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-

AYHAN AKSOY,

Respondent.

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Complaint No. M-E-NS-14-1030965
Federal Charge No. 16F-2014-00333C
OATH Index No. 1617/15

DECISION AND ORDER

On September 17, 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 Ayhan Aksoy published an advertisement for employment expressing a limitation based on gender and national origin, in violation of § 8-107(1)(d) of the NYCHRL. (ALJ Ex. 1.)[1] Specifically, the Complaint alleges that Respondent posted an advertisement on the website Craigslist.org ("Craigslist"), seeking "2 full-time Eastern European waitresses and a female bartender/phone person" for a restaurant on the Upper East Side of Manhattan. (*Id.* at ¶ 4.)

The *pro se* Respondent filed a verified answer and position statement dated November 18, 2014, arguing, among other things, that he is not an employer within the meaning of the NYCHRL and that the ad that he posted on Craigslist "was not for [himself] or any business [he]

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[1] The Complaint originally named two respondents, Ayhan Aksoy and John Aksoy. The caption was subsequently amended to reflect the fact that Ayhan and "John" Aksoy are the same person. *See In re Comm'n on Human Rights v. Aksoy*, OATH Index No. 1617/15, report & recommendation ("R&R"), 2015 WL 5471443, at *1 n.1 (Aug. 24, 2015).

[is] associated with in any way." (Bureau Ex. 6 at 3.) On January 16, 2015, the Bureau issued a Notice of Probable Cause Determination and of Intention to Proceed to Public Hearing. (ALJ Ex. 1.) A hearing was held on August 6, 2015, before Administrative Law Judge ("ALJ") Kevin F. Casey at the Office of Administrative Trials and Hearings ("OATH"). (Hearing Tr. ("Tr.") at 4:11-12.) At the hearing, Judge Casey granted the Bureau's motion to amend the Complaint to add a theory of liability based on Respondent being an agent of an employer, in addition to its original theory that Respondent is himself an employer. (Tr. at 5:1-8:17.) Based on the evidence presented, Judge Casey issued a report and recommendation dated August 24, 2015 ("the Report and Recommendation"), recommending that the Office of the Chairperson of the Commission on Human Rights ("Commission") hold Respondent liable for discrimination under § 8-107(1)(d) of the NYCHRL and impose a civil penalty of $5,000.00. *Aksoy*, 2015 WL 5471443, at *5. Respondent submitted a letter to the Commission dated October 8, 2015, setting forth comments to the Report and Recommendation. *See* 47 RCNY § 1-76. The Bureau waived its right to submit comments in this case. (Bureau letter to Comm'n dated Oct. 2, 2015.)

After reviewing the Report and Recommendation, the hearing transcript, the evidence submitted during the hearing, and Respondent's comments on the Report and Recommendation, the Commission concludes that the record does not support a finding of liability and dismisses the claims against Respondent.

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

For purposes of this Decision and Order, familiarity with the facts described in the Report and Recommendation is assumed. During the hearing, the Bureau presented documentary evidence and testimony from Respondent and the tester from the New York City Commission on Human Rights who found the Craigslist ad at issue in the case. Respondent also submitted documentary evidence and testified on his own behalf.

Respondent is a computer scientist. (Tr. at 56:4-7.) He admits that on or about August 3, 2014, he posted an ad seeking "2 full-time Eastern European waitresses for our very busy family-style restaurant," that stated "We prefer Eastern-European candidates . . . because most of our customers are from the same region." (*Id.* at 31:9-14; Resp't's Ex. A at 2.) He also admits that about one week later, on August 13, 2013, he posted a second ad, "seeking 2 full-time Eastern European waitresses and a female bartender/phone person for the night shifts" and expressing a preference for "Eastern-European (Polish, Romanian, Russian, Bulgarian, Kazakh, Uzbek, etc.) candidates." (Tr. 31:9-14; Bureau Ex. 1; *see also* Resp't's Ex. A at 1.) It is the second of these ads that is the subject of the Complaint. (ALJ Ex. 1.)

Respondent asserts that he posted the ads on behalf of an acquaintance, Sadrjoun,[2] who frequented the same restaurant as Respondent and with whom he had developed a conversational relationship. (*See* Tr. at 29:4-6, 30:4-5, 33:10-34:17.) Respondent testified that Sadrjoun told him he worked as the manager of a different restaurant and needed two new employees – a bartender and a wait staffer. (*Id.* at 41:24-25, 43:4-5.)[3] He stated that Sadrjoun had not intended to limit new hires based on gender or national origin, but rather had hoped to diversify his all-male staff and to hire Russian-speaking staff. (*Id.* at 10: 22-11:3, 49:12-13.) Because Respondent was not working at the time, he volunteered, as a favor, to place a job posting for Sadrjoun and to forward any responses he received. (*Id.* at 10:21-22, 28:18-23, 40:24-41:4; *see also* Bureau Ex. 6 at 3.) Respondent insists that he never went to the restaurant where Sadrjoun worked and does not know its name, location, or how many staff were employed there. (Tr. at 28:10-11; 42:14).

Respondent testified that, after posting the first ad on August 3, 2014, he bumped into Sadrjoun, who asked him to post the second ad because he was unable to locate the first ad on Craigslist. (*Id.* at 29:4-11; 31:17-32:7.) Respondent claims that he only saw Sadrjoun twice after that and has not seen him since. (*Id.* at 47:12-48:18.) He states that he was not paid for any of his work and was only reimbursed for the cost of posting the ads. (*Id.* at 32:8-19.)

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

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2 Respondent claims he never knew Sadrjoun's last name. (Tr. at 30:4-5.)

3 Respondent testified that, despite the fact that the August 13, 2013 ad indicated three available positions, Sadrjoun was actually only seeking two new employees. (Tr. at 28:18-22.)

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. Failure to State a Claim Under § 8-107(1)(d)

Under § 8-107(1)(d) of the NYCHRL, it is unlawful:

> For any *employer, labor organization or employment agency or an employee or agent thereof* to declare, print or circulate . . . any statement, advertisement or publication . . which expresses, directly or indirectly, any limitation, specification or discrimination as to . . . national origin [or] gender . . .

N.Y.C. Admin. Code § 8-107(1)(d) (emphasis added). For purposes of § 8-107(1), the definition of employer "does not include any employer with fewer than four persons in his or her employ" inclusive of "natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers." *Id.* at § 8-102(5).

During the hearing, the Bureau abandoned its theory that Respondent should be held liable as an employer, and offered no evidence to rebut Respondent's assertion that he does not have any employees. (*See* Bureau Ex. 6 at 3; Resp't's Comments at 2.) Instead, the Bureau

premises Respondent's liability on the theory that he acted as an agent of the restaurant where Sadrjoun worked. Before considering the issue of agency, the Commission must first assess whether the restaurant in fact qualifies as an employer under the NYCHRL.

During the hearing, the Bureau argued in conclusory fashion that the restaurant must have a minimum of four employees counting kitchen staff and the three new hires sought in the Craigslist ad. (Tr. at 78:3-10.) Judge Casey generally agreed with the Bureau's argument, stating "it appears that Sadrjoun, the restaurant manager, had at least three co-workers." *Aksoy,* 2015 WL 5471443, at *2. In reaching that conclusion, Judge Casey pointed to the fact that the Craigslist ad sought three new workers and described the restaurant as "very busy." *Id.*

Such evidence is not sufficient to establish that the restaurant had the minimum of four employees required to bring it within the definition of "employer" under the NYCHRL. First, the number of employees sought in the Craigslist ad is not indicative of the restaurant's actual number of employees. Although Respondent testified that Sadrjoun told him of having hired one new employee, there is no evidence to confirm that the other two positions advertised on Craigslist were ever filled. (*See* Tr. at 47:14-16.) Moreover, it is not clear, as a matter of law, that to satisfy the definition of "employer" under § 8-102(5) of the NYCHRL, individuals recruited with the Craigslist ad and hired after the occurrence of the alleged violation may be counted toward the four-employee minimum. *See Lenhoff v. Getty*, No. 97 Civ. 9458, 2000 WL 977900, at *3 (S.D.N.Y. July 17, 2000) (assessing "employer" under the NYCHRL based on the number of employees "at the time of the allegedly discriminatory act"); *compare* N.Y.C. Admin. Code § 8-102(5) *with* 42 U.S.C. § 2000e(b) (defining "employer" under Title VII as person with 15 or more employees "for each working day in each of twenty or more calendar weeks in the current

or preceding calendar year"). In addition, the fact that a restaurant is "very busy" is not indicative of the number of actual staff, even when viewed in light of the other evidence in this case.

Without more, the Commission concludes that the Bureau did not carry its burden to show by a preponderance of the evidence that the restaurant is a covered employer under the NYCHRL and that, by extension, Respondent may be held liable as its agent.[4] *See Stamm*, 2016 WL 1644879, at *6 (discussing preponderance of the evidence standard); N.Y.C. Admin. Code § 8-107(1)(d) (referring to "employer . . . or agent *thereof*") (emphasis added). Because Respondent does not qualify as an "employer, labor organization or employment agency or an employee or agent thereof," the claims against him must be dismissed for failure to state a claim.

IV. CONCLUSION

For the reasons discussed herein, it is hereby ORDERED that the claims against Respondent are dismissed.

Dated: New York, New York
June 21, 2017

SO ORDERED:
New York City Commission on Human Rights

Carmelyn P. Malalis
Commissioner/Chair

[4] Although the Commission need not reach the issue, it is also unclear whether Respondent was subject to the control of the restaurant and qualifies as its agent. *See, e.g., White v. Pacifica Found.*, 973 F. Supp. 2d 363, 377 (S.D.N.Y. 2013); *Am./Int'l 1994 Venture v. Mau*, 146 A.D.3d 40, 55 (2d Dep't 2016).