CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS

----------x

In the Matter of

COMMISSION ON HUMAN RIGHTS,

Petitioner,

-against-

CRAZY ASYLUM, LLC, CROWN GROUP HOSPITALITY, LLC, and THE WINDSOR,

Respondents.

----------x

Complaint No. M-E-S-11-1025573

OATH Index Nos.
2262/13, 2263/13 and 2264/13

DECISION AND ORDER

The Law Enforcement Bureau of the New York City Commission on Human Rights (the "Bureau") initiated this employment discrimination action on July 29, 2011, against Respondents Crazy Asylum, LLC ("Crazy Asylum"), Crown Group Hospitality LLC ("Crown Group") and The Windsor (collectively, "Respondents") 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 served the Complaint on Respondents on August 8, 2011, alleging that on May 25, 2011, Respondents posted an employment advertisement on the craigslist.org website seeking "waitresses," thereby expressing an unlawful gender-based limitation, in violation of NYCHRL Section 8-107(1)(d).

After serving the Complaint, the Bureau contacted Respondents no less than five times to inform them of their obligation under the NYCHRL and Commission Rules to respond to the Complaint – and extended the time for Respondents to file an answer by 18 months – before moving to find Respondents in default two years later, in September 2013. During that time,

however, Respondents posted another discriminatory employment advertisement on craigslist.org on December 10, 2012, which again expressed an unlawful gender-based limitation similar to the one identified in the Bureau's July 2011 Complaint.

Throughout this action, Respondents have displayed a complete disregard for not only the NYCHRL, but also the rules of the Commission and orders of the administrative law judge, which serve to effectuate the purposes of the NYCHRL. The following timeline of the proceedings evinces Respondents' recalcitrance.

Respondents were served with the Complaint on August 8, 2011. On September 1, 2011, an attorney from the Bureau called and spoke with Respondents' representative, notifying her of the September 7, 2011 deadline to submit an answer as per NYCHRL Section 8-111(a) and 47 RCNY 1-14(a). *Comm'n on Human Rts. v. Crazy Asylum LLC*, OATH 2262/13, 2263/13, 2264/13, Mem. Dec. (Oct. 1, 2013) ("*Crazy Asylum I*") at 2. On February 7, 2013, the Bureau sent Respondents a letter extending the time to answer the Complaint to March 8, 2013. *Id.* at 2-3. On April 25, 2013, the Bureau emailed Respondents, following up on a phone call, to inform them that the Bureau had still not received an answer. *Id.* at 3.

On May 22, 2013, after nearly two years of the Respondents ignoring the Commission rule requiring them to file an answer, the Bureau served Respondents with notice that it referred the case to OATH for trial. (Law Enforcement Bureau Comments to Judge Spooner's Report and Recommendation, dated May 15, 2014 (Bureau Comments) at 2.) Respondents first appeared in this case on June 19, 2013, represented by counsel at a pre-trial conference at OATH. *Crazy Asylum I* at 1. At the conference, Respondents were warned that their failure to file an answer pursuant to NYCHRL Section 8-111(a) and 47 RCNY 1-14(a) would result in a

finding of default and would preclude Respondents' participation at trial, which was set for September 10, 2013. *Id.*

On September 5, 2013, Judge Spooner held a telephonic conference with the parties. During that conference, the Bureau requested an adjournment of the September 10, 2013 trial to allow the Bureau to file a motion for a default judgment against the Respondents for flouting NYCHRL Section 8-111(a) and 47 RCNY 1-14(a) and failing to file an answer. *Id.* Judge Spooner granted the Bureau's request orally at the conference. *Id.* at 2. The following day, the Bureau moved for a default judgment against Respondents, to admit as true the allegations in the Complaint, and to preclude Respondents from filing any answer or otherwise participating in further proceedings. *Id.* That same day, Respondents' counsel filed a letter opposing the motion, which included a general denial of nearly all of the facts in the Complaint, and attached a document purporting to be an answer pursuant to NYCHRL Section 8-111(a) and 47 RCNY 1-14(a). The document listed Respondents' purported affirmative defenses to the Bureau's allegations, based on the First Amendment of the U.S. Constitution and the Bureau's failure to state a claim. *Id.*

On October 1, 2013, Judge Spooner issued a Memorandum Decision, not subject to review by the Commission, granting the Bureau's motion for default judgment and ordering Respondents to file any motion to vacate the default "no later than October 7, 2013." *Id.* at 4-5. October 7, 2013 passed without any filings or requests from Respondents. On October 9, 2013, Respondents filed a motion to vacate the default without any explanation for flouting Judge Spooner's deadline and filing their motion late. *Comm'n on Human Rts. v. Crazy Asylum LLC*, OATH 2262/13, 2263/13, 2264/13, Mem. Dec. (Nov. 6, 2013) at 1-2. In their submission, Respondents sought to have Judge Spooner accept for filing the answer dated September 6, 2013.

Id. On October 21, 2013, the Bureau filed an opposition to Respondents' motion. *Id.* at 2. On November 6, 2013, Judge Spooner issued a Memorandum Decision – also not subject to the Commission's review – denying Respondents' motion to vacate the default judgment, rejecting Respondents' purported answer as untimely, and precluding Respondents' further participation in the proceeding. *Id.* at 4-5. Instead of proceeding to trial, the Bureau moved for summary judgment on December 12, 2013. Due to the default, Respondents were precluded from opposing the Bureau's motion. *Id.* at 5.

On January 30, 2014, Judge Spooner issued a Report and Recommendation, which is the subject of the Commission's review. Judge Spooner recommended (1) dismissing Respondent Crazy Asylum; (2) finding that Respondents Crown Group and The Windsor violated Section 8-107(1)(d) of the NYCHRL by posting its May 25, 2011 job advertisement indicating an unlawful limitation on potential employees as to gender; and (3) ordering (i) a civil penalty of $5,000 against Respondents; and (ii) training for Respondents' staff on the NYCHRL. (Report and Recommendation (R&R) at 3, 6, 9.)

The parties had the right to submit written comments and objections to the Report and Recommendation for consideration by the Office of the Chairperson of the Commission on Human Rights (the "Commission") in issuing the final decision and order in the case. Respondents submitted written comments on February 18, 2014, asserting that "waitress" was used in the "generic sense...without intent to discriminate," and claiming that Respondents are being denied their "day in court." (Respondents' Comments to Judge Spooner's Report and Recommendation, dated February 18, 2014 (Resp'ts Comments) at 1-2.)[1] The Bureau submitted

[1] Respondents also commented on the Bureau's use of testers, which followed Respondents' May 2011 advertisement. Had the Bureau pursued a claim of discrimination in hiring, facts regarding the testing may be relevant to the Commission's inquiry. (Resp'ts

written comments on May 15, 2014, requesting that the Commission affirm Judge Spooner's finding that Respondents violated NYCHRL Section 8-107(1)(d) and seeking a $10,000 civil penalty. (Bureau Comments at 3.)

The Commission has reviewed the Bureau's motion for summary judgment, Judge Spooner's Report and Recommendation, and the parties' 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 applied correctly to the facts. *Politis*, OATH 1673/11, 1674/11, at 8

Comments at 1-2.) However, the only claim presented to the Commission is a claim under Section 8-107(1)(d) of the NYCHRL. Any facts related to the Bureau's use of testers is, therefore, irrelevant to the Commission's review.

(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 (N.Y. 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 as admitted by the parties and/or not contested in the parties' summary judgment papers or comments to the Report and Recommendation. On May 25, 2011, Respondents posted an advertisement on craigslist.org with the caption "Open Call for Waitresses," and text stating "The Windsor an Upscale West Village Restaurant and Bar seeks experienced and driven individual for waitress position." (Bureau's Affirmation in Support of Motion for Summary Judgment (Bureau Aff.), Ex. A.) On December 10, 2012, Respondents posted another employment advertisement on craigslist.org for a "Hostess" who could "wear heels." (Bureau Aff. at 3; Ex. D.) Respondent Crown Group is, according to its website, a Manhattan-based restaurant management firm which "creates, curates, owns, and operates renowned eateries across New York[.]" (*Id.* at 2.) Respondent Windsor is one of its seven restaurants. (*Id.*)

III. CONCLUSIONS OF LAW

A. Claims Against Respondent Crazy Asylum

In his Report and Recommendation, Judge Spooner recommends dismissing the charges against Crazy Asylum because the Bureau failed to put forth any allegations that Crazy Asylum posted the advertisement or is related to either Crown Group Hospitality or The Windsor. (R&R at 3.) In its comments to the Report and Recommendation, the Bureau does not object to such dismissal. Therefore, all claims against Respondent Crazy Asylum are dismissed with prejudice.

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. It is undisputed that Respondents posted the May 25, 2011 job advertisement containing an indirect gender-based limitation, holding an open call for a "waitress" position; therefore, it is also undisputed that Respondents have engaged in an unlawful discriminatory practice under the NYCHRL and are liable for that *per se* violation of the statute.

The Bureau also seeks to hold Respondents Crown Group and The Windsor liable under Section 8-107(1)(d) of the NYCHRL for posting an advertisement for "hostess" on craiglist.org on December 10, 2012. (Bureau Aff. at 3; Ex. D.) Judge Spooner determined that because the second advertisement was not pled in the Complaint, it is beyond the scope of the Bureau's motion and cannot be considered. (R&R at 4-5.) The Commission agrees with Judge Spooner

that the Commission cannot consider the December 2012 advertisement as a separate violation of the statute for purposes of liability because the Bureau did not include that claim in the Complaint or amend the Complaint to add that claim. 47 RCNY § 1-11(c)(3). However, the Commission may consider the December 2012 advertisement as "relevant background information," in considering remedial action and/or penalties. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 112 (2002).

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(a). 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). 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). Civil penalties are paid to the general fund of the City of New York. *Id.* § 8-127(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 all of 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). The Commission also finds that it effectuates the purposes of the NYCHRL to create continued knowledge and awareness of the NYCHRL by respondents, their employees, and the public they serve by posting a notice of rights under the NYCHRL in respondents' places of business. *Comm'n on Human Rts. v. CU29 Copper Rest. & Bar*, OATH 647/15, Dec. & Ord. (Oct. 29, 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 the NYCHRL 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. Here, it is undisputed that Respondents are a Manhattan-based restaurant management corporation that owns and oversees the operations of seven high-end restaurants across New York City. (Bureau Aff. at 2.) Therefore, Respondents have ample financial resources and are a sophisticated business enterprise of significant size. These factors weigh in favor of a civil penalty. Further, Respondents were represented by counsel throughout the proceedings described above. Given Respondents' size, resources, sophistication, and ability to retain counsel, Respondents knew or should have known that the advertisement was a *per se* violation of the NYCHRL. Indeed, none of the evidence before the Commission indicates anything to the contrary.

In assessing the impact on the public of issuing civil penalties, the Commission considers whether a civil penalty is necessary to deter respondents from future violations of the NYCHRL. *See Capitol Records, Inc. v. MP3tunes, LLC*, 48 F. Supp. 3d 703, 728 (S.D.N.Y. 2014) (it is the tribunal's task "to make certain that the [civil penalties] are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." (internal quotation marks and citations omitted)). Though the Commission is not considering Respondents' December 2012 advertisement for purposes of finding a separate violation of the NYCHRL, the Commission can consider it for purposes of assessing whether a civil penalty is necessary for deterrence of future violations of the law. It appears that Respondents were not sufficiently deterred from posting another advertisement indicating a limitation on gender even *after* they had received the Bureau's Complaint specifying a similar claim. Respondents have not denied posting the May 25, 2011 ad and have not offered any evidence suggesting that they plan to cease and desist from posting other such ads in the future. (Resp'ts Comments at 1-2.) Considering these facts, the Commission finds that civil penalties are necessary to deter Respondents from future violations of the NYCHRL.

In assessing the appropriate amount of civil penalties to be levied, the Commission can consider the resources of the respondents, as well as their conduct during the course of the proceedings. *See Norris*, 2009 WL 82556, at *20 n.2 ("one purpose of punitive damages is deterrence, and that deterrence is directly related to what people can afford to pay." (citing *Lee*, 101 F.3d at 813)). Civil penalties are intended to deter future unlawful conduct, but civil penalties as a form of deterrence are only effective if the amount of the penalty reflects the size and financial resources of the respondent. *See id.* Therefore, in determining the appropriate amount of a civil penalty in situations where the respondent has committed a *per se* violation of

the NYCHRL by posting a discriminatory job advertisement, the Commission will consider the respondent's size and financial resources. As stated above, Respondents are a Manhattan-based restaurant management corporation that owns and oversees the operations of seven high-end restaurants across New York City. As such, Respondents have ample financial resources and the ability to retain counsel to advise them on how to comply with the law and to provide adequate representation through this process.

By their own description on their website, Respondents are sophisticated businesses and undoubtedly have the resources to address the claims made by the Bureau, either by taking quick remedial action or by properly engaging in the Commission process. They did neither. Respondents' failure to respond to the Commission's attempts to investigate the complaint further supports civil penalties. *See Comm'n on Human Rights ex rel. Alvarez v. Gerardo's Transp.*, OATH 2045/09, R&R, *adopted*, Dec. & Ord. (Aug. 12, 2009) at 9 ("Because it is in the public interest to have individuals respond and participate in a process designed to cure discriminatory practices," the failure of a respondent to cooperate with the Commission may be considered an aggravating factor). Respondents' steadfast refusal to take this process seriously – by flouting Commission procedures requiring the filing of an answer to the Complaint, and ignoring Judge Spooner's order setting a deadline for filing their motion to vacate without any explanation for the delay – militates in favor of a higher penalty. Here, the Commission finds that a civil penalty of $10,000 is appropriate.

For the reasons identified above, the Commission can vindicate the public interest by mandating that Respondents pay a civil penalty that is proportional to their size and resources; attend a training on the NYCHRL; and post a notice of rights in a conspicuous location in Respondents' business. Accordingly,

IT IS HEREBY ORDERED, that all claims against Respondent Crazy Asylum are dismissed with prejudice;

IT IS HEREBY ORDERED, that Respondents Crown Group and The Windsor immediately cease and desist from posting job advertisements containing direct or indirect gender-based limitations;

IT IS HEREBY ORDERED, that no later than thirty (30) calendar days after service of this Order, Respondents Crown Group and The Windsor pay a fine of $10,000 to the general fund of the City of New York; and

IT IS FURTHER ORDERED, that no later than sixty (60) calendar days after service of this Order, Respondents Crown Group and The Windsor's human resources personnel, supervisors, and any other individuals with hire and fire authority or tasked with the responsibility of approving job advertisements attend a training on the NYCHRL at the expense of Respondents Crown Group and The Windsor, and provide proof of attendance at the training in a form to be provided by the Bureau;

IT IS FURTHER ORDERED, that no later than thirty (30) calendar days after service of this Order, Respondents post a notice of rights, in a form to be provided by the Bureau, in a conspicuous location at The Windsor 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

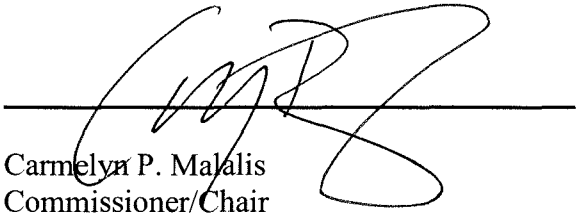
assessed against Respondents, Respondents shall pay a civil penalty of one hundred (100) dollars per day for every day the violation continues. N.Y.C. Admin. Code § 8-124.

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