

CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

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In the Matter of

NEW YORK CITY COMMISSION ON
HUMAN RIGHTS,

Petitioner,

-against-

SEBASTIAN ROZARIO,

Respondent.
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Complaint No. M-E-S-14-1030839-E
Federal Charge No. 16F-2014-00347C
OATH Index No. 1273/15

DECISION AND ORDER

On September 25, 2014, the Law Enforcement Bureau of the New York City Commission on Human Rights (“Bureau”) filed a verified complaint (“Complaint”) pursuant to § 8-109(c) of the New York City Human Rights Law (“NYCHRL”), alleging that Respondent Sebastian Rozario published an advertisement for employment that expressed a limitation based on gender, in violation of § 8-107(1)(d) of the NYCHRL. (Bureau Ex. 1(C).) Specifically, the Complaint alleges that Respondent posted an advertisement on the website Craigslislist.org (“Craigslislist”), seeking a “waitress” for an unidentified restaurant in Brooklyn. (*Id.*)

On February 26, 2015, after Respondent failed to appear or file an answer in response to the Complaint, the Bureau moved to have him held in default and precluded from participating in further proceedings before the Office of Administrative Trials and Hearings (“OATH”). (Bureau Ex. 2.) Administrative Law Judge (“ALJ”) Tynia D. Richard issued a memorandum decision on March 31, 2015, granting the Bureau’s motion and notifying Respondent that a motion to vacate the default must be filed by April 10, 2015. (*Id.*) Respondent did not move to vacate the default and did not appear at the inquest hearing held at OATH on April 13, 2015. *See In re Comm’n on*

Human Rights v. Rozario, OATH Index No. 1273/15, report & recommendation (“R&R”), 2015 WL 4249263, at *1 (June 3, 2015). Based on the evidence presented during the hearing and the allegations deemed admitted because of Respondent’s default, Judge Richard issued a report and recommendation dated June 3, 2015 (“the Report and Recommendation”), recommending that the Office of the Chairperson of the Commission on Human Rights (“Commission”) hold Respondent liable for gender discrimination under § 8-107(1)(d) of the NYCHRL and impose a civil penalty of \$5,000.00. *Rozario*, 2015 WL 4249263, at *5. No comments to the Report and Recommendation were submitted by either party. *See* 47 RCNY § 1-76. After reviewing the Report and Recommendation, the hearing transcript, and the evidence admitted during the hearing, the Commission adopts the Report and Recommendation’s finding of liability and, as relief, orders that Respondent pay a fine of \$500.00, participate in a Commission-led training on the NYCHRL, and post a notice of rights in his place of business.

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 ALJ. Though the findings of an ALJ 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. *In re Comm’n on Human Rights ex rel. Agosto v. Am. Constr. Assocs.*, OATH Index No. 1964/15, Am. Dec. & Order, 2017 WL 1335244, at *2 (Apr. 5, 2017); *In re Comm’n on Human Rights v. A Nanny on the Net*, OATH Index Nos. 1364/14 & 1365/14, Dec. & Order, 2017 WL 694027, at *2 (Feb. 10, 2017); *In re Comm’n on Human Rights ex rel. Spitzer v. Dahbi*, OATH Index No. 883/15, Dec. & Order, 2016 WL 7106071, at *2 (July 7, 2016); *In re Comm’n on Human*

Rights v. CU 29 Copper Rest. & Bar, OATH Index No. 647/15, Dec. & Order, 2015 WL 7260570, at *2 (Oct. 28, 2015). The Commission is also tasked with the responsibility of interpreting the NYCHRL and ensuring the law is correctly applied to the facts. *See Spitzer*, 2016 WL 7106071, at *2; *In re Comm'n on Human Rights ex rel. Howe v. Best Apartments, Inc.*, OATH Index No. 2602/14, 2016 WL 1050864, at *2 (Mar. 14, 2016); *In re Comm'n on Human Rights v. Crazy Asylum*, OATH Index Nos. 2262/13, 2263/13 & 2264/13, 2015 WL 7260568, at *3 (Oct. 28, 2015). 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.” *N.Y.C. Comm'n on Human Rights v. Ancient Order of Hibernians in Am., Inc.*, Compl. No. MPA-0362, Dec. & Order, 1992 WL 814982, at *1 (Oct. 27, 1992); *see also In re Cutri v. N.Y.C. Comm'n on Human Rights*, 113 A.D.3d 608, 609 (2d Dep’t 2014) (“As the Commission bears responsibility for rendering the ultimate determination, it was not required to adopt the recommendation of the Administrative Law Judge assigned to the proceeding . . .”); *In re Orlic v. Gatling*, 44 A.D.3d 955, 957 (2d Dep’t 2007) (“it is the Commission, not the Administrative Law Judge, that bears responsibility for rendering the ultimate factual determinations”).

When parties submit comments, replies, or objections to a report and recommendation pursuant to 47 RCNY § 1-76, the Commission must review the comments, replies, or objections in the context of the Commission’s other factual determinations and conclusions of law. The Commission reviews a report and recommendation and the parties’ comments and objections *de novo* as to findings of fact and conclusions of law. *In re Comm'n on Human Rights ex rel. Stamm v. E&E Bagels*, OATH Index No. 803/14, Dec. & Order, 2016 WL 1644879, at *2

(Apr. 20, 2016); *Howe*, 2016 WL 1050864, at *3; *CU 29 Copper Rest. & Bar*, 2015 WL 7260570, at *2.

II. HEARING TESTIMONY AND EVIDENCE

The facts of the case are undisputed, in light of Respondent's deemed admission of allegations in the Complaint and his failure to challenge the evidence offered by the Bureau during the hearing. *See* N.Y.C. Admin. Code § 8-111(c) ("Any allegation in the complaint not specifically denied or explained shall be deemed admitted and shall be so found by the commission unless good cause to the contrary is shown."). Respondent is an employer with at least 15 employees. (Bureau Ex. 1(C) ¶ 2.) On or about July 29, 2014, Respondent posted the following ad on Craigslist:

Waitress with barista experience as well (Brooklyn)

Hello !

We are a small 25 seating restaurant in brooklyn. We are looking for experienced waitress who can make cappucinno and has general barista experience as well. We appreciate a team player who has a positive energy. Please be dependable . We cannot hire all applicants. But will be happy to call you when further need arises. Please forward your resume with contact details and availability. Do not send the resume as attached files. All the best in your endeavors.

Sebastian. Rozario

(Bureau Ex. 4 (sic); *see also* Bureau Ex. 1(B).) After the Bureau served the Complaint, a Bureau attorney attempted to speak with Respondent by phone. (Bureau Ex. 1 ¶¶ 9-10.) Respondent stated that he did not believe he had done anything wrong, then hung up the phone, and did not return the Bureau attorney's subsequent call or respond to any of the legal notices that the Bureau served on him. (*Id.* & Bureau Ex. 2 at 2-3.)

III. DISCUSSION

A. Legal Standard

The NYCHRL expressly provides that it “shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of [the NYCHRL] have been so construed.” N.Y.C. Admin. Code § 8-130. Pursuant to the Local Civil Rights Restoration Act of 2005, “[i]nterpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of the New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a floor below which the City’s Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.” Local Law No. 85 (2005); *see also* Local Law No. 35 (2016); *Albunio v. City of N.Y.*, 23 N.Y.3d 65, 73 (2014) (“the New York City Council’s 2005 amendment to the NYCHRL was, in part, an effort to emphasize the broader remedial scope of the NYCHRL in comparison with its state and federal counterparts and, therefore, to curtail courts’ reliance on case law interpreting textually analogous state and federal statutes”).

B. 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, directly or indirectly, to a specific gender are *per se* violations of the NYCHRL. *Crazy Asylum*, 2015 WL 7260568, at *8; *CU 29 Copper Rest. & Bar*, 2015 WL

7260570, at *3. It is undisputed that Respondent is an employer and posted a job advertisement on or about July 29, 2014, containing an indirect gender-based limitation that invited applications for a “waitress” position. *See Crazy Asylum*, 2015 WL 7260568, at *4; *see also Waitress*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/waitress> (last visited Jun. 21, 2017) (“a woman who waits tables (as in a restaurant)”). The Commission therefore holds that Respondent engaged in an unlawful discriminatory practice under the NYCHRL and is liable for that *per se* violation of the statute.

IV. CIVIL PENALTIES AND REMEDIAL ACTION

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 action as, in the judgment of the commission, will effectuate the purposes of” the NYCHRL. N.Y.C. Admin. Code § 8-120(a). The Commission may also award damages to persons aggrieved by violations of the law, including complainants. *See id.* § 8-120(a)(8). However, because there is no complainant in this case, damages are not at issue. The Commission may also impose civil penalties of not more than \$125,000.00, unless the “unlawful discriminatory practice was the result of the respondent’s willful, wanton or malicious act,” in which case a civil penalty of not more than \$250,000.00 may be imposed. *Id.* § 8-126(a); *see In re Comm’n on Human Rights ex rel. Cardenas v. Automatic Meter Reading Corp.*, OATH Index No. 1240/13, Dec. & Order, 2015 WL 7260567, at *15 (Oct. 28, 2015) (finding \$250,000.00 civil penalty appropriate where respondent engaged in willful and wanton sexual harassment over a three-year period). Civil penalties are paid to the general fund of the City of New York. N.Y.C. Admin. Code § 8-127(a).

In assessing whether the imposition of civil penalties will vindicate the public interest, 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. *See, e.g., CU 29 Copper Rest. & Bar*, 2015 WL 7260570, at *4. The Commission also considers the extent to which respondents cooperated with the Bureau's investigation and with OATH, *see, e.g., Cardenas*, 2015 WL 7260567, at *15; *Howe*, 2016 WL 1050864, at *8; *Crazy Asylum*, 2015 WL 7260568, at *6, as well as the amount of remedial action that respondents may have already undertaken, *see, e.g., CU 29 Copper Rest. & Bar*, 2015 WL 7260570, at *4 (holding "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").

In a case such as this, civil penalties would likely not have been necessary had Respondent cooperated with the administrative investigation and hearing processes. Indeed, in recent years, the New York City Commission on Human Rights has revised its approach to cases involving unlawful postings. Instead of allocating valuable public resources to litigation, the New York City Commission on Human Rights is reaching out to small, unsophisticated potential respondents who appear to be unfamiliar with the NYCHRL and educating them about their obligations under the law. This approach recognizes that greater impact can often be achieved by focusing on changing behavior, rather than simply imposing penalties.

Here, Respondent appears to be a small actor and there is no evidence in the record to suggest that he runs any businesses other than the one restaurant referenced in his ad. *Contrast Crazy Asylum*, 2015 WL 7260568, at *6 (imposing \$10,000.00 fine where Respondents were

large, sophisticated businesses with seven high-end restaurants); *Comm'n on Human Rights v. Shalom Bombay 2 LLC*, OATH Index No.: 544/15, Dec. & Order (June 21, 2017) (imposing \$1,000.00 fine where Respondents had three separate corporations). Civil penalties generally do not serve the public interest if they 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 business.” *CU 29 Copper Rest. & Bar*, 2015 WL 7260570, at *4.

The Commission finds that a minor civil penalty is warranted here primarily because of the important public interest in ensuring cooperation with the Commission’s administrative investigation and hearing processes. *See Agosto*, 2017 WL 1335244, at *11; *Howe*, 2016 WL 1050864, at *8. A refusal to take the administrative process seriously “militates in favor of a higher penalty because it is in the public interest to have individuals respond and participate in a process designed to cure discriminatory practices.” *Howe*, 2016 WL 1050864, at *8 (internal quotes omitted). Solely because of his failure to cooperate in this case, Respondent is required to pay a civil penalty of \$500.00. In addition, Respondent is required to complete training on the NYCHRL to ensure that he is knowledgeable about his ongoing obligations under the NYCHRL. *See, e.g., Agosto*, 2017 WL 1335244, at *13; *Spitzer*, 2016 WL 7106071, at *10; *In re Comm'n on Human Rights ex rel. Jordan v. Raza*, OATH Index No. 716/15, 2016 WL 7106070, at *11 (July 7, 2016). Furthermore, the Commission finds that it effectuates the purposes of the NYCHRL to facilitate public awareness of the law by requiring Respondent to post a notice of rights under the NYCHRL in his place of business. *See Agosto*, 2017 WL 1335244, at *13; *Crazy Asylum*, 2015 WL 7260568, at *7.

V. CONCLUSION

FOR THE REASONS DISCUSSED HEREIN, IT IS HEREBY ORDERED that Respondent immediately cease and desist from engaging in discriminatory conduct.

IT IS FURTHER ORDERED that no later than 30 calendar days after service of this Order, Respondent pay a fine of \$500.00 to the City of New York, by sending to the New York City Commission on Human Rights, 22 Reade Street, New York, New York 10007, Attn: Recoveries, a bank certified or business check made payable to the City of New York, including a written reference to OATH Index No. 1273/15.

IT IS FURTHER ORDERED that no later than 60 calendar days after service of this Order, Respondent attend a Commission-led training on the NYCHRL. A schedule of available trainings may be obtained by calling the Director of Training and Development at (212) 416-0193 or emailing trainings@cchr.nyc.gov.

IT IS FURTHER ORDERED that within 30 calendar days of service of this Order, and for a period of no less than two (2) years Respondent post, in a location conspicuous to current and prospective employees, a copy of the Notice of Rights available at http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/CCHR_NoticeOfRights2.pdf.

Failure to timely comply with any of the foregoing provisions shall constitute non-compliance with a Commission Order. In addition to any civil penalties that may be assessed against Respondent, Respondent shall pay a civil penalty of \$100.00 per day for every day the violation continues. N.Y.C. Admin. Code § 8-124. Furthermore, failure to abide by this Order may result in criminal penalties. *Id.* at § 8-129.

Dated: New York, New York
June 21, 2017

SO ORDERED:
New York City Commission on Human Rights

Carmelyn P. Malalis
Commissioner/Chair

To:

Law Enforcement Bureau

Hollis Pfitsch, Esq.

Deputy Commissioner, Law Enforcement Bureau

New York City Commission on Human Rights

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Respondent

Mr. Sebastian Rozario

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