

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-

SHALOM BOMBAY 2 LLC, ALAN
COHNEN, and RAPHAEL GASNER,

Respondents.

Complaint No. M-E-NR-14-1029500-E
Federal Charge No. 16F-2014-00072C
OATH Index No. 544/15

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DECISION AND ORDER

The Law Enforcement Bureau of the New York City Commission on Human Rights (“Bureau”) commenced this employment discrimination case on December 11, 2013. (ALJ Ex. 1.) On May 27, 2014, the Bureau filed a verified amended complaint (“Amended Complaint”), alleging that Respondents Shalom Bombay 2 LLC (“Shalom Bombay 2”), Raphael Gasner, and Alan Cohnen (collectively, “Respondents”) published an advertisement for employment that expressed a limitation based on race and national origin, in violation of § 8-107(1)(d) of the New York City Human Rights Law (“NYCHRL”), codified as N.Y.C. Admin. Code tit. 8. (ALJ Ex. 2.) Specifically, the Amended Complaint alleges that Respondents placed an advertisement on the website Craigslist.org (“Craigslist”), seeking an “Indian” waiter or waitress for a restaurant in New York City. (*Id.* at ¶ 5.)

The Bureau issued a Notice of Probable Cause Determination on August 29, 2014 and, on September 5, 2014, referred the case to the Office of Administrative Trials and Hearings (“OATH”). (ALJ Exs. 3 & 4.) Respondents never appeared in the case or filed any submissions, despite the Bureau’s multiple telephone conversations with Respondent Gasner in August and

September of 2014 and repeated warnings that Respondents must file an answer. (Bureau Ex. 3 at ¶¶ 13-24.) After Respondents failed to attend a conference at OATH on November 6, 2014, the Bureau filed a motion on December 18, 2014, seeking to hold Respondents in default and to preclude them from participating in further OATH proceedings. (Bureau Ex. 3(J).)

Administrative Law Judge (“ALJ”) Kevin F. Casey issued a memorandum decision on January 5, 2015, granting the Bureau’s motion pursuant to § 2-27 of OATH rules. (Bureau Ex. 3(K)); 48 RCNY § 2-27. Respondents did not move to vacate the default and did not appear at the inquest hearing held at OATH on April 15, 2015. *In re Comm’n on Human Rights v. Shalom Bombay 2 LLC*, OATH Index No. 544/15, report & recommendation (“R&R”), 2015 WL 2359658, at *1 (Apr. 23, 2015).

Following the hearing, Judge Casey issued a report and recommendation on April 23, 2015 (“the Report and Recommendation”), recommending that the Office of the Chairperson of the Commission on Human Rights (“Commission”): (i) hold Respondents liable for discrimination in violation of § 8-107(1)(d) of the NYCHRL; (ii) impose a civil penalty of \$5,000.00; and (iii) require Respondents and their management and hiring staff to undergo anti-discrimination training. *Id.* at *3. 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 submitted during the hearing, the Commission adopts the Report and Recommendation’s finding of liability and, as relief, orders that Respondents pay a fine of \$1,000.00, participate in a Commission-led training on the NYCHRL, and post a notice of rights in their New York City restaurants.

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 Respondents’ deemed admission of the allegations in the Amended Complaint and their 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.”). During the relevant period, Respondents Gasner and Cohnen were owners and/or managers of Shalom Bombay 2, an Indian restaurant in Midtown Manhattan. (ALJ Ex. 2 at ¶¶ 2-4). They employed at least 15 employees. (ALJ Ex. 2 at ¶¶ 2-4).

On or about October 28, 2013, Respondent Cohnen posted an advertisement on the New York City jobs section of Craigslist, seeking an “Experienced Indian Waiter or Waitress.” (Bureau Exs. 1, 3(A) & 3(D); ALJ Ex. 2 at ¶ 5; Hearing Tr. (“Tr.”) at 9:15.) The ad stated “ask for Rafi” and listed the email address “shalombombay@yahoo.com” and the same phone number that appeared on the website of Shalom Bombay 2. (ALJ Ex. 2 at ¶ 6; Bureau Ex. 1 & Ex. 3(B); Tr. at 10:23-24.) Records from the New York Department of State listed Respondent Gasner as the person designated to receive legal service on behalf of Shalom Bombay 2. (Bureau Ex. 3(A).)

On or about October 30, 2013, a Commission tester responded to Respondents’ Craigslist ad under the names Stephanie Canales and George Harris. (Bureau Ex. 2; Tr. at 9:2-3.) Using an email add-on that confirms when an email has been opened by the recipient, the tester confirmed that both emails were opened. (Bureau Ex. 2.) However, the tester did not receive a response to either job application. (*Id.*)

Documentary evidence submitted by the Bureau indicates that, in addition to Shalom Bombay 2, Respondent Gasner owned at least two other businesses in New Jersey in 2014. (Bureau Ex. 3(A).) In September 2014, Respondent Gasner advised a Bureau attorney that he had retained counsel in the case, though no attorney ever appeared on Respondents’ behalf. (*See* Bureau Ex. 3 at ¶ 18.)

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 an employee 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 . . . race . . . [or] national origin . . .

N.Y.C. Admin. Code § 8-107(1)(d). Therefore, employers’ job postings and advertisements limiting positions, directly or indirectly, to a specific race or national origin are *per se* violations of the NYCHRL. *See Crazy Asylum*, 2015 WL 7260568, at *8; *CU 29 Copper Rest. & Bar*, 2015 WL 7260570, at *3. It is undisputed that Respondents are employers and posted a job advertisement on October 28, 2013, inviting applications for an “Indian” wait staff person, thereby expressing a direct limitation based on race and national origin. Accordingly, the Commission holds that Respondents engaged in an unlawful discriminatory practice under the NYCHRL and are 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 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 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. Nonetheless, civil penalties remain an important remedy in cases such as this where respondents appear to have some degree of sophistication and have refused to cooperate with the

administrative investigation and hearing processes, despite the Bureau's repeated efforts to engage them in the process.

A. Civil Penalties

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").

The evidence in this case concerning the size of Respondents' business and their financial resources is limited, in part because of Respondents' failure to cooperate during the investigative process. The ad at issue in this case stated that wait staff receive "Great Tips" (Bureau Ex. 2), suggesting that Shalom Bombay 2 was turning over a fair amount of business during the relevant period. In addition, at the time of the hearing, Respondent Gasner owned at least three separate corporations, including Shalom Bombay 2 and two other businesses in New Jersey. However, there is no evidence in the record about the size or resources of either of those corporations. As for Respondents' ability to retain counsel, Respondent Gasner specifically told a Bureau attorney

that he hired an attorney to represent him in the case. Collectively, these facts suggest that Respondents operated a moderately-sized business enterprise, warranting moderate civil penalties. *See Howe*, 2016 WL 1050864, at *8; *Crazy Asylum*, 2015 WL 7260568, at *5. *Contrast Comm'n on Human Rights v. Rozario*, OATH Index No.: 1273/15, Dec. & Order (June 21, 2017).

Respondents' failure to cooperate with the Bureau investigation and to participate in the OATH hearing process necessitates the imposition of civil penalties "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); *see also Agosto*, 2017 WL 1335244, at *11.

In a recent case, *Crazy Asylum*, the Commission fined respondents \$10,000.00 for publishing a discriminatory job posting. *Crazy Asylum*, 2015 WL 7260568, at *6. As in this case, the respondents in *Crazy Asylum* failed to cooperate with the administrative investigation. *Id.* at *5-6. However, in that case, the record revealed a much larger business enterprise than is supported by the record in this case. The respondents in *Crazy Asylum* ran seven high-end restaurants in New York City, compared to the three businesses of unknown size held by Respondents in this case. *Id.* at *6. Significantly, the respondents in *Crazy Asylum* were also found to have published a new discriminatory ad, even after being served with a Bureau complaint regarding the same type of discriminatory conduct, thus demonstrating contempt for the law and necessitating a robust civil penalty to deter future violations. *Id.* Based on these considerations, the Commission requires that Respondents in this case pay a civil penalty of \$1,000.00.

B. Remedial Action

The Commission requires that Respondents Gasner and Cohnen and their managerial staff in New York City complete training on the NYCHRL to ensure that they are knowledgeable about their 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). 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 each of their places of business within New York City. *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 Respondents 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, Respondents pay a fine of \$1,000.00 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. 544/15.

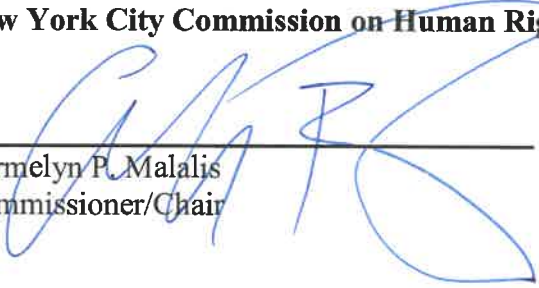
IT IS FURTHER ORDERED that no later than 60 calendar days after service of this Order, Respondents Gasner and Cohnen, and all of their managerial staff in New York City attend a Commission-led training on the NYCHRL. A schedule of available trainings may be obtained by calling the Director of Training 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, Respondents post, in a location conspicuous to current and prospective employees in New York City, 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 Respondents, Respondents shall pay a fine 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

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Deputy Commissioner, Law Enforcement Bureau

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