CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

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In the Matter of

COMMISSION ON HUMAN RIGHTS,

Petitioner,

-against-

CU 29 COPPER RESTAURANT & BAR,
and CU29 LTD.,

Respondents.

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Complaint No. M-E-S-13-1028387-E

OATH Index No. 647/15

DECISION AND ORDER

The Law Enforcement Bureau of the New York City Commission on Human Rights (the "Bureau") initiated this employment discrimination action on April 12, 2013, against Respondent CU 29 Copper Restaurant & Bar ("Respondent Copper Restaurant") by filing a verified Complaint pursuant to its authority under Section 8-109(c) of the New York City Human Rights Law ("NYCHRL"). The Bureau alleges that Respondent Copper Restaurant placed an employment advertisement on craigslist.org seeking a "female bartender" and a "pizza man," thereby expressing unlawful gender-based limitations in violation of NYCHRL Section 8-107(1)(d). Respondent Copper Restaurant filed a sworn Answer on January 8, 2014. After issuing a Probable Cause Determination on August 28, 2014, the Bureau referred the Complaint to the Office of Administrative Trials and Hearings ("OATH") for trial and a recommendation by an administrative law judge ("Report and Recommendation"). On February 3, 2015, the Bureau added Respondent CU29, LTD (together with Respondent Copper Restaurant, "Respondents") as

a party, which is Respondent Copper Restaurant's corporate name registered with the New York Department of State, Division of Corporations. (ALJ Exhibit 2 (Amended Complaint).)

Respondents appeared *pro se* for the initial OATH conference on November 18, 2014. However, Respondents failed to appear at the next pre-scheduled mandatory conference and the trial scheduled for April 1, 2015. Administrative Law Judge Alexandra F. Zorgniotti issued a Report and Recommendation on April 7, 2015 (1) finding that Respondents violated Section 8-107(1)(d) of the NYCHRL by publishing a job advertisement using the words "female bartender" and "pizza man" indicating unlawful limitations on potential employees as to gender; and (2) recommending (i) a civil penalty of $7,500 paid to the general fund of the City of New York; and (ii) that Respondents and their staff undergo anti-discrimination training.

The parties had the right to submit written comments and objections to the Report and Recommendation within twenty days after the Office of the Chairperson of the Commission on Human Rights (the "Commission") commenced consideration of the Report and Recommendation on May 12, 2015, unless good cause for additional time was shown. 47 RCNY § 1-76. The Bureau submitted its comments to the Report and Recommendation on May 29, 2015, urging the Commission to adopt Judge Zorgniotti's Report and Recommendation in its entirety. Respondents did not submit comments or objections to the Report and Recommendation.

The Commission has reviewed Judge Zorgniotti's Report and Recommendation, the trial transcript, the trial exhibits, and the Bureau's comments to the Report and Recommendation. For the reasons set forth in this Decision and Order, the Commission adopts the Report and Recommendation, except as indicated below.

I. STANDARD OF REVIEW

In reviewing a Report and Recommendation, the Commission may accept, reject, or modify, in whole or in part, the findings or recommendations made by the administrative law judge. Though the findings of an administrative law judge may be helpful to the Commission in assessing the weight of the evidence, the Commission is ultimately responsible for making its own determinations as to the credibility of witnesses, the weight of the evidence, and other assessments to be made by a factfinder. *Comm'n on Human Rts. v. Shahbain*, OATH 2439/13, Dec. & Ord. (May 22, 2014); *Comm'n on Human Rts. v. Jenkins*, OATH 2331/13, Dec. & Ord. (Apr. 14, 2014); *Comm'n on Human Rts. v. Britati Realty, Inc.*, OATH 778/13, Dec. & Ord. (Oct. 31, 2013); *Politis v. Marine Terrace Holdings, LLC*, OATH 1673/11, 1674/11, Dec. & Ord. (Apr. 24, 2012); *L.D. v. Riverbay Corp.*, OATH 1300/11, Dec. & Ord. (Jan. 9, 2012); *Comm'n on Human Rts. v. 325 Coop. Inc.*, OATH 1423/98, Dec. & Ord. (Jan. 12, 1999).

The Commission is also tasked with the responsibility of interpreting the NYCHRL and ensuring the law is correctly applied to the facts. *Politis*, OATH 1673/11, 1674/11, at 8 (Commission rejected R&R, finding that ALJ did not properly apply the NYCHRL). Therefore, the Commission has the final authority to determine "whether there are sufficient facts in the record to support the Administrative Law Judge's decision, and whether the Administrative Law Judge correctly applied the New York City Human Rights Law to the facts." *Comm'n on Human Rts. v. Ancient Order of Hibernians*, Comp. No. MPA-0362, Dec. & Ord. (Oct. 28, 1992); *see also Orlic v. Gatling*, 844 N.Y.S. 2d 366, 368 (App. Div. 2007) ("it is the Commission, not the Administrative Law Judge, that bears responsibility for rendering the ultimate factual determinations"); *Cutri v. N.Y.C. Comm'n on Human Rts.*, 977 N.Y.S.2d 909, 910 (N.Y. Sup. Ct. 2014) (Commission not required to adopt the Administrative Law Judge's

recommendation). Accordingly, the Commission reviews the Report and Recommendation *de novo* as to findings of fact and conclusions of law.

II. FACTUAL FINDINGS

The following relevant facts are not in dispute. On April 1, 2013, Respondents posted an employment advertisement on craigslist.org for a "female bartender" and a "pizza man." (Complaint at 1.) These facts were admitted by Respondents in their Answer, signed and notarized by Respondents' owner, Ekaterina Telushkin. (Bureau Exhibit 2 (Answer).) The Answer asserts that Respondents have only five employees; that Respondents have both male and female employees; that Telushkin's first language is not English; that Telushkin used language from other job advertisements she found; that Telushkin was not aware that the language in the advertisements was improper; and that her business is "struggling" and "on the brink of collapse." (*Id.*) Respondents appeared *pro se*.

III. CONCLUSIONS OF LAW

A. Liability

The NYCHRL makes clear that it is an unlawful discriminatory practice

> [f]or any employer . . . or agent thereof to declare, print or circulate or cause to be declared, printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to. . . gender, ...

N.Y.C. Admin. Code § 8-107(1)(d). Therefore, employers' job postings and advertisements limiting positions to a specific gender are *per se* violations of the NYCHRL. In admitting to posting a job advertisement containing two gender-based limitations – "female bartender" and "pizza man" – Respondents also admit to liability for engaging in an unlawful discriminatory practice under the NYCHRL.

B. Remedial Action/Civil Penalties

Where the Commission finds that respondents have engaged in an unlawful discriminatory practice, the NYCHRL authorizes the Commission to order respondents to cease and desist from such practices and order such other "affirmative actions as, in the judgment of the commission, will effectuate the purposes of" the NYCHRL. N.Y.C. Admin. Code § 8-120. In order to vindicate the public interest and deter respondents from violating the NYCHRL in the future, the Commission may also impose civil penalties. *Id.* § 8-126(a); *see Norris v. N.Y.C. Coll. of Tech.*, No. 07 Civ. 853, 2009 WL 82556, at *20 n.2 (E.D.N.Y. Jan. 14, 2009) (citing *Lee v. Edwards*, 101 F.3d 805, 813 (2d Cir. 1996)). Civil penalties up to $125,000 may be imposed on respondents. N.Y.C. Admin. Code § 8-126(a). The penalties are paid to the general fund of the City of New York. *Id.* § 8-127(a). If the unlawful discriminatory practice was the result of a respondent's "willful, wanton or malicious act," the Commission may impose a civil penalty of up to $250,000. *Id.* § 8-126(a).

In cases such as this where respondents have committed a *per se* violation of the NYCHRL by posting a job advertisement expressing a limitation based on gender, the Commission has ordered respondents to complete a training on the NYCHRL to make sure they are knowledgeable about their obligations under the NYCHRL. *See, e.g.*, *Comm'n on Human Rts. v. Framboise Pastry, Inc.*, OATH 727/13, 728/13, Dec. & Ord. (Sept. 25, 2013); *Comm'n on Human Rts. v. Vudu Lounge*, OATH 233/12, Dec. & Ord. (Mar. 22, 2012). Such training is especially appropriate here, where Respondents' owner admitted that she was not aware that the language in the advertisements was improper. (Answer.) The Commission also finds that it effectuates the purposes of the NYCHRL to facilitate public awareness of the law by requiring respondents to post a notice of rights under the NYCHRL in their place of business. *Comm'n on*

Human Rts. v. Crazy Asylum, 2262/13, 2263/13, 2264/13. Dec. & Ord. (Oct. 28, 2015). Such posting serves as a reminder of the law to Respondents, while it also informs the public of their rights under the NYCHRL and helps ensure a workplace that recognizes individuals' rights.

In assessing whether the imposition of civil penalties will vindicate the public interest in situations where a respondent has committed a *per se* violation of NYCHRL Section 8-107(1)(d) by posting a discriminatory job advertisement, the Commission may consider several factors, including, but not limited to: 1) respondents' financial resources; 2) the sophistication of respondents' enterprise; 3) respondents' size; 4) the willfulness of the violation; 5) the ability of respondents to obtain counsel; and 6) the impact on the public of issuing civil penalties. It is undisputed that Respondents have extremely limited financial resources and are not a sophisticated enterprise, as they have only five employees and function within one small location. (Answer.) Respondents' owner stated that they did not willfully violate the law, as they were unaware that the language in the advertisements was improper. Respondents appeared *pro se* in the matter, and their owner expressed their limited resources by describing their business as "struggling" and "on the brink of collapse." Taking into consideration each of these factors, the Commission finds that the imposition of civil penalties in this case does not serve the public interest as such penalties may have the result of forcing the closure of a small business, leaving its employees without jobs, and discouraging potential small business owners from starting their own businesses. Further, civil penalties are not necessary to deter Respondents from future violations of the NYCHRL, as they have committed to publishing advertisements that comply with the law. (*Id.*)

For the reasons identified above, the Commission can vindicate the public interest by mandating that Respondents attend a free know-your-obligations training at the Commission and posting a notice of rights in a conspicuous location in Respondents' business. Accordingly,

IT IS HEREBY ORDERED, that Respondents cease and desist from posting job advertisements containing gender-based limitations;

IT IS FURTHER ORDERED, that no later than sixty (60) calendar days after service of this Order, Respondents must attend a know-your-obligations training on the NYCHRL and provide proof of attendance at the training in a form to be provided by the Bureau within twenty (20) calendar days after service of this Order;

IT IS FURTHER ORDERED, that Respondents post a notice of rights, in a form to be provided by the Bureau, within twenty (20) calendar days after service of this Order, in a conspicuous location where it will be visible to both employees and members of the public for a period no shorter than two (2) years after the date of this Order.

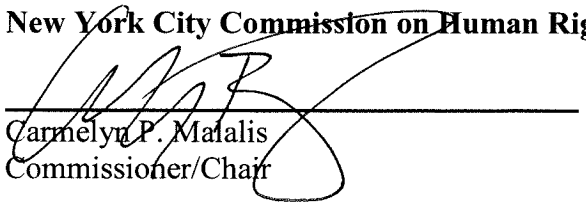
Failure to comply with any of the foregoing provisions in a timely manner shall constitute non-compliance with a Commission Order. In addition to any civil penalties that may be assessed against Respondents, Respondents shall pay a civil penalty of one hundred (100) dollars per day for every day the violation continues. N.Y.C. Admin. Code § 8-124.

Failure to abide by this Order may result in criminal penalties. *Id.* § 8-129.

Dated: New York, New York
October 28, 2015

SO ORDERED:

New York City Commission on Human Rights



Carmelyn P. Malalis
Commissioner/Chair