that, in July 2015, he attempted to apply online for a Team Member position at Chipotle's Tenleytown (Washington, D.C.) location. Shortly before completing his application, Complainant says he was asked to certify on the application: a) a statement acknowledging his "… [consent] to a pre and/or post-employment background check"—*if* one was required—and b) that he "…underst[ood] that [he] may [have] to pass a background

check…" as a requirement to securing employment with Chipotle. D.C. Office of Human Rights' Mot. in Opp. To Resp's Mot. for Summary Judgment (October 29, 2018) ("OHR Opp'n"). During the application process, Complainant says that he was also presented with an online questionnaire (or "IRS 8850 Form")[1], that asked if he had been convicted of a felony or received a deferred adjudication within the last year. Resp. Mot. for Summary Judgment (September 28, 2018) ("Motion for SJ."). Consequently, on September 10, 2015, Complainant filed a Charge of Discrimination against Chipotle with the District of Columbia Office of Human Rights ("OHR").

In May 2018, OHR found probable cause to believe that Chipotle violated the FCRSA by unlawfully requesting Complainant's authorization for a pre-employment background check and asking Complainant if he had been convicted of a felony before making a conditional offer of employment. In August 2018, OHR certified Complainant's matter to the District of Columbia Commission on Human Rights ("Commission") for a public hearing before former Chief Administrative Law Judge David C. Simmons ("former Chief Judge Simmons"). Shortly thereafter, former Chief Judge Simmons requested briefing from the parties on two issues, the first being whether a person has to actually submit an application for employment if the

[1] The online questionnaire is modeled after the IRS' Pre-screening Notice and Certification Request for the Work Opportunity Credit form ("IRS Form 8850"), a form employers use to pre-screen [applicants] and determine members of targeted groups, for purposes of employers' qualifying for the Work Opportunity [Tax] Credit. https://www.irs.gov/instructions/i8850. Employers also send the IRS Form 8850 to their respective state workforce agency (SWA)—which is located in the same state as the business—to certify an individual as a member of a targeted group for purposes of qualifying for the IRS' work opportunity credit. *Id*. The Work Opportunity Tax Credit (WOTC) is a Federal tax credit available to employers for hiring individuals from certain targeted groups who have consistently faced significant barriers to employment. https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit. Submitting an IRS 8850 Form to an SWA is but one step in the process of qualifying for the Work Opportunity Tax Credit. https://www.irs.gov/instructions/i8850. Thereafter, the state WOTC coordinator for the SWA must certify that the job applicant is a member of a targeted group, and after starting work, the employee must meet the minimum number-of-hours-worked requirement for the work opportunity credit. *Id*.

application contains an inquiry into the person's criminal background. OHR Opp'n. Second, the parties were asked to consider whether Chipotle's participation in the Work Opportunity Tax Credit Program ("WOTC") was the type of federal program envisioned by the FCRSA to exempt an employer from [FCRSA] prohibitions. *Id*. On September 28, 2018, Respondent filed a Motion for Summary Judgment ("Motion for SJ" or "motion") requesting dismissal of Complainant's claim with prejudice. OHR filed its Opposition one month later. On November 12, 2018, Respondent filed a Reply.

On March 10, 2021, Administrative Law Judge Brandes Ash ("Judge Ash"), issued a Proposed Decision and Order ("Proposed Order") in this case, recommending that the Commission grant the Respondent's Motion for Summary Judgment and dismiss Complainant's claim with prejudice. Thereafter, OHR filed Exceptions to Judge Ash's Proposed Order, asking the Commission to, instead, consider and adopt its arguments in any Final Decision and Order ("Final Order"). After taking into account the parties' respective arguments, and OHR's Exceptions, Judge Ash issued a Final Proposed Decision and Order, again recommending that the Commission grant Respondent's Motion and dismiss Complainant's claim with prejudice.

In its motion, Respondent lists the following as undisputed material facts: a) Complainant did not complete an application for employment with Chipotle and, therefore, lacks standing to bring a claim under the FCRSA; and b) Chipotle did not make any unlawful inquiry into Complainant's criminal history. Motion for SJ. Respondent also argues that its 2015 job application did not contain any questions related to criminal background or history and that the online questionnaire is voluntary and separate from Chipotle's employment application because it is administered and controlled by a third party administrator on a third party website. *Id*. Along these lines, Respondent further maintains that, in 2015, if Complainant had completed all

necessary portions of Chipotle's online employment application, he would have been presented with an option to *voluntarily* visit the third party administrator's website to complete the online questionnaire…and been advised [that] completing the questionnaire was optional. *Id*. Respondent further contends that if Complainant had continued to the third party website to complete the questionnaire, he would have been given another opportunity to opt out. *Id*. To the extent that Complainant went through with completing the questionnaire, Respondent says that the third party administrator would have only relayed to Chipotle a summary result of either "qualified for state/federal credits" or "not qualified for state/federal credits", as opposed to sharing Complainant's actual answers. *Id*. Respondent also says it presents the questionnaire to applicants before any offer of employment, because it participates in the Work Opportunity Tax Credit program. *Id*.

In its Opposition, OHR contends that the term "applicant," as referenced and defined under the FCRSA, broadly extends to a person like Complainant, who does *not* complete an application for employment because the application form contains an unlawful criminal background inquiry. OHR Opp'n. Accordingly, in proceeding with this case, OHR asks the Commission to defer to its interpretation of "applicant." Moreover, OHR contends that summary judgment is inappropriate for two reasons: 1) because a genuine issue of material facts exists regarding whether Respondent violated the FCRSA and 2) because the parties have not engaged in discovery. *Id*. OHR further contends that Respondent is not exempt from FCRSA prohibitions. *Id*.

II. STANDARD OF REVIEW

Summary judgment is granted when there are no genuine issues of material fact such that the moving party is entitled to a judgment as a matter law. *Celotex Corporation v. Catrett*, 477 U.S. 317, 318 (1986); *Padou v. District of Columbia*, 29 A.3d 973, 980 (D.C. 2011). A material

fact is one which, under the applicable substantive law, is relevant and might affect the outcome of a case; thus, the mere existence of a factual dispute is insufficient, on its own, to bar summary judgment. *Brown v. 1301 K St. Ltd. P'ship*, 31 A.3d 902, 908-909 (D.C. 2011); *Faison v. Vance-Cooks*, 896 F Supp. 2d 37, 48 (D.D.C. 2012). Moreover, summary judgment is mandated if a party fails to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. at 322. In such a situation, since there is a failure of proof concerning an essential element of the non-moving party's case, there is no genuine issue of material fact, which renders all other facts immaterial. *Id.* at 322–323.

To prevail upon a motion for summary judgment, the moving party must clearly demonstrate that there is no genuine dispute as to any material fact. *See Beard v. Goodyear Tire and Rubber Co.*, 587 A.2d 195, 198 (D.C. 1991). A dispute over a material fact is genuine when, upon review of the evidence, a reasonable factfinder could find for the nonmoving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). Once a moving defendant makes an initial showing that the record presents no genuine issue of material fact, the burden of production of evidence shifts to the nonmoving party to show that a genuine material issue exists. *See Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005). In opposing a summary judgment, a party may not rely on vague allegations, but instead must present specific facts showing that there is a genuine issue for trial. *Graff v. Malawar*, 592 A.2d 1038, 1040 (D.C. 1991). In deciding summary judgment motions, the court may not make credibility determinations or weigh the evidence, rather the evidence must be analyzed in the light most favorable to the nonmoving party. *Faison*, 896 F. Supp. at 48.

III. DISCUSSION

A. The FCRSA was enacted in an effort to remove unfair barriers to gainful employment for persons with criminal histories.

On December 17, 2014, Bill 20-642 was enacted into law as the Fair Criminal Records Screening Amendment Act ("FCRSA"). Specifically, the Bill served as an amendment to the Returning Citizen Public Employment Inclusion Amendment Act of 2010 ("Returning Citizen Act" or "RCA"), a law that had previously established procedures governing inquiries into the criminal history of applicants seeking employment with District of Columbia government. Under the FCRSA, an employer may only inquire about or require an applicant to disclose a criminal conviction *after* making the applicant a conditional offer of employment. D.C. Code § 32-1342(b). Otherwise, any such inquiry is unlawful, including questions about an applicant's arrests or any criminal accusations made against the applicant that are not pending and/or have not resulted in conviction. D.C. Code § 32-1342(a).

In the Introduction of the D.C. Council's Committee on the Judiciary and Public Safety Report ("report"), presented on May 28, 2014, then Judiciary and Public Safety Committee Chair, Tommy Wells ("Chairman Wells"), described the FCRSA as a means to remove unfair barriers to gainful employment for individuals with criminal records, including prohibiting employers from making any criminal history inquiry until after the first interview. D.C. Council Comm. on Judiciary and Public Safety Report on Bill 20-642 at 1 (May 28, 2014). Up until that point, there had also been discussion about establishing financial penalties for non-compliant employers in the District, and giving authority for enforcement of the law to the District of Columbia Office of Human Rights, all in an effort to assist with reintegrating previously incarcerated persons successfully into the community. *Id.* To that end, Chairman Wells discussed at length in his report the need for the bill, noting that a criminal record "functions as a label that, once affixed, subjects

an individual to a life-long stigma…[, one that] is particularly problematic when seeking employment. *Id.* at 3.

Chairman Wells' report also highlighted many employers' concerns, including whether the FCRSA would inhibit their abilities to identify and select the best candidates for employment. To that effect, the legislature determined that a compromise to both enacting the FCRSA and addressing employers' concerns would involve granting employers exemptions. *Id.* at 11. Specifically, employers would receive exemptions for positions they designated as part of federal or local government programs and obligations that encouraged the hiring of persons with criminal records because, in such instances, the goals of the federal and local programs were consistent with the goals of the FCRSA. *Id.*

B. Whether Complainant is an "Applicant" as defined by the FCRSA?

A foremost issue in this case is whether Complainant is an "applicant" under the FCRSA. Specifically, the D.C. Council defined "applicant" in D.C. Code § 32-1341(1) as: "any person considered for employment [by an employer] *or* who requests to be considered for employment by an employer." Importantly, the term ("applicant") is also defined in the FCRSA's predecessor legislation, the Returning Citizen Act, as "an individual who has *filed* an application for employment with a public employer or who has *filed* an application or made a verbal request to serve in a volunteer position with a public employer." D.C. Code § 1-620.41. (*italic*s added"). The term "applicant" is also defined under the District's Criminal Background Checks for Government Services to Children statute ("Children's Statute").

A statute comparable in purpose and execution to both the Returning Citizen Act and FCRSA, the Children's Statute establishes procedures governing inquiries into the criminal background of applicants seeking employment and volunteer work with any covered child or youth

services provider in the District of Columbia.[2] In this statute, an "applicant" is defined as "an individual who has filed a *written* application for employment with a covered child or youth services provider or an individual who has made an affirmative effort through a *written* application or a verbal request to serve in an unsupervised volunteer position with a covered child or youth services provider." D.C. Code § 4-1501.02. (*italic*s added").

Nonetheless, in short, OHR contends that its much broader interpretation of the term "applicant" under the FCRSA—to include an individual like Complainant who, in this case, never actually submitted an employment application to work for Respondent—is the only plausible interpretation, because it says so.[3] OHR further maintains that it considered the statutory language

[2] OHR maintains that any reference to the definition of "applicant" according to the Children's Statute belies the point that the term is unambiguous under the FCRSA. OHR Exceptions at 6. OHR also argues that [considering] the definition of applicant under the Children's Statute is inappropriate [in this case] because [the purpose of the Children's Statute] is entirely different than that of the FCRSA. *Id*. The Commission does not agree with either position. Moreover, any reference to the definition of "applicant" under the Children's Statute (as well as the Returning Citizen Act) is merely to point out that the word "applicant" has been used and similarly defined in comparable criminal background check statutes, particularly since OHR has requested the adoption of its overly broad interpretation of the term. As such, OHR's attempt to make relevant the distinction between the Children's Statute being enacted to effectuate criminal background checks specifically for persons requesting to work only with children, compared to the FCRSA, which applies to an individual requesting to work at any job located in the District, is a red herring.

[3] OHR contends that a court cannot substitute its interpretation for that of [OHR's], even if it is a reasonable and plausible one and, instead, *must* sustain the agency's interpretation even if a petitioner advances another reasonable interpretation of the same statute or if it might have been persuaded by the alternate interpretation had it been construing the statue in the first place. OHR Exceptions at 4. (*Smith v. D.C. Dep't of Emp. Services*, 548 A.2d 95, 97 (D.C. 1988). Perhaps, most important, it is worth pointing out that, in this instance, OHR exaggerates its role and authority. While OHR may request and/or believe that the agency is entitled to deference for its interpretation of the FCRSA, a court will only accord such deference in the event that OHR's interpretation is reasonable and consistent with the language, legislative history and purpose of the statute. Otherwise, of course, the Court has the final authority. *D.C. Off. of Tax & Revenue v. BAE Sys. Enter. Sys., Inc.*, 56 A.3d 477, 481 (D.C. 2012); *D.C. Off. of Hum. Rts. v. D.C. Dep't of Corr.*, 40 A.3d 917, 923 (D.C. 2012). In other words, just because a Court generally accords deference to an agency's interpretation, does not mean a Court is required to do so, including for this case.

and legislative history of the FCRSA, as well as relied upon its own expertise, in determining that Complainant is an applicant. OHR Exceptions at 3.

i. Statutory Construction

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language the [the lawmaker] used." *Clyburn v. United States*, 48 A.3d 147, 151 (D.C. 2012) (internal citations omitted). To that end, the plain meaning of a statute is examined first, "construing words according to their ordinary meaning." *Id*. However, "[t]he literal words of [a] statute are not the sole index to legislative intent, but rather they are to be read in the light of the statute taken as a whole, and are to be given a sensible construction, one that would not work an obvious injustice." *Id.* (quotation marks omitted and alteration in original). For this reason, "… in appropriate cases, [the] legislative history of a statute" is also considered. *Id.* (quotation marks omitted).

When the plain meaning of statutory language is unambiguous, the intent of the legislature is clear, and judicial inquiry need go no further." *1618 Twenty-First St. Tenants' Ass'n, Inc. v. The Phillips Collection*, 829 A.2d 201, 203 (D.C. 2003). In other words, if a statute's language is "plain," and allows for no other meaning, courts generally look no further and will give the "words used the meaning ordinarily attributed to them." *Whitfield v. United States*, 99 A.3d 650, 656 (D.C. 2014). Nonetheless, the District of Columbia Court of Appeals has cautioned that in some instances, it "may refuse to adhere strictly to the plain language of a statute in order to effectuate its legislative purpose, as determined by a reading of the legislative history or by an examination of the statute as a whole." *Id.* (citations and internal quotation marks omitted). Specifically, the plain meaning of the words of a statute may be disregarded only when the

application of their literal meaning would inevitably (1) produce absurd consequences, which the legislature clearly did not intend, or (2) frustrate the manifest purposes which appear from the provisions of the statute when considered as a whole in light of its legislative history.

Along these lines, it is well established that courts generally defer to an agency's interpretation of its own regulations unless that interpretation is "plainly erroneous or inconsistent with statutory purpose." *D.C. Office of Human Rights v D.C. Dept. of Corr.*, 40 A.3d 917 (D.C. 2012).[4] (In this case, it is not OHR's regulations that are being interpreted; rather, it is OHR's interpretation of a statute passed by the Council of the District of Columbia for which it has been charged with enforcement.) However, even when agency regulations are not at issue, the D.C. Court of Appeals will also accord significant deference to an expert agency's interpretation of a statutory provision the agency administers, except when the interpretation is unreasonable in light of a [statute's] text, history, and purpose."*;* see, *e.g., Washington Gas Light Co. v. Public Serv. Comm'n*, 982 A.2d 691, 710–11 (D.C. 2009) (court will defer to agency interpretation that is "reasonable in light of the statutory language, the legislative history, and judicial precedent"). *Id.*

In this case, OHR argues that its interpretation of the FCRSA should be accorded deference for two reasons: 1) because its interpretation is supported by thorough analysis, is reasonable, and accords with the FCRSA's statutory purpose and 2) [because] OHR has consistently interpreted the FCRSA to apply to individuals who did not submit an application because of a respondent's illegal inquiry into their criminal backgrounds. OHR Exceptions at 5.

[4] "When construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *D.C. Off. of Hum. Rts. v. D.C. Dep't of Corr.*, 40 A.3d 917, 923 (D.C. 2012); see also *1330 Connecticut Ave. Inc. v. District of Columbia Zoning Comm'n*, 669 A.2d 708, 714–15 (D.C.1995) (internal quotation marks omitted); *see Schonberger v. District of Columbia Bd. of Zoning Adjustment*, 940 A.2d 159, 162 (D.C.2008) (deferring to agency interpretation where regulations were ambiguous or silent).

As to the former reason, in its exceptions OHR maintains it has relied upon its expertise "… to determine what interpretation would effectuate the FCRSA's purpose and goals—[particularly, expertise acquired from the agency's] research on FCRSA's impact on communities, outreach, [the] analysis of FCRSA data and the processing of FCSRA complaints.]" OHR Exceptions at 7. In reality, however, since the FCRSA passed nearly eight years ago, OHR has acknowledged that its data is actually *limited* to complaint figures, such that it has *not* been able to truly scrutinize the impact of the FCRSA in the District. The District of Columbia Fair Criminal Record Screening Amendment Act of 2014: The Work and Enforcement by the DC Office of Human Rights ("OHR FCRSA Report" or "Report"). https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/OHR_Report_FCRSA_May2019_FINAL.pdf. Perhaps not surprisingly, then, in the agency's official Report, which highlighted the impact of the FCRSA from its enactment through the end of the year in 2018, OHR's "community outreach" embodied that of just six testimonials—mere opinions, really—all summarizing indisputable benefits of having the FCRSA in the District, as well as the importance of hiring returning citizens.[5] As for any further impact the FCSRA has had on the community, including the agency's efforts to engage in outreach, OHR's Report detailed the agency's 149 trainings, offered over the course of nearly 4 years after the law was implemented—although, notably, there are no details about the trainings included in the Report.

OHR also summarized its analysis of FCRSA data and FCSRA complaints in its Report, remarking that the agency processed 1,709 FCRSA complaints within 4 years of the enactment of the law. OHR Report. At the same time, out of these complaints, nearly half had been dismissed

[5] OHR's official Report on the FCRSA included a total of six testimonials from employers (Ben and Jerry's, the Marriott, and a construction company), two returning citizens, and a government agency and non-profit, that assist returning citizens seeking employment.

at the time of the drafting of the Report (45%), because either a) OHR determined there was no probable cause to believe that a violation of the FCRSA had actually occurred or b) the agency decided, absent any investigation, to close cases solely for administrative convenience. OHR Report. (The remaining half of FCRSA cases that had been closed at the time of drafting the Report, had been settled via conciliation or mutual agreements by the persons involved.) *Id*.

In support of its argument in this case, that the agency has consistently interpreted the FCRSA to apply to individuals who do *not* actually submit job applications, in its exceptions, OHR references the Letters of Determination issued in four of its cases in September 2017, August 2018, November 2018 and May 2020. *Id*. Presumably in each matter[6], in response to claims that the complainants lacked standing under the FCRSA, **OHR cites to what it contends is and has always been the agency's broad and "longstanding"[7] definition of the word "applicant"**: **an individual who "*begins to fill out* an employment application but does not submit the application because it contained an unlawful criminal background inquiry**." *Id*. In actuality, however, there has been no such invariable construction of the FCRSA and, particularly, the term "applicant." Instead, for example, in another FCRSA case currently pending before the Commission (*[REDACTED] v. International Spy Museum*, OHR Docket No. 16-653-FCRSA), OHR defines "applicant" as *an individual who merely inquires* if an employer has any jobs and

[6] OHR seemingly attempts to attach, as Exhibit A to its exceptions, the Letter of Determination (LOD) for each case in OHR Docket Nos. 15-648-P(N), 17-161-FCRSA, 16-023-FCRSA and 19-059-FCRSA, but does not attach the LOD in Docket No. 19-059-FCRSA. Instead, OHR attaches the LOD for OHR Docket No. 15-818-P(CN).

[7] OHR cites to *United Parcel Serv. V. D.C. Dep't of Emp. Servs.* in arguing that deference "is at its zenith where the [agency's] administrative construction has been consistent and longstanding. OHR Exceptions; *see also United Parcel Serv. v. D.C. Dep't of Emp. Servs*. 834 A.2d 868, 871 (D.C. 2003). In *United Parcel Serv.*, the Director's position with respect to the question of law before the Court had been consistent for 8 years.

subsequently receives an application for employment. (In *International Spy Museum*, there is no dispute that the Complainant did not even "begin to fill out" an application for employment. Hence, in determining the complainant's standing under the FCRSA in that case, OHR simply eliminated the "begins to fill out" element of the "longstanding" definition of "applicant" that it cites to in this case.) Indeed, it appears that OHR will attempt to adapt and expand, in as many ways possible, its construction of the term "applicant," depending upon the facts of a given case—actions that certainly do not warrant any significant deference.

ii. Complainant cannot be considered an "applicant" under D.C. Code § 32-134(1).

Respondent relies upon the plain-language interpretation of D.C. Code § 32-1341(1)[8] to support its contention that Complainant is not an applicant under the FCRSA and that his case should be dismissed. Resp. Motion for SJ. On the other hand, OHR considers as an appropriate definition of the word "applicant," the above-mentioned broader designation: any individual "who sought to be considered for employment by commencing/ beginning to fill out an application, but is unable to complete the application due to an unlawful criminal background inquiry on the application." OHR Opp'n at 2, 9, 11.

At the same time, OHR also recognizes "it is appropriate to look to dictionary definitions" in determining the ordinary meaning of the words in a statute.[9] OHR Exceptions at 10. We could not agree more. According to the Merriam-Webster dictionary, an "applicant" is defined as "one

[8] The FCRSA defines an applicant as "any person considered for employment or who requests to be considered for employment by an employer." *See* D.C. Code § 32-1341(1).

[9] OHR uses the Merriam-Webster dictionary to define part of the FCRSA definition of applicant, namely those persons who "*request* to be considered for employment by an employer." Specifically, according to OHR, "the plain meaning of the word "request" is to "ask for" and, thus, a person "obtaining and beginning an online application is the modern-day equivalent of approaching an employer and asking for an application and the opportunity to apply and be considered for employment." OHR Exceptions at 10.

who applies." https://www.merriam-webster.com/dictionary/applicant. Taking it one step further, the word apply means "to make an appeal or request in the form of a written application" or "to request something, usually officially, especially in writing or by sending in a form." https://www.merriam-webster.com/dictionary/apply; Cambridge English Dictionary. Similarly, the phrases "apply for a job" and "job application" are described and/or defined respectively in the dictionary as follows: "if you apply for… a job… you write a letter or email, or fill in a form in order to ask formally for it…."; [likewise, a "job application" is defined as:] "a letter or form containing details of [an individual's] qualifications, skills, experience, etc., [sent in] to an organization when [the person is] applying for a job with [the organization]." Cambridge English Dictionary; Collins Dictionary. In each the above-referenced instances, written communication and/or the submission of a form is required.

Accordingly, in this instance, Respondent contends that the plain language of the FCRSA could not be any clearer. In the literal sense, D.C. Code § 32-1341(1) recognizes essential elements of a potential employer-employee relationship: *awareness*[10], and more specifically, the *communication* of some sort between an employer and an individual related to the individual's desire for employment with the employer. (As follows, in determining whether an individual has actually requested consideration for employment, the individual must have taken some positive

[10] Judge Ash first raised this concept of "awareness" in her Proposed Decision and Order to grant Chipotle's motion. OHR responded in its Exceptions, by misguidedly arguing that Judge Ash's characterization of the employer—employee relationship was, somehow, an attempt to create a new "standard" that is not recognized by law. OHR Exceptions 8,14-15. More accurately, the Commission interprets Judge Ash's use of the word "awareness" as simply her own description of an element of the employer-employee relationship.

step,[11] or made some affirmative effort, to demonstrate an application for employment and/ or request that an employer consider her/him/them for employment.)

Considering the plain-language meaning definition of "applicant," as discussed above, neither party in this case has claimed that anyone throughout all of Respondent's corporation was ever aware of Complainant, or ever considered him for employment before, during or even after July 2015 when Complainant says he began filling out an online application at Respondent's Tenleytown location. Moreover, neither party maintains that Complainant ever asked anyone within Respondent's corporation to consider him for employment in any manner. There is simply no evidence that Complainant ever communicated with Respondent, or took any action to demonstrate to Respondent, that he sought employment with Chipotle.[12]

As previously mentioned, when the plain meaning of statutory language is unambiguous—as is the case here—judicial inquiry need go no further. *1618 Twenty-First St. Tenants' Ass'n, Inc. v. The Phillips Collection*, 829 A.2d at 203. Thus, in considering the plain language interpretation of D.C. Code § 32-1341(1), there is simply no evidence in the record that Complainant ever "applied" for a position with Chipotle, which means we cannot find that Complainant is an "applicant" as defined according to the FCRSA. Nonetheless, for a complete record, we will

[11] Unsurprisingly, this same "*positive step or action*" can be easily identified in the above-referenced D.C. Children's Statute, where, among other things, an "applicant" is "an individual who has made an *affirmative effort* through a *written* application or a verbal request [for employment] with a covered child or youth services provider." D.C. Code § 4-1501.02.

[12] Complainant and OHR may argue that Complainant's purported screenshot of Respondent's online application—that was attached to Complainant's initial complaint—is proof that Complainant sought employment with Chipotle. However, this argument fails. Even if the screenshot accurately depicts the application Complainant intended to submit to Chipotle at a given time, the fact remains he never did. Consequently, there is no evidence Respondent was ever aware of Complainant's intentions or that he sought employment with Chipotle, and presumably would never have been aware but for Complainant's contentions in this case.

discuss OHR's argument that a broad interpretation of "applicant" is warranted in this case considering the legislative history of the FCRSA. OHR Opp'n.

C. Considering the intent and legislative history of the FCRSA, the Commission cannot defer to OHR's interpretation of "applicant" in this case.

As discussed above, the FCRSA was passed as an amendment to the Returning Citizen Public Employment Inclusion Amendment Act of 2010 ("Returning Citizen Act" or "RCA"), a law that established procedures governing inquiries into the criminal history of applicants seeking employment with D.C. ("District") government. D.C. Council Comm. on Judiciary and Public Safety Report on Bill 20-642 at 6 (May 28, 2014). Specifically, the RCA prohibited District government employers from investigating the criminal background of applicants for certain 'non-covered positions' until after the initial screening of applications. *Id.* The D.C. Government Office of Human Resources ("Human Resources") was charged with monitoring the progress of RCA, and by the time D.C. Council voted to pass the FCRSA, had determined that because of RCA, 76% of applicants with a criminal record were still suitable for District government employment. *Id.* Presumably by then, considering the Council's work to define and give substance to the purpose of the FCRSA, it became readily apparent (to the Council as well as RCA and FCRSA supporters) that, at least for persons with criminal records, there is a clear advantage to employers learning more about them as people, before learning about their criminal histories. *Id.*

Ultimately, the Council decided that non-compliant employers would pay penalty fines to D.C. Government for violating the FCRSA; thus, in due course, some FCRSA supporters began advocating for the payment of, at least, a portion of penalty fines directly to applicants—individuals who, in light of their criminal backgrounds may have already been experiencing difficulty earning a living. *Id.* at 10. The Council agreed with these supporters and voted to amend draft FCRSA legislation to provide for the payment of half of all fines levied against non-compliant

employers directly to job applicants who filed complaints with OHR. *Id*. This amendment was, indeed, a compensatory measure, and aligned with the true intent and purpose of the FCRSA: to assist an already vulnerable population by, among other things, acknowledging the discriminatory experiences persons with criminal histories may encounter when actively applying for employment while, at the same time, incentivizing and encouraging these applicants' efforts to successfully reintegrate society. The Council did *not*, however, vote to implement direct payment measures with the anticipation of opening the floodgates of litigation to potentially *anyone and everyone* who wishes to file a claim against a District employer, including persons with no criminal records[13] who simply have no intention of productively re-integrating society and, instead, deem reporting and being paid for FCRSA violations as a form of "work" itself.

In 2008, the plaintiffs in *Starbucks Corporation v. Superior Court* filed a lawsuit claiming that Starbucks violated California Labor Code Section 423.8 ("Section 423.8") which, absent a few exemptions, prohibits California employers from asking job applicants (including employees seeking promotion) about convictions for minor marijuana offenses that are more than two years old. 168 Cal. App. 4th 1436, 1440–41 (2008). The sole basis of the lawsuit was that the plaintiffs had been given a 2-page job application form containing a criminal inquiry when they applied for employment. *Id*. at 1443. Specifically, the offending question asked: "Have you been convicted

[13] OHR argues that any reference to an applicant who does not have a criminal record, as well as the California case, *Starbucks Corporation v. Superior Court* where the complainants did not have criminal records, is irrelevant because Complainant has a criminal record. OHR Exceptions at 16. However, OHR is missing the point. The reference to "persons without criminal records" is not misplaced or irrelevant. Consider the entire first half of the sentence in which the phrase rests: "[t]he Council did *not*, however, vote to implement direct payment measures with the anticipation of opening the floodgates of litigation to potentially *anyone and everyone* who wishes to file a claim against a District employer…" The phrase "persons without criminal records" directly refers to the "anyone and everyone" group. The phrase also introduces the parties in the comparable *Starbucks* case.

of a crime in the last seven (7) years? If 'Yes,' list convictions that are a matter of public record (arrests are not convictions). A conviction will not necessarily disqualify you for employment." *Id.* at 1441. None of the plaintiffs had ever been convicted or even arrested for marijuana-related charges, they simply filled out the application, filed suit, and claimed entitlement to statutory damages that, if awarded, would have totaled $26 million dollars.

After analyzing the statute, the court held that it "decline[d] to adopt an interpretation of the statute that would turn it into a veritable financial bonanza [including] for litigants, like the plaintiffs, who had no fear of stigmatizing marijuana convictions." *Id*. at 1449. The court further indicated that "[w]here civil liability is predicated upon a legislative provision ... plaintiffs must establish that they fall within the class of persons for whose protection the legislative provision was enacted." *Id.* at 1448. Moreover, the court found that "the [law] must protect against the kind of harm that had occurred… because had the legislatures who enacted [Section 423.8] intended to confer a right to automatic damages on any and *all* job applicants, it doubted they would have been so opaque in their draftsmanship." *Id.*

Such is the risk in adopting OHR's flexible interpretation of "applicant" under D.C. Code § 32-1341(1)—any person having heard about the law, notwithstanding said person's criminal background, could simply hunt around for job applications from D.C. employers containing questions about criminal history and file claims endlessly with OHR for a chance at collecting penalty fees. It is unreasonable to believe that in drafting the FCRSA, D.C. Council was willing to assume a risk of this magnitude by remaining open to a flexible and possibly ever-changing definition of the term "applicant." This risk, and particularly the opportunity it provides for an unrestricted number of persons to file claims alleging employers' violations of FCRSA—including when they never actually submitted an application—is impossible to reconcile with the legislative

history and purpose of the FCRSA, as, among other implications, opportunities and potentially helpful resources are sure to be taken away from the targeted group of persons who were truly intended to benefit from FRCRA's enactment.

Nonetheless, in further support of its claim that a *broad* interpretation of "applicant" under the FCRSA is warranted, OHR also characterizes Complainant as an "aggrieved party" under the law, sufficient to confer upon him, in this case, the right to bring suit under the FCRSA. D.C. Office of Human Rights' Mot. in Opp. To Resp's Mot. for Summary Judgment. (October 29, 2018). Accordingly, notwithstanding our belief that we cannot defer to any broad construction of the word "applicant" under the FCRSA, we will, nonetheless, consider OHR's interpretation of an "aggrieved party" and standing below.

i. OHR's broad interpretation of "aggrieved" and "aggrieved party" (under D.C. Code § 32-1343(a)) is unsupported.

In addressing the issue of standing in this case, OHR, first, examines the word "aggrieved," as referenced in D.C. Code § 32-1343(a), to support its claim that any person—including Complainant —claiming to be *aggrieved* by a violation of the FCRSA has standing to file a claim with OHR. OHR Opp'n. Specifically, OHR contends that the legislature's choice to use the word "aggrieved" under the FCRSA requires deference to the D.C. Court of Appeals' (expansive) definition of an "aggrieved party" under the D.C. Human Rights Act ("DCHRA"), which states that: "an aggrieved party may extend to individuals whose rights are not directly infringed because limiting standing to only those whose rights were directly infringed upon would "hamstring efforts to effect [a] statute's broad purpose." *Id.* While acknowledging that the FCRSA does not actually define the term "aggrieved," [or "aggrieved party"], OHR maintains that '"the word[s are to] be construed according to their ordinary sense, as well as meanings that are commonly attributed to

them.'" *Id.*[14] Nonetheless, the Commission does not see the need to explore further, whether or not Complainant was "aggrieved," or if he is an "aggrieved party," because the courts simply have not adopted such a broad construction of the word "aggrieved" in defining standing requirements under the FCRSA.

The question of standing in any court [or administrative proceeding] is significant and thus, can even be raised *sua sponte* by [a finder of fact]. *Riverside Hosp. v. D.C. Dep't of Health*, 944 A.2d 1098, 1103 (D.C. 2008). Specifically, the Supreme Court generally requires a litigant to "assert his [or her] own legal rights and interests" in order to promote the "fundamental purpose[s] of standing: a) [ensuring] that courts hear only concrete disputes between interested litigants who will frame the issues properly," and b) reducing the likelihood [that courts will] "adjudicate [third parties'] rights unnecessarily, [particularly since the] holders of such rights [may] not wish to assert them, or [can] enjoy them regardless of whether or not in-court litigants [are] successful." *Id.* at 1104-1105.

In determining whether a party has standing to file suit in the District of Columbia, the D.C. Court of Appeals typically requires a party asserting his or her own legal rights to demonstrate an actual or imminent threat of injury caused by the defendant, and that the injury is redressable through adjudication. *Id.* at 1104. If a party brings a claim on behalf of someone else (a third party), the Court of Appeals generally requires the party to have "suffered an 'injury in fact', such that he or she has a 'sufficiently concrete interest' in the outcome of the issue in dispute." *Id.* The party must also be able to demonstrate a close relationship with the third party as well as some

[14] Given this logic, then, an "aggrieved person" is commonly defined as a person sufficiently harmed by a legal judgment, decree, or order to have *standing* to prosecute…," a definition which is not applicable in this case. See Merriam-Webster, https://www.merriam-webster.com/dictionary/.

reason the third party was unable to protect his or her own interests." *Id.*; *see also Powers v. Ohio*, 499 U.S. 400, 411 (1991).

In this case, Complainant maintains that Respondent violated the FCRSA by unlawfully inquiring about his criminal history on the online application form he attempted to complete inside Respondent's Tenleytown restaurant. Most apparently, Complainant cannot articulate any injury, directly attributable to his person, that was caused by Respondent. (On the contrary, if Complainant *had* actually filled out and submitted an application form containing unlawful criminal history inquiries to Respondent and, for example, Complainant was not hired, there would not likely be any question regarding whether Complainant has standing in this case.) As to whether Complainant filed his Charge of Discrimination with OHR "on behalf" of a third party, that has not been articulated. Consequently, Complainant lacks standing in this case.

Nonetheless, OHR attempts to draw a parallel between the facts in Complainant's case and *Executive Sandwich Shoppe, Inc. v. Carr Realty Corporation*, wherein a leaseholder alleged it had suffered monetary losses because of its landlord's discrimination against two prospective sub-lessees. 749 A.2d 724, 733 (D.C. 2000). Specifically, the leaseholder filed several claims against the landlord, including two that alleged a violation of the DCHRA after the landlord refused to rent to the two prospective sub-lessees because they were Asian. *Id.* The landlord challenged the leaseholder's right to file suit on behalf of the sub-lessees and, ultimately, the trial court dismissed the DCHRA-related claims. On appeal, however, the D.C. Court of Appeals held that standing under the DCHRA only requires a plaintiff to allege "a minim[um] of injury in fact." *Id.* However, *Executive Sandwich Shoppe* is distinguishable from Complainant's matter in that the DCHRA is a much broader statute than the FCRSA as, most certainly, the same rights and issues

are not at stake. Moreover, Complainant has not alleged that he suffered any "injury in fact" such that he would have an actual interest in the outcome of this matter.

In further support of its argument that Complainant has standing to file suit under the FCRSA, OHR also cites to a Supreme Court employment discrimination case interpreting Title VII of the Civil Rights Act, *International Brotherhood of Teamsters v. United States*. In *International Brotherhood*, the Supreme Court spoke to the broad equitable powers in Title VII courts "'to [facilitate] the most complete relief possible,' in an effort to eliminate the discriminatory effects of the past and bar the likes of such discrimination in the future." 431 U.S. 324, 364-365 (1977) (citing to *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 418 (1975). Specifically, the Court determined that [in Title VII cases] the effects of and the injuries suffered from discriminatory employment practices are not always confined to the individuals who [are] expressly denied a requested employment opportunity. *Id*. Thus, a consistently enforced discriminatory policy [could] deter job applications from those who are aware of it [as well as those who are] simply unwilling to subject themselves to the humiliation of and…rejection from the policy. *Id*. The Court ultimately concluded that when a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture [that person] is just as much a victim of discrimination as is [the person] who goes through the motions of submitting an application. *Id*. at 366. However, the D.C. Circuit and others have held this doctrine is only available "in the rare case where an employer has essentially foreclosed the interactive process through its policies or explicit actions ..." *Id.* at 1333 (applying futility doctrine to excuse failure to request accommodations where plaintiff was aware of city's policy against reassignment and "was also explicitly told by [her Superior] that the city would not help her find another position."). *Pappas v. Dist. of Columbia*, CV 19-2800 (RC), 2021 WL 106468, at *11

(D.D.C. Jan. 12, 2021); *see also Tartt v. Wilson County, Tenn.*, 982 F. Supp. 2d 810, 821 (M.D. Tenn. 2013) (holding that this exemption from the usual application requirement comes into play where the circumstances "reveal overwhelming evidence of pervasive discrimination in all aspects of the employer's [hiring] practices, and that any application would have been futile and perhaps foolhardy").

Both Title VII and the more expansive DCHRA were enacted to assist in the prevention and prohibition of many kinds of discrimination. However—notwithstanding the similarity between Complainant's failure to submit an application to Chipotle and the "non-applicants" in *International Brotherhood* who declined to submit applications for promotions—the case at hand is distinguishable from both *Executive Sandwich Shoppe* and *International Brotherhood* cases, because a criminal record is not listed as a protected basis under Title VIII [or DCHRA]. U.S. Equal Employment Commission, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act (April 25, 2012). Accordingly, any reliance on Title VII or DCHRA authority, in claiming criminal history as being the reason for denied employment, depends, first, on whether the criminal history claim derives from a claim of (employment) discrimination on the basis of race, color, religion, sex, national origin and/or any other relevant protected class. *Id*. Hence in the instant matter, while the *Executive Sandwich Shoppe* and *International Brotherhood* cases may offer some authoritative support for OHR's argument that Complainant was within his right to file a claim with OHR, the fact is, courts have not yet adopted any similar broad, flexible construction of standing for persons deemed "applicants" under the FCRSA.

Even *if* the Commission were to accept as persuasive OHR's broad interpretation of standing under the FCRSA, it is worth noting that the *aggrieved parties* in both *Executive*

Sandwich Shoppe and *International Brotherhood* were not automatically entitled to relief. Quite the contrary, in *International Brotherhood*, the Supreme Court determined that it is not easy for a person to prove that he or she was deterred from applying for a job because of an employer's [unlawful] practices and that is because doing so requires actual proof that the person *would* have applied for the job had it not been for those practices. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 367–68 (1977). In applying this same construct to the instant matter, Complainant merely demonstrating what Chipotle's online application form may have communicated to him about Respondent's hiring process that, perhaps, prevented him from actually submitting an application is, in itself, insufficient. Simply put, even a known prospect of discriminatory rejection from a job shows only that a potential employee may have been deterred from applying for the job, but it does not show that a non-applicant actually wanted the job, or that a non-applicant even possessed the requisite qualifications for the job. *Id*. at 369. To that end, even if a finder of fact determines that a potential job applicant was a victim of a company's discriminatory practices, the fact finder must still engage, as nearly as possible, in a process that "recreates the conditions and relationships that *would have been* had there been no unlawful discrimination," a difficult, if not absolutely impossible, process that unavoidably involves varying degrees of approximation and imprecision. *Id*. at 371-372.

In light of this analysis, ultimately, the Commission cannot adopt OHR's proposed broad interpretation of "aggrieved" and an "aggrieved party" under D.C. Code § 32-1343(a) to support its argument that Complainant is an applicant under the FCRSA and has standing in this case.

D. Whether genuine disputes exist related to Chipotle's 2015 online application and its participation in the WOTC program is irrelevant because Complainant is not entitled to relief under the FCRSA.

While there are genuine disputes between the parties related to facts in this case, the Respondent has not met the threshold of standing in this case because he cannot demonstrate that he is an "applicant" under the FCRSA. Accordingly, it is not necessary to provide as detailed a response here and consider the issues in dispute.

E. Whether Respondent is exempt from FCRSA prohibitions, or the parties have engaged in discovery is irrelevant, because Complainant is not entitled to relief under the FCRSA.

The parties do not agree about Respondent's exemption status under D.C. Code § 32-1342(c)(3), and whether the Team Member position, at issue in this case, is exempt from FCRSA prohibitions. Even so, given that Complainant cannot demonstrate that he is an applicant under the FCRSA, it is unnecessary for the Commission to consider further argument on this issue. As another argument opposing Respondent's motion, OHR relies on the general practice that mandates the entry of summary judgment after there has been adequate time for discovery, e.g. once the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact such that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). OHR also argues that there are specific regulations outlining the bases for dismissal that are permitted at various stages of a complaint, none of which apply in this case.[15] OHR Exceptions at 18.

[15] OHR cites to 4 DCMR § 426.2 in arguing that a complaint may be dismissed prior to the commencement of a hearing process for [only] the following reasons: a) lack of jurisdiction over the subject matter; b) lack of jurisdiction over the respondent; c) untimely filing of the complaint; d) prior filing in court; or e) prior settlement of the complaint.

While it may be general practice that summary judgment is not granted until after there has been adequate time for discovery, indeed, there is no hard rule *requiring* that parties be allowed to conduct discovery before entry of summary judgment, particularly if a moving party "… clearly apprises a court [or tribunal] that a prompt decision will likely avoid significant unnecessary discovery." *Humphreys v. Roche Biomedical Labs., Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993); See also *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1188 (11th Cir. 2005). Most importantly, the Respondent cannot demonstrate that he is an "applicant" under the FCRSA, thus any discovery would be unnecessary.

Finally, this case does not fall under the DCHRA and neither OHR nor the Commission has established any specific regulations implementing the FCRSA. Nonetheless, under 4 DCMR § 405(g), a hearing examiner [or Administrative Law Judge] may recommend rulings to a Hearing Tribunal on motions, like the Respondent's in this case, that will determine the outcome of a hearing process. To that effect, the Commission may dismiss any matter certified from OHR *sua sponte* or upon motion or recommendation of the [Administrative Law Judge]. 4 DCMR § 426.1.

IV. CONCLUSIONS OF LAW AND RECOMMENDATION

The Commission has deliberated, at length, regarding the parties' respective positions on standing (and whether Complainant is an aggrieved party), as well as OHR's request that the Commission adopt its broad construction of the word "applicant" under D.C. Code § 32-1341(1). Accordingly, we are unpersuaded that Complainant has standing in this case. To that end, while it is clear the parties disagree about facts in this case, they are immaterial given that Complainant cannot demonstrate that he is an applicant under the FCRSA.

While, ultimately, this case should not have been certified to the Commission, given Complainant's lack of standing, we think it is also important to make clear that our recommendation

does not absolve Respondent from any wrongdoing. For instance, from our recent observations, an individual seeking employment at a Washington, D.C. Chipotle location can still access Respondent's online application through its website and will, in turn, be presented with the option to answer criminal background questions, and without it being entirely obvious that answering said questions is optional. Simply put, in this instance, with a different set of facts—namely Complainant being an actual applicant—we would not be making the same recommendation.

For this reason, we highly recommend that OHR consider, among other things, more expansive remedies to potential FCRSA violations, and particularly in instances like this one, where there could be opportunity to issue a probable cause finding but the intended Complainant lacks standing. Additional measures may include the Director of OHR utilizing the Director's Inquiry tool, a proactive enforcement initiative afforded by OHR, to carry out public inquiry measures against alleged violators of the FCRSA. This tool, for example, may provide opportunities for the agency to engage directly with employers about reports of discrimination, including reviewing said employers' hiring policies and procedures. Thereafter, there may be additional opportunities for continuous investigation and monitoring for any areas of non-compliance. Along these lines, OHR may also wish to consider proposing to D.C. Council a formal amendment of the FCRSA, and more specifically the definition of applicant.

Nonetheless, in light of the foregoing, and for the reasons set forth herein, it is hereby

ORDERED that Respondent's Motion for Summary Judgment is **GRANTED;**

and it is further

ORDERED that Complainant's case is dismissed with prejudice; and it is further

ORDERED that the reconsideration and appeal rights of any party aggrieved by this Order are attached.

So ORDERED this **7th** day of **January 2022**.

[redacted] 1/7/2022 | 2:14 PM PST
Commissioner **Date**

[redacted] 1/7/2022 | 1:46 PM PST
Commissioner **Date**

[redacted] 1/7/2022 | 4:20 PM EST
Commissioner **Date**

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